other interests."[91] In *Ysursa*, this approach would likely have required the Court to strike down the VCA because the value of political speech, which lies at the core of the First Amendment, would have certainly outweighed both the State's slight interest in restricting the speech and the deduction program's minimal cost to Idaho.

Many scholars have recognized that the government requires some flexibility to speak without constitutional restraints.[92] However, policing the barriers of the government speech doctrine is even more important in the modern age where government regulation — and government dollars — touch more and more of daily life. As Professor Mark Yudof recognized three decades ago, "[t]he greatest threat to the system of freedom of expression emanates from the welfare state, not from a multitude of corporate, mass media, union, and other voices."[93] Because "under contemporary conditions[] instrumental organizations of government presently infiltrate almost all aspects of social life," the Court will encounter increasing difficulty successfully "draw[ing] a sharp distinction between the [speech of the] state and [that of] its citizens."[94] The Court's growing reliance on government-centric categorical analysis is flawed because it refuses to recognize the messy reality of the modern world: the line between private and government speech is growing thinner and thinner. The Court can come to terms with this truth by eschewing categorical analysis altogether and adopting Justice Breyer's balancing test. In so doing, the Court can prevent the First Amendment's protections from shrinking as the government grows ever larger.

II. FEDERAL JURISDICTION AND PROCEDURE

A. Civil Procedure

Pleading Standards. — For fifty years, the standard for a motion to dismiss was governed by *Conley v. Gibson*,[1] which held 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 sup-

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[91] *Ysursa*, 129 S. Ct. at 1103 (Breyer, J., concurring in part and dissenting in part). Justice Breyer has suggested a similar approach in other government speech contexts. *See, e.g.*, Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1140 (2009) (Breyer, J., concurring) (arguing that the Court should ask whether "government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective").

[92] *See, e.g.*, David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 681 (1992) ("The citizenry has an interest in knowing the government's point of view, and the government has an interest in using speech to advance the programs and policies it enacts.").

[93] Yudof, *supra* note 84, at 873.

[94] Post, *supra* note 78, at 178 (noting also how "institutional boundaries are open and porous").

[1] 355 U.S. 41 (1957).

port of his claim which would entitle him to relief."[2] Two years ago, the Supreme Court expressly disavowed the "no set of facts" standard in *Bell Atlantic Corp. v. Twombly*,[3] an antitrust case, and replaced it with a requirement that a complaint state "enough factual matter" to make the claim "plausible."[4] Last Term, in *Ashcroft v. Iqbal*,[5] the Supreme Court made it clear that *Twombly*'s plausibility standard applies to motions to dismiss in all civil cases. The Court also subtly strengthened the plausibility standard by effectively adding a "probability requirement" — in spite of the fact that both *Twombly* and *Iqbal* explicitly state that the plausibility standard does not include a probability requirement.[6] The *Iqbal* decision will allow federal courts to dismiss a complaint whenever they believe that, given the allegations in the complaint, it is more likely than not that no illegal conduct occurred. Such a standard will likely constitute a substantial hurdle to most types of litigation.

In the months following the terrorist attacks of September 11, 2001, the FBI "detained thousands of Arab Muslim men . . . as part of its investigation into the attacks."[7] Javaid Iqbal, a Pakistani Muslim man,[8] was arrested by Immigration and Naturalization Service (INS) and FBI agents in early November 2001[9] and charged with conspiracy to defraud the United States and with fraud in relation to identification documents.[10] Iqbal was housed in the Metropolitan Detention Center (MDC) in Brooklyn, New York for several months, including a stint of approximately six months in the prison's Administrative Maximum Special Housing Unit (ADMAX SHU).[11] Iqbal alleged that, while imprisoned in the ADMAX SHU, he was "kept in solitary confinement, not permitted to leave [his] cell[] for more than one hour each day with few exceptions, verbally and physically abused, routinely subjected to . . . unnecessary strip and body-cavity searches, denied access to basic medical care, denied access to legal counsel, [and]

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[2] *Id.* at 45–46.

[3] 127 S. Ct. 1955 (2007).

[4] *Id.* at 1965.

