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TEXT, FAIRNESS, AND EFFICIENCY: THE CASE AGAINST THE PLAUSIBILITY STANDARD FOR AFFIRMATIVE DEFENSES

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INTRODUCTION

Lower federal courts have struggled to answer the following question without any guidance from the U.S. Supreme Court: Does the *Iqbal* and *Twombly* plausibility standard apply to affirmative defenses? In this essay, we explain why the answer is no. We aim to provide practical guidance to the countless judges deciding whether to strike an affirmative defense. First, we argue that Rule 8's text makes using the plausibility standard to evaluate affirmative defenses improper. Judges should pay especially careful attention to our textual analysis because the Supreme Court has placed great weight on the text's plain meaning in recent civil procedure cases. Second, we argue that using the plausibility standard in the context of affirmative defenses is unworkable, inefficient, and unfair.

I. BACKGROUND

A. The Plausibility Standard

For many years, a "notice pleading" regime—best exemplified by *Conley v. Gibson*—governed how courts analyzed motions to dismiss complaints for failure to state a claim.[1] In *Conley*, the U.S. Supreme Court considered a discrimination claim from Black plaintiffs that a lower court dismissed for failure to state a claim.[2] To support upholding dismissal, the defendant argued that plaintiffs "failed to set forth specific facts to support [their] general allegations of discrimination . . . ."[3] The *Conley* Court responded that:

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[1] Marcus Gadson, *Federal Pleading Standards in State Court*, 121 MICH. L. REV. 409, 416-17 (2022).

[2] Conley v. Gibson, 355 U.S. 41, 42-43 (1957).

[3] *Id.* at 47.

> The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.[4]

The Court insisted on "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[5] Under notice pleading at its most generous, "[p]laintiffs need not plead facts; they need not plead law; they plead claims for relief. Usually they need do no more than narrate a grievance simply and directly, so that the defendant knows what he has been accused of."[6] Notice pleading rested on the premise of "reject[ing] the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept[ing] the principle that the purpose of pleading is to facilitate a proper decision on the merits."[7]

Two U.S. Supreme Court decisions best illustrate how that framework changed.[8] In *Bell Atlantic v. Twombly*, the plaintiffs argued that the defendants had breached the Sherman Act by engaging in anti-competitive practices.[9] They based their claim on the defendants' parallel behavior, suggesting it was indicative of a conspiracy.[10] However, the Court ordered the complaint dismissed, stating, "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."[11] The Court further explained that, although a conspiracy might have been possible, "without some further factual

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[4] *Id.* (footnote omitted).

[5] *Id.* at 45-46.

[6] Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005).

[7] *Conley*, 355 U.S. at 48.

[8] *See* Gadson, *supra* note 1, at 418-20 (explaining how *Iqbal and Twombly* solidified a movement towards heightened pleading standards).

[9] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 552 (2007).

[10] *Id.* at 548-49.

[11] *Id.* at 556-57.

enhancement [the allegation] stops short of the line between possibility and plausibility of entitlement to relief."[12]

This *Twombly* approach conflicted with *Conley's* earlier "no set of facts" guidance.[13] Nevertheless, the Court clarified that lower courts had been increasingly resistant to interpreting *Conley*'s wording as a strict standard for pleading since the 1970s.[14] *Twombly* called *Conley*'s language "an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[15] In his dissent, Justice Stevens criticized *Twombly* for not reconciling its new plausibility standard with Rule 8's text, which mandates that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[16]

The Court's shift was primarily driven by policy concerns—namely, the high cost of discovery, especially in antitrust cases.[17] The Court worried that lenient pleading standards would place an undue burden on defendants in such cases, as "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."[18]

The ruling in *Ashcroft v. Iqbal* extended the plausibility standard beyond antitrust cases.[19] Javaid Iqbal, a Pakistani Muslim, was arrested following the September 11th attacks and detained under restrictive conditions because he was deemed a "high interest" individual.[20] Iqbal filed a *Bivens* action, alleging that the federal officials targeted him based on his race, religion, and national origin.[21] As evidence, he pointed to the fact that

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[12] *Id.* at 557 (internal quotations omitted).

[13] *Id.* at 561. As justification for its departure from *Conley*, the Court complained that "[o]n such a focused and literal reading of *Conley's* 'no set of facts,' a wholly conclusory statement of 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." *Id.* (alteration in original).

[14] *Id.* at 562.

[15] *Id.* at 563.

[16] *Id.* at 573 (Stevens, J., dissenting) (quoting the language of FED. R. CIV. P. 8(a)(2)).

[17] *Id.* at 558-59.

[18] *Id.* at 559.

[19] Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).

[20] *Id.* at 667-68.

[21] *Id.* at 668-69.

Middle Eastern Muslims were disproportionately classified as high interest and subjected to harsh conditions.[22] However, the Court ruled that while Iqbal's allegations were "conceivable[,]" they were not plausible.[23] The facts did not sufficiently prove that discriminatory intent was the most plausible explanation for the actions of Ashcroft and Mueller.[24] Instead, the Court reasoned that the more likely explanation was that because the September 11th attackers were Muslim, the investigation naturally focused on Middle Eastern Muslims.[25]

As in *Twombly*, the Court highlighted the burdens of discovery, stating that although litigation may be "necessary to ensure that officials comply with the law," it "exact[ed] heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."[26]

The Supreme Court gave only modest guidance about how much factual detail complaints needed to contain going forward. *Iqbal* insisted that "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."[27] In one breath, *Iqbal* invited lower court judges to "draw on [their] judicial experience and common sense"[28] while *Twombly* cautioned that "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."[29]

B. Lower Courts Attempt to Apply the Plausibility Standard

Lower courts have read the plausibility standard in different ways. Some courts have suggested that plaintiffs must plead facts

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[22] *Id* at 669.