[5] 129 S. Ct. 1937 (2009).

[6] *See id.* at 1949 ("The plausibility standard is not akin to a 'probability requirement' . . . ." (quoting *Twombly*, 127 S. Ct. at 1965)); *Twombly*, 127 S. Ct. at 1965 ("Asking for plausible grounds to infer [illegal conduct] does not impose a probability requirement . . . .").

[7] Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *2 (E.D.N.Y. Sept. 27, 2005).

[8] *Id.* at *1.

[9] First Amended Complaint and Jury Demand at 15, Elmaghraby v. Ashcroft, No. 04 CV 01809 (JG) (JA) (E.D.N.Y. Sept. 30, 2004), 2004 WL 3756442 [hereinafter Complaint].

[10] *Elmaghraby*, 2005 WL 2375202, at *1 n.1.

[11] Complaint, *supra* note 9, at 15. An ADMAX SHU is the "most restrictive type" of confinement available. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES 118 (2003), *available at* http://www.usdoj.gov/oig/special/0306/full.pdf.

denied adequate exercise and nutrition."[12] Iqbal pled guilty in April 2002 and, after sentencing, remained in the MDC until January 2003, when he was removed to Pakistan.[13]

In September 2004, Iqbal filed a complaint in the U.S. District Court for the Eastern District of New York against numerous current and former federal officials and federal corrections officers.[14] Iqbal claimed that he was entitled to damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[15] for multiple violations of his constitutional rights.[16] Among the named defendants were John Ashcroft, the Attorney General of the United States, and Robert Mueller, the director of the FBI.[17] The complaint alleged, inter alia, that Ashcroft and Mueller had violated the First and Fifth Amendments by imposing harsher detention conditions on Iqbal because of his race and religion.[18]

Specifically, the complaint alleged that "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks — however unrelated the arrestee was to the investigation — were immediately classified as 'of interest' to the post-September-11th investigation."[19] According to the complaint, Ashcroft and Mueller approved "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI."[20] The complaint further alleged that Ashcroft was a "principal architect"[21] of these detention policies and that Mueller "was instrumental in the adoption, promulgation, and implementation" of the challenged policies and practices.[22] Finally, the complaint alleged that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or na-

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12 Complaint, *supra* note 9, at 15.

13 Iqbal v. Hasty, 490 F.3d 143, 149 (2d Cir. 2007).

14 Complaint, *supra* note 9. Iqbal was one of two named plaintiffs; the other plaintiff was Ehab Elmaghraby, an Egyptian Muslim, who was also detained in the ADMAX SHU at the Brooklyn MDC. *Id.* at 2–3.

15 403 U.S. 388 (1971). A *Bivens* action is "an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001).

16 *See* Complaint, *supra* note 9, at 3–4.

17 *Id.* at 4–5.

18 *Id.* at 43–44.

19 *Id.* at 11.

20 *Id.* at 13–14.

21 *Id.* at 4.

22 *Id.* at 4–5.

tional origin."[23] Ashcroft and Mueller filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[24]

The district court denied Ashcroft and Mueller's motion to dismiss.[25] As *Twombly* had not yet been decided, the court applied *Conley* and found that "it cannot be said that there [is] no set of facts on which the plaintiffs would be entitled to relief as against Ashcroft and [Mueller]."[26]

The Second Circuit affirmed in part and reversed in part.[27] Writing for the panel, Judge Newman[28] discussed the proper standard for assessing a motion to dismiss. In the intervening period between the district court's decision and the court of appeals's consideration, the Supreme Court had decided *Twombly*, which expressly disavowed the "no set of facts" standard that had previously prevailed.[29] Judge Newman interpreted this decision as "requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."[30] The court held that Iqbal's allegations were "suffic[ient] to state claims of racial, ethnic, and religious discrimination."[31] Specifically, Iqbal's allegations that the FBI classified him as "'of high interest' solely because of his race, ethnic background, and religion" and that all New York Arab Muslim men arrested during that period were designated as "of interest" satisfied the plausibility standard.[32] Furthermore, the "complaint allege[d] broadly that Ashcroft and Mueller were instrumental in adopting" the challenged policies and practices, and the court reasoned that "the allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves" with detention policies after

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[23] *Id.* at 17–18.