[23] *Id*. at 680, 681 ("Taken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.").

[24] *Id*. at 681-82.

[25] *Id*. at 682.

[26] *Id*. at 685.

[27] *Id*. at 678.

[28] *Id*. at 679.

[29] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (internal citation omitted).

corresponding to each element of a claim.[30] To make this concrete, consider a defamation claim, which, according to one formulation, requires:

> (1) publication; (2) falsity; (3) [that the] actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) [that the] statement must be defamatory.[31]

According to a pleading-of-the-elements approach to plausibility, a plaintiff would need to allege facts corresponding to all five components of a defamation tort to survive a motion to dismiss.[32] A second approach applies the plausibility standard to the complaint as a whole and doesn't insist that said complaint allege facts matching each element of a claim.[33] Finally, courts have

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[30] *E.g.*, *McCleary-Evans v. Md. Dep't of Transp.*, 780 F.3d 582, 585 (4th Cir. 2015).

> In her complaint, McCleary-Evans purported to state a claim under Title VII, which means that she was required to allege facts to satisfy the elements of a cause of action created by that statute—i.e., in this case, that the Highway Administration 'fail[ed] or refus[ed] to hire' her '*because of* [her] race . . . [or] sex.

Id. (alterations in original); Ingram v. Ark. Dep't of Corr., 91 F.4th 924, 927-28 (8th Cir. 2024).

> At the pleading stage in the discrimination context, it is unnecessary to plead enough facts to establish a prima facie case. Nevertheless, the elements of a prima facie case remain relevant in determining the plausibility standard as the elements may be used as a prism to shed light upon the plausibility of the claim.

Id. (internal quotation omitted) (citation omitted); Gregory v. Dillard's, Inc., 565 F.3d 464, 473 (8th Cir. 2009) ("Absent an allegation that the plaintiffs attempted to purchase merchandise, the complaint fails to meet the foundational pleading requirements for a suit under § 1981, because it does not satisfy the third element that the plaintiffs attempted to make a contract.").

[31] Johnston v. Borders, 36 F.4th 1254, 1275 (11th Cir. 2022) (quoting Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1105-06 (Fla. 2008)).

[32] *See id.*

[33] *E.g.*, Ocasio-Hernandez v. Fortuño-Burset, 640 F.3d 1, 14 (1st Cir. 2011).

> Additionally, the district court erred when it failed to evaluate the cumulative effect of the factual allegations. The question confronting a court on a motion to dismiss is whether *all* the facts alleged, when viewed in the light most favorable to the plaintiffs, render the plaintiff's entitlement to relief plausible.

Id.; Martínez-Toboas v. Universidad Carlos Albizu, Inc., No. 20-1503 (FAB), 2021 WL 2786265, at *4 (D.P.R. July 2, 2021) ("At the motion to dismiss stage, a plaintiff does not

divided over whether they should always consider "obvious alternative explanations" to a plaintiff's complaint on a motion to dismiss.[34] As of this writing, courts are continuing to debate and refine the meaning of the plausibility standard.

C. Affirmative Defenses and the Plausibility Standard

"An affirmative defense will defeat the plaintiff's claim if it is accepted by the district court or the jury."[35] Rule 8(c) lists eighteen specific defenses and indicates others beyond those specifically enumerated.[36] Rule 8(c) requires, "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense . . . ."[37] After *Twombly* and *Iqbal*, courts have considered whether the plausibility standard applies to affirmative defenses.[38] The U.S. Supreme Court has yet to weigh in.

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need to plead facts for every element that will eventually be necessary to establish a *prima facie* case."); Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 55 (1st Cir. 2013) ("There need not be a one-to-one relationship between any single allegation and a necessary element of the cause of action. What counts is the cumulative effect of the [complaint's] factual allegations.") (alterations in original) (internal quotation omitted) (citation omitted).

[34] *E.g.*, *McCleary-Evans,* 780 F.3d at 588.

> Similarly, McCleary-Evans' complaint leaves open to speculation the cause for the defendant's decision to select someone other than her, and the cause that she asks us to infer (*i.e.,* invidious discrimination) is not plausible in light of the "obvious alternative explanation" that the decisionmakers simply judged those hired to be more qualified and better suited for the positions.

Id.(citing Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009)); Swanson v. Citibank, 614 F.3d 400, 404, 407 (7th Cir. 2010) (showing Judge Posner and the majority sparring over whether to consider alternative explanations in a housing discrimination claim). Even the U.S. Supreme Court has been confusing on this point. In *Iqbal*, for example, it did consider an alternative explanation. Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009). However, in *National Rifle Ass'n v. Vullo*, the Court refused to weigh whether an alternative explanation was more likely than the plaintiff's allegations of government coercion in evaluating a complaint. Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 195 (2024).

[35] A. BENJAMIN SPENCER, 5 FED. PRAC. & PROC. CIV. § 1270 (Charles Alan Wright & Arthur R. Miller eds., 4th ed. 2024).

[36] FED. R. CIV. P. 8(c).

[37] *Id.*

[38] United States v. ConAgra Grocery Prods. Co., LLC, 4 F. Supp. 3d 243, 252 (D. Me. 2014) ("Federal courts across the country have been grappling with the question of whether *Iqbal* and *Twombly's* plausibility requirements apply to a defendant's assertion of affirmative defenses"); Moore v. United States, 318 F. Supp. 3d 188, 193 (D.D.C. 2018)

Only one appellate court has explicitly addressed the issue. The U.S. Court of Appeals for the Second Circuit has held that the plausibility standard does apply to affirmative defenses, albeit with the caveat that applying the plausibility standard is a "'context-specific' task."[39] It then suggested that courts should apply the plausibility standard leniently because defendants typically have only twenty-one days to respond to a complaint, while plaintiffs have the entire statute of limitations period to research factual details.[40] The court did not consider textual differences between Rule 8(a) and (c), which other courts have found relevant in deciding this issue.

With no guidance from the U.S. Supreme Court and little from courts of appeals, district courts have struggled with the question of whether to apply the plausibility standard to affirmative defenses. Courts that have rejected using the plausibility standard generally relied on differences in the language between Rule 8(a) and (c),[41] asserted that it would be unfair to apply the pleading standard to affirmative defenses,[42] or argued that applying the plausibility standard would make litigation more inefficient.[43] As for the first justification, Rule 8(a) requires a pleading to provide "a short and plain statement of the claim showing that the pleader is entitled to relief[,]" while 8(c) says that "a party must affirmatively

("It is a matter of some debate as to whether the *Twombly/Iqbal* standard applies to affirmative defenses.").

[39] GEOMC Co. v. Calmare Therapeutics Inc., 918 F.3d 92, 98 (2d Cir. 2019).

[40] *Id.* The court acknowledged nuances in Rules 12 and 15 that might give a defendant slightly longer to raise an affirmative defense. *Id.*

[41] *See*, Curbio, Inc. v. Miller, No. 22-3619-KSM, 2023 WL 2505534, at *4 (E.D. Pa. Mar. 13, 2023); Meyers v. Village of Oxford, No. 17-cv-10623, 2019 WL 653807, at *3 (E.D. Mich. Feb. 15, 2019); Jam Tire, Inc. v. Harbin, No. 3:14-cv-00489, 2014 WL 4388286, at *3 (N.D. Ohio Sept. 5, 2014); Newborn Bros. Co. v. Albion Eng'g Co., 299 F.R.D. 90, 97 (D.N.J. 2014); Aatrix Software, Inc. v. Green Shades Software, Inc., No. 3:15-cv-00164-J-20MCR, 2019 WL 11648463, at *7 (M.D. Fla. Jan. 16, 2019); EEOC v. LHC Group, Inc., No. 1:11CV355-LG-JMR, 2012 WL 3242168, at *2 (S.D. Miss. Aug. 7, 2012).

[42] *Jam Tire, Inc.*, 2014 WL 4388286, at *3; Cottle v. Falcon Holdings Mgmt., No. 2:11-CV-95-PRC, 2012 WL 266968, at *2 (N.D. Ind. Jan. 30, 2012); Wells Fargo & Co. v. United States, 750 F. Supp. 2d 1049, 1051-52 (D. Minn. 2010); Aros v. United Rentals, Inc., No. 3:10-CV-73 (JCH), 2011 WL 5238829, at *3 (D. Conn. Oct. 31, 2011).

[43] *Wells Fargo & Co.*, 750 F. Supp. 2d at 1051-52; *Cottle*, 2012 WL 266968, at *2; Schlief v. Nu-Source, Inc., No. 10–4477 (DWF/SER), 2011 WL 1560672, at *9 (D. Minn. Apr. 25, 2011).

state any avoidance or affirmative defense . . . ."[44] The key difference between the two is that 8(a) directs pleadings to "show" why they are entitled to relief, while 8(c) directs pleadings asserting affirmative defenses to "state" them.[45] Courts then claim that "show" and "state" have different meanings.[46] As for the second justification, courts finding the plausibility standard inapplicable to affirmative defenses have explained that defendants have less time to prepare answers than plaintiffs do to prepare complaints and then claimed that the asymmetry in time to prepare makes it unfair to apply a pleading standard developed for complaints to answers.[47] As for the third justification, the thinking goes like this: if defenses can be stricken under a plausibility standard, then plaintiffs will file more motions to strike affirmative defenses, which might result in more amendments to answers and further litigation about whether those newly amended answers plausibly support affirmative defenses.[48] An already long litigation process could then lengthen considerably.[49]

On the other hand, several district courts *have* applied the plausibility standard to affirmative defenses. They have generally asserted that doing so is necessary to equalize the treatment of plaintiffs and defendants[50] and make the litigation process more efficient.[51] In terms of fairness, one court claimed that:

> It neither makes sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit the defendant under another

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[44] FED. R. CIV. P. 8(a), (c).

[45] *See* cases cited *supra* note 41.

[46] *Id.*

[47] *See* cases cited *supra* note 42.

[48] *See* cases cited *supra* note 43.

[49] *Id.*

[50] Amerisure Ins. Co. v. Thomas, No. 4:11CV642 JCH, 2011 WL 3021205, at *2 (E.D. Mo. July 21, 2011); Bradshaw v. Hilco Receivables, LLC, 725 F. Supp. 2d 532, 536-37 (D. Md. 2010); Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 WL 2605179, at *5 (W.D. Va. June 24, 2010).

[51] HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010).

> pleading standard simply to suggest that some defense may possibly apply in the case.[52]

As for efficiency, a court claimed, and others have agreed, that since "the holdings of *Twombly* and *Iqbal* were designed to eliminate the potential high costs of discovery associated with meritless claims[,] [b]oilerplate affirmative defenses that provide little or no factual support can have the same detrimental effect on the cost of litigation as poorly worded complaints."[53]

II. THE TEXT OF RULE 8(C) PRECLUDES APPLYING THE PLAUSIBILITY STANDARD

The Supreme Court, in deciding *Twombly*, did not emphasize a textual analysis of the Federal Rules of Civil Procedure.[54] The Court chastised lower courts for reading the language in *Conley* too literally.[55] *Iqbal* did invoke the term "showing" reflected in Rule 8(a)(2) to support the plausibility standard,[56] but the Court spent most of its analysis explaining how it was adhering to *Twombly*.[57]

However, lower court judges today must decide whether to apply the plausibility standard to affirmative defenses in a context

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[52] *Palmer*, 2010 WL 2605179, at *4. Other courts have emphasized similar logic. *E.g.*, Ulyssix Techs., Inc. v. Orbital Network Eng'g, Inc., No. ELH-10-02091, 2011 WL 631145, at *15 (D. Md. Feb. 11, 2011); Topline Sols., Inc. v. Sandler Sys., Inc., No. L–09–3102, 2010 WL 2998836, at *1 (D. Md. July 27, 2010).

[53] *Iwer*, 708 F. Supp. 2d at 691; *see also* Safeco Ins. Co. of Am. v. O'Hara Corp., No. 08-CV-10545, 2008 WL 2558015, at *1 (E.D. Mich. June 25, 2008) ("Boilerplate defenses clutter the docket and, further, create unnecessary work. Opposing counsel generally must respond to such defenses with interrogatories or other discovery aimed at ascertaining which defenses are truly at issue and which are merely asserted without factual basis but in an abundance of caution."); Rehab Sols., Inc. v. St. James Nursing & Phys. Rehab. Ctr., Inc., No. 14–cv–13651, 2014 WL 6750590, at *1 (E.D. Mich. Dec. 1, 2014) ("When boilerplate affirmative defenses are offered with no specifics, an opposing party will not have enough information to argue against the defenses.").

[54] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-59 (2007) (stating that "something beyond the mere possibility of loss" is the threshold for compliance with Rule 8(a), "lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people," and highlighting the extensive scope and cost of discovery in antitrust cases) (internal quotations omitted).

[55] *Id.* at 561-62.

[56] Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'— 'that the pleader is entitled to relief.'" (alterations in original) (citing FED. R. CIV. P. 8(a)(2))).

[57] *Id.* at 680-85.

where the Supreme Court may emphasize Rule 8's text more. Since *Twombly* and *Iqbal* were decided in 2007 and 2009, respectively, Justices Gorsuch, Kavanaugh, Barrett and Brown-Jackson have joined the Court.[58] Commentators have explained that this composition shift yields interpretations focusing more on the law's objective words than on subjective policy considerations.[59] In recent years, this philosophy has led the Supreme Court to overturn several landmark cases, indicating a willingness—even a "proclivity"—to overturn established case law.[60] The Court's recent decision in *Royal Canin U.S.A. v. Wullschleger* demonstrates that this trend applies to civil procedure.[61] If a question about the application of *Twombly* to an affirmative defense makes its way to the Court today, the Justices will perform a careful textual

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[58] Ryan Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 289 (2021).

> Though textualism has been an influential method of statutory interpretation among Supreme Court Justices since the appointment of Scalia in 1986, the recent appointments of Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, all avowed textualists, has made it all but impossible to assemble a majority in a statutory case without heavy reliance on textual arguments.

Id.; Mark Joseph Stern, *Kentanji Brown Jackson Has Perfected the Art of Originalism Jujitsu*, SLATE (July 28, 2023, 10:30 AM), https://slate.com/news-and-politics/2023/07/supreme-court-ketanji-brown-jackson-originalism-jujitsu.html [https://perma.cc/4QLX-4NZA] ("During her confirmation hearing, Justice Ketanji Brown Jackson associated herself with two methodologies, originalism and textualism, that are prized by the conservative legal movement.").

[59] Hannah Clements, *Hypertextualism and the Clean Water Act: Rejecting Rigid Interpretations of Environmental Statutes*, 49 ENVTL. L. 1107, 1133 (2019) (highlighting that recent trends toward textualism and shifts in the Supreme Court's composition indicate that "it is likely that hypertextualism, or textualism that otherwise ignores purpose and practical consequences, will continue to be present in statutory interpretation").

[60] *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overturning the landmark 1973 case, Roe v. Wade, 410 U.S. 113 (1973)); Loper Bright Enters. v. Raimondo, 603 U.S. 369(2024) (overturning the landmark 1984 case, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (overturning the landmark 2003 case, Grutter v. Bollinger, 539 U.S. 306 (2003)); N.Y. State Rifle & Pistol Ass'n, v. Bruen, 597 U.S. 1 (2022) (overruling the approach of many lower courts to the Second Amendment).

[61] Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22, 43 (2025) (focusing heavily on the text of 28 U.S.C. §1367(a) to decide that an amended complaint removing a federal question also deprives a court of supplemental jurisdiction over factually related state law claims).

analysis.[62] Therefore, it is essential for lower courts to carefully analyze the text in their own decisions. There are two important considerations: (1) the structure of Rule 8 and (2) the difference in language used in Rules 8(a) and 8(c) of the Federal Rules of Civil Procedure. We believe the best reading of Rule 8's text is that 8(a) and 8(c) dictate different pleading standards, and, as a result, it is inappropriate to apply 8(a)'s plausibility standard to 8(c).

A. The Structure of Rule 8

Proponents of the application of *Twombly* to affirmative defenses state that because Rule 8 structurally includes the general rules that apply to "pleadings," cases that set rules for initial pleadings must also be used for responsive pleadings.[63] The argument is that the Court, knowing the structure of the Federal Rules, must have intended for *Twombly* and *Iqbal* to apply to all types of pleadings. This line of thinking stems in part from *Conley*,[64] a 1957 Supreme Court case that initially applied only to plaintiffs' claims but, over time, was accepted as also applying to affirmative defenses.[65] This ignores that the Federal Rules of Civil Procedure delineate different rules for initial and responsive pleadings by using different language for each.[66] That language is broken down in Section II.B, but the fact that the language differs

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[62] Notably, one of the most thoughtful law review articles arguing that the plausibility standard does apply to affirmative defenses is premised on the idea that "[t]he Supreme Court's recent pleading decisions do not turn on the language differential between Rule 8(a) and Rule 8(c)" and relied almost exclusively on policy considerations to support its conclusions. Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. 987, 1004-05 (2012). It also conceded meaningful textual differences between Rule 8(a) and (c). *Id.* at 999-1000.

[63] Hayden v. United States, 147 F. Supp. 3d 1125, 1128, 1130 (D. Or. 2015).

[64] *See generally* Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[65] Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979) ("The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense." (citing *Conley*, 355 U.S. at 47-48 (1957))); *Hayden*, 147 F. Supp. 3d at 1129 (arguing that if *Conley* applied to affirmative defenses, courts should accept that *Twombly* applies to affirmative defenses as well); Manuel John Dominguez et al., *The Plausibility Standard as a Double-Edged Sword: The Application of* Twombly *and* Iqbal *to Affirmative Defenses*, 84 FLA. BAR J. 77, 78 (2010).

[66] Paleteria La Michoacana v. Productos Lacteos, 905 F. Supp. 2d 189, 191 (D.D.C. 2012) ("The fact that Rule 8(a) and Rule 8(c) use different language is a strong indication that the two rules should be interpreted differently.").

hints at the authors' intent. If the Federal Rules Advisory Committee had intended for all pleadings to be treated identically, it could have drafted the section on pleadings as one section with the same rules for all pleadings and not in three separate sections of Rule 8.[67] The fact that the analyses in *Twombly* and *Iqbal* only refer to what a "plaintiff must plead" specific to Rule 8(a)(2) indicates that Rules 8(a), 8(b), and 8(c) can be, and are, analyzed separately.[68] Courts note that only Rule 8(a)(2) was analyzed in *Twombly* and *Iqbal* and have found that complaints, therefore, have a different pleading standard than affirmative defenses.[69]

B. Language Difference Between Rules 8(a) and 8(c)

Moreover, the language in Rules 8(a), 8(b), and 8(c) is different.[70] This suggests that the standard applied to complaints and affirmative defenses should also differ.[71] Rule 8(a)(2) dictates that initial claims must "*show*[] that the pleader is entitled to relief."[72] Rule 8(b)(2) indicates a denial must "*state* in short and plain terms its defenses to each claim asserted against it."[73] Rule 8(c) says an affirmative defense must "*state* any avoidance or

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[67] *See generally* FED. R. CIV. P. 8.

[68] *Twombly*, 550 U.S. at 545 ("This case presents the antecedent question of what a *plaintiff* must plead in order to state a . . . claim.") (emphasis added); Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("Determining whether a *complaint* states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task . . . .") (emphasis added).

[69] Sprint Sols., Inc. v. Shoukry, No. 2:14-cv-00127, 2014 WL 5469877, at *5 (S.D. Ohio Oct. 28, 2014) ("As numerous courts have observed, *Iqbal* and *Twombly* analyzed only complaints and Rule 8(a)(2)."); *Paleteria La Michoacana*, 905 F. Supp. 2d at 190 ("*Iqbal* and *Twombly* interpreted Rule 8(a)(2), which sets forth the pleading requirements for a complaint. Affirmative defenses are governed by a different provision, Rule 8(c).").

[70] Cottle v. Falcon Holdings Mgmt., LLC, No. 2:11-CV-95-PRC, 2012 WL 266968, at *2 (N.D. Ind. Jan. 30, 2012) ("[T]he language of Rule 8(a)(2) relied on by the Supreme Court in *Twombly* and *Iqbal* . . . is not contained in Rules 8(b) or 8(c), which govern defenses and affirmative defenses, respectively.").

[71] Vann v. Inst. of Nuclear Power Operations, Inc., No. 1:09-CV-1169-CC-LTW, 2011 WL 13272741, at *13 (N.D. Ga. Oct. 6, 2011) ("The contrasting language in the rules governing the pleading of defenses and affirmative defenses suggests that the plausibility standard should not apply to the pleading of defenses and affirmative defenses.").

[72] FED. R. CIV. P. 8(a)(2) (emphasis added).

[73] FED. R. CIV. P. 8(b)(1)(A) (emphasis added).

affirmative defense."[74] The difference between "show" and "state" is paramount. Even *Twombly* highlights that Rule 8(a) requires "'showing,' rather than a blanket assertion, of entitlement to relief" when it alleges that the dissent "oversimplifies" the Federal Rules.[75] *Twombly* connected the heightened pleading standard with the word "showing" in Rule 8(a); however, Rule 8(c) does not require the defendant to "show" anything. Courts have determined that this language difference means that a plausibility standard cannot be applied to affirmative defenses.[76] Oxford's English dictionary confirms these courts' reading of Rule 8. It defines "show" as "the action or an act of displaying, exhibiting, or presenting something."[77] However, it defines "state" as "to express in speech or writing."[78] These definitions suggest that more factual detail is required to "show" something than it takes to "state" something. Although, as will be acknowledged shortly, Rule 8(a)'s reference to "show" might not justify the plausibility standard.

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Lower court judges should be mindful of how much the current Supreme Court avowedly values text above and beyond policy and other pragmatic considerations. We recognize that closely analyzing Rule 8's text raises serious questions about whether *Twombly* and *Iqbal* were properly decided; a considerable body of

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[74] FED. R. CIV. P. 8(c)(1) (emphasis added).

[75] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 n.3 (2007).

[76] *See e.g.*, Floyd v. SunTrust Banks, Inc., No. 1:10-CV-2620-RWS, 2011 WL 2441744, at *7 (N.D. Ga. June 13, 2011) (citing the differences between the language in Rules 8(a) and 8(c) as compelling reasoning to hold that *Twombly* and *Iqbal* do not apply to affirmative defenses); Charleswell v. Chase Manhattan Bank, N.A., No. 01-119, 2009 WL 4981730, at *4-5 (D.V.I. Dec. 8, 2009) ("This Court concludes that the pleading standards articulated in *Twombly* and *Iqbal* do not extend to affirmative defenses [because] . . . [t]here is no requirement under Rule 8(c) that a defendant 'show' any facts at all.").

[77] *Show*, OXFORD ENG. DICTIONARY, https://www.oed.com/search/dictionary/?scope=Entries&q=show [https://perma.cc/7QA8-H2PV] (last visited Jan. 20, 2025).

[78] *State*, OXFORD ENG. DICTIONARY, https://www.oed.com/search/dictionary/?scope=Entries&q=state [https://perma.cc/ZMD4-Y46S] (last visited Jan. 20, 2025).

thoughtful scholarship makes that point.[79] While lower court judges cannot take it upon themselves to overrule *Iqbal* and *Twombly,* they must carefully consider Rule 8's text with due regard for the Supreme Court's dominant interpretive philosophy going forward.[80] For the reasons we have indicated, a close textual analysis makes applying the plausibility standard to affirmative defenses inappropriate.

III. POLICY CONSIDERATIONS SUPPORT NOT EXTENDING THE PLAUSIBILITY STANDARD TO AFFIRMATIVE DEFENSES

This section considers the common policy concerns on both sides of the argument about applying the plausibility standard to affirmative defenses. Overall, these policy concerns should lead a lower court *not* to use the plausibility standard to assess affirmative defenses.

A. Workability

Lower courts should ask important threshold questions: how well has the plausibility standard worked? Has it been consistently applied? Has it yielded predictable decisions for litigants? How confident are you that you really know how the Supreme Court expects you to use the standard? Lower court judges cannot ask these questions when evaluating motions to dismiss complaints; they must do their best to apply *Iqbal* and *Twombly*. However, absent *any* Supreme Court guidance on what standard to apply to affirmative defenses, lower court judges have a choice (to be fair, a choice we think a fair reading of Rule 8's text dictates).

We think they should choose not to apply the plausibility standard because it is a morass. Courts have not agreed on whether the standard applies to the complaint as a whole, whether it requires plaintiffs to plead facts corresponding to each element of a claim, or whether and when it is appropriate to consider alternative explanations.[81] Judge David Hamilton of the Seventh Circuit spoke for many when he lamented that "the lower federal court decisions

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[79] *E.g.* Gadson, *supra* note 1, at 423 n.93 (2022) (stating that the term "plausible" was not in Rule 8's text and recognizing scholarly criticism of the plausibility standard).

[80] *See* Doerfler, *supra* note 58, at 289.

[81] *See supra* Part I(B).

seeking to apply the new 'plausibility' standard are wildly inconsistent with each other" and that "[a]pplication of the [plausibility standard] is leading to judge-specific and case-specific differences in outcome that confuse everyone involved."[82]

If you are among the many lower court judges who feel uncertain about the plausibility standard when evaluating complaints, why create additional uncertainty for yourself when evaluating answers?

B. Efficiency

Proponents of applying the *Twombly* and *Iqbal* heightened standard to affirmative defenses argue that application will promote efficiency in our legal system. They say applying the plausibility standard will streamline the judicial process by forcing litigants to do more than avoid waiver of future defenses by stating any defense they may use.[83] Requiring defendants to provide "more than labels and conclusions" in responsive pleadings purports to speed up the judicial process and avoid wasting time by reducing frivolous defenses.[84] Some courts applying *Twombly* to affirmative defenses seek to avoid "[b]oilerplate affirmative defenses," finding they "can have the same detrimental effect on the cost of litigation as poorly worded complaints."[85] However, while increasing the pleading standard for initial claims may ultimately reduce the number of claims permitted to go forward, the opposite outcome is more likely when increasing the standard for affirmative defenses.[86]

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[82] McCauley v. City of Chicago, 671 F. 3d 611, 622, 624-25 (7th Cir. 2011) (Hamilton, J., dissenting).

[83] Anthony Gambol, *The* Twombly/Iqbal *Plausibility Pleading Standard and Affirmative Defenses: Gooses and Ganders Ten Years Later*, 41 PACE L. REV. 193, 200 (2020).

[84] *See* McGinity v. USAA Fed. Sav. Bank, No. 5:19-cv-560-BO, 2020 WL 1867386, at *1-2 (E.D.N.C. Apr. 14, 2020) (granting the defendant leave to amend its answer to one which "would permit the Court to draw a reasonable inference that would suggest a cognizable defense").

[85] HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010).

[86] Floridia v. DLT 3 Girls, Inc., No. 4:11-cv-3624, 2012 WL 1565533, at *2 (S.D. Tex. May 2, 2012) ("[W]hile a motion to dismiss can resolve a case, thereby avoiding discovery entirely, motions to strike only prolong pre-discovery motion practice; as such, raising the standard for pleading affirmative defenses would only encourage more motions to

Part of the pre-trial motions process is that plaintiffs may file motions to strike affirmative defenses that are "redundant, immaterial, impertinent, or scandalous."[87] Defendants may file motions to dismiss either the entire case or certain claims.[88] Notably, the goals of the two types of motions are different. A motion to dismiss an initial claim aims to *remove* the litigation from the legal process. A motion to strike an affirmative defense aims to *keep* the litigation in the legal process. Additionally, leaves to amend after a motion to strike are granted liberally, so those motions achieve little efficiency and only prolong litigation.[89] Increasing the standard for any pleading makes it more difficult for that pleading to survive a motion to strike. If the threshold for a satisfactory affirmative defense is heightened, more defenses will be stricken, which, in turn, will increase the number of cases remaining in the judicial process.[90] This means that requiring defendants to include more factual detail than Rule 8(c)'s text demands ultimately *impairs* judicial efficiency.

Recent experience suggests the way courts interpret the plausibility standard when assessing affirmative defenses may also undermine any efficiency gain. The U.S. Court of Appeals for the Second Circuit, the only appellate court to formally extend the *Twombly* standard to affirmative defenses, emphasized that courts

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strike."). One of us has previously questioned whether the plausibility standard really makes the litigation process more efficient. Gadson, *supra* note 1, at 454.

> [F]or every case that federal pleading standards eliminate, they might prolong another one. In many instances, federal courts have dismissed complaints for failure to meet the plausibility standard but then given the plaintiff leave to amend and ultimately found the amended complaint plausible. In such cases, federal pleading standards would cause courts to spend *more* time on a case and not less.

Id. (footnotes omitted). If that logic is right, then the fact the plausibility standard may ultimately be *inefficient* is another reason not to apply it to affirmative defenses.

87 FED. R. CIV. P. 12(f).

88 *See* FED. R. CIV. P. 12(b).

89 Bayer CropScience AG v. Dow AgroSciences LLC, No. 10-1045 RMB/JS, 2011 WL 6934557, at *2 (D. Del. Dec. 30, 2011) (citing "the low likelihood that motions to strike affirmative defenses would expedite the litigation, given that leave to amend is routinely granted" as a reason not to extend *Twombly*).

90 Shannon Forshay, *Striking Contrast: Applying* Twombly *to Affirmative Defenses,* 42 AM. BANKR. INST. J. 22, 23 (2023) ("[W]hile a motion to dismiss can resolve a case, thereby avoiding discovery entirely, motions to strike only prolong pre-discovery motion practice . . . .").

should evaluate affirmative defenses in light of their unique "context."[91] While *Iqbal* described analyzing complaints as a "context-specific task,"[92] the nature of complaints and defenses differs. For each complaint, defendants may assert many defenses because they are incentivized to include any and every defense they may later use; otherwise, they risk waiver.[93] *GEOMC* instructs courts analyzing affirmative defenses to consider both broad factors, such as the limited time frame in which a defense is formulated, and the specific factors of nuanced context unique to each affirmative defense.[94] This approach effectively requires courts to conduct an individualized analysis for every affirmative defense, examining each one's distinct factual context.[95] Under the guise of judicial efficiency, *GEOMC* asks courts to apply more discretion and use more resources instead of fewer, achieving the opposite of its policy objective. Ironically, if *GEOMC* causes courts to analyze affirmative defenses with a different standard than initial pleadings, what does that mean for the argument that the two pleadings should be treated the same under *Twombly*?

If applying the *Twombly* and *Iqbal* heightened pleading standard to affirmative defenses is aimed at judicial efficiency, it fails.

C. Fairness

Proponents of the application of *Twombly* to affirmative defenses argue that if the initial claim must meet the heightened standard, it is only fair that the responsive pleading should also meet that elevated standard.[96] This argument encompasses two key

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[91] GEOMC Co., v. Calmare Therapeutics Inc., 918 F.3d 92, 98 (2d Cir. 2019).

[92] Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

[93] *See* Burton v. Ghosh, 961 F.3d 960, 962 (7th Cir. 2020) (holding that affirmative defenses are waived if not timely raised, unless raised in response to an amended complaint which "changes the scope of the case in a relevant way").

[94] *GEOMC Co*., 918 F.3d at 98.

[95] Gambol, *supra* note 83, at 223 ("All told, the Second Circuit has mandated that the district courts develop as many gradations of scrutiny as there are affirmative defenses.").

[96] *E.g.*, Andean Life, LLC v. Barry Callebaut U.S.A. LLC, No. 20-20765-Civ, 2020 WL 1703552, at *4 (S.D. Fla. Apr. 8, 2020) ("[T]here is no separate standard for complaints and affirmative defenses in connection with Rule 8."); Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010.)

elements: first, the disparity in the time allotted for filing each type of pleading; and second, the distinct purposes served by an initial claim and a responsive pleading.

At first glance, requiring equal pleading standards may seem equitable, but a real challenge is presented by the time constraint under which the defendant must submit a responsive pleading.[97] A plaintiff filing an initial claim may have anywhere from months to several years, depending on the state's statute of limitations laws, to hire an attorney, gather information, brainstorm strategies, and assemble an argument.[98] The defendant, on the other hand, has only twenty-one days, or sixty days if they choose to waive Rule 4's service of process requirements, to realize they have been sued, find an attorney, develop a defense, and put together a legally sufficient document to submit to the court.[99] Courts have recognized the significantly shorter time period as one of the reasons *Twombly* should not apply to affirmative defenses.[100] Courts acknowledge that it is "unreasonable" to expect defendants to have the necessary facts to provide a *Twombly* level pleading at that stage in litigation.[101] That difference in time to prepare a complaint and

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> [I]t neither makes sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit the defendant under another pleading standard simply to suggest that some defense may possibly apply in the case.

Id.; Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009) ("It makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses.").

[97] Falley v. Friends Univ., 787 F. Supp. 2d 1255, 1258-59 (D. Kan. 2011) ("[T]he court finds logic in maintaining a higher standard for pleading claims than defenses. A plaintiff may take years to investigate and prepare a complaint, limited only by the reigning statute of limitations. But once that complaint is served, a defendant has only 21 days in which to serve an answer.").

[98] Henry v. Ocwen Loan Servicing, LLC, No. 17cv0688 JM(NLS), 2018 WL 1101097, at *3 (S.D. Cal. Feb. 26, 2018) ("[A] plaintiff may investigate a potential claim for weeks, months, or even years before filing a complaint.").

[99] FED. R. CIV. P. 12(a)(1)(A).

[100] *E.g.*, Lee v. Choudhri (*In re* Briar Bldg. Hous. LLC), No. 18-32218, 2021 WL 2460979, at *10 (Bankr. S.D. Tex. June 16, 2021); United States ex rel. Parikh v. Citizens Med. Ctr., 302 F.R.D. 416, 419 (S.D. Tex. 2014).

[101] *E.g.*, Lane v. Page, 272 F.R.D. 581, 590-91 (D.N.M. 2011).

> Given the time requirements for filing an answer, . . . it is entirely unreasonable on the date defendants' answer is due to expect them to be aware

defense is significant; fairness will certainly not be achieved by requiring both parties to use equal specificity and factual detail to outline their legal arguments.[102]

Another reason that fairness is a misplaced argument here is the differing purposes of the initial claim and the responsive pleading. The purpose of the initial claim is to put the defendant on notice of what the claim against them is. Because the responsive pleading is exactly that, a "response" to the claim, the claimant already has notice of the particular issues being raised. Therefore, a claimant does not need the kind of notice that a defendant needs upon learning that a lawsuit has been filed for the first time. To assume that the plaintiff and defendant are on equal ground is to assume the two have the same role in a lawsuit.[103]

In sum, while proponents of applying the *Twombly* standard to affirmative defenses argue that it promotes judicial efficiency and fairness, the practical outcomes suggest otherwise. Heightening the pleading standard for defenses increases procedural burdens, prolongs litigation through motions to strike and subsequent amendments, and requires courts to expend, rather than conserve, additional resources conducting individualized analyses of defenses. On the fairness front, proponents suggest that applying the same standard to claims and defenses creates parity between parties. Yet the differences in the roles and purposes of claims and defenses and the significantly shorter time defendants have to prepare their responsive pleadings weigh against this argument.

CONCLUSION: SUMMARY AND CALL FOR CLARITY

The overwhelming weight of evidence supports rejecting the application of the *Twombly* standard to affirmative defenses. While proponents argue that judicial efficiency and fairness would benefit from applying the heightened pleading standard to affirmative defenses, these claims are unconvincing when tested against

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> of all the facts necessary to support their affirmative defenses is or even to know for sure whether a particular affirmative defense is applicable.

Id. (internal quotations omitted).

[102] *See Ocwen Loan Servicing, LLC*, 2018 WL 1101097, at *3.

[103] Wells Fargo & Co. v. United States, 750 F. Supp. 2d 1049, 1051 (D. Minn. 2010) ("[P]laintiffs and defendants are in much different positions.").

practical outcomes. Increasing motions practice diminishes, rather than enhances, judicial efficiency, and imposing an "equal standard" on plaintiffs and defendants does not result in equitable pleading requirements, given each party's distinct roles and constraints. Furthermore, a textual analysis of the Federal Rules of Civil Procedure strongly indicates that the *Twombly* standard was never intended to apply to affirmative defenses.

Courts facing this issue should adopt the conclusions outlined in this essay's detailed analysis: the plausibility standard should not govern affirmative defenses. Circuit courts that have not yet addressed the matter explicitly—or have only implicitly rejected the heightened standard—should issue definitive rulings to provide clear guidance to lower courts and litigants.

We want to end by noting that the Federal Rules Advisory Committee has an important role here. It can and should resolve this years-long debate by explicitly making amendments to the text of Rules 8(a), 8(b), and 8(c) to clarify whether the plausibility standard applies to affirmative defenses. We think it should indicate that the plausibility standard does not apply. Still, even if the committee disagrees with our reasoning, it can at least settle an issue that has bedeviled courts for over a decade at the stroke of a pen. It should take the opportunity.