[24] *See* Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *1–2 & n.3 (E.D.N.Y. Sept. 27, 2005).

[25] *Id.* at *35.

[26] *Id.* at *29.

[27] Iqbal v. Hasty, 490 F.3d 143, 178 (2d Cir. 2007). The Second Circuit affirmed the district court's "denial of the [d]efendants' motions to dismiss all of the [p]laintiffs' claims, except for the claim of a violation of . . . procedural due process, as to which" the Second Circuit reversed the district court and ordered the claim dismissed. *See id.* at 177–78.

[28] Judges Cabranes and Sack joined Judge Newman's opinion.

[29] *See Iqbal*, 490 F.3d at 155.

[30] *Id.* at 157–58.

[31] *Id.* at 175.

[32] *Id.*

September 11th.[33] The court therefore affirmed the district court's denial of Ashcroft and Mueller's motion to dismiss.[34]

Judge Cabranes concurred and filed a separate opinion stating his concern that high-ranking officials such as Ashcroft and Mueller "may be required to comply with inherently onerous discovery requests."[35] Judge Cabranes also noted "that some of th[e] precedents [relied on by the majority] are less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity."[36]

The Supreme Court reversed and remanded. Writing for the majority, Justice Kennedy[37] laid out the elements that a plaintiff must plead to state a *Bivens* claim of unconstitutional discrimination.[38] The Court stated that Iqbal "correctly concede[d] that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*."[39] The Court then rejected Iqbal's argument "that, under a theory of 'supervisory liability,' petitioners can be liable for 'knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees.'"[40] Instead, "purpose rather than knowledge is required to impose *Bivens* liability . . . [on] an official charged with violations arising from his or her superintendent responsibilities."[41]

The Court then discussed the proper standard for a motion to dismiss. The Court stated that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[42] This plausibility standard, the Court wrote, "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully";[43] a complaint that alleges conduct "merely consistent with" unlawfulness is insufficient.[44] Underlying the decision in *Twombly*, the Court stated, was the principle that "legal conclusions" do not have to be accepted as true: "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suf-

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[33] *Id.*

[34] *Id.* at 177–78.

[35] *Id.* at 179 (Cabranes, J., concurring).

[36] *Id.* at 178.

[37] Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined Justice Kennedy.

[38] *Iqbal*, 129 S. Ct. at 1947–49. The Court first held that the court of appeals had subject matter jurisdiction to hear an appeal from the district court's denial of the motion to dismiss. *Id.* at 1945–47.

[39] *Id.* at 1948 (citing Brief for Respondent Javaid Iqbal at 46, *Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 4734962).

[40] *Id.* at 1949 (quoting Brief for Respondent Javaid Iqbal, *supra* note 39, at 45–46).

[41] *Id.*

[42] *Id.* (quoting Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007)).

[43] *Id.* (quoting *Twombly*, 127 S. Ct. at 1965).

[44] *Id.* (quoting *Twombly*, 127 S. Ct. at 1966) (internal quotation marks omitted).

fice."[45] Thus, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."[46]

The Court proceeded to analyze Iqbal's complaint under the plausibility standard and to explain why his "complaint has not 'nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'"[47] First, the Court "identif[ied] the allegations in the complaint that are not entitled to the assumption of truth":

> Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin . . . ." The complaint alleges that Ashcroft was the "principal architect" of this invidious policy and that Mueller was "instrumental" in adopting and executing it. These bare assertions . . . amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim . . . . As such, the allegations are conclusory and not entitled to be assumed true.[48]

Next, the Court looked at the remaining factual allegations. The complaint alleged that the FBI "arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11"[49] and that the policy of keeping the detainees in harsh conditions was approved by Ashcroft and Mueller.[50] The Court stated that, "[t]aken 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."[51]

The "more likely explanation[]," according to the Court, was that a legitimate policy of detaining people suspected of links to terrorism would have a "disparate, incidental impact on Arab Muslims" because the September 11th attacks were perpetrated by Arab Muslims who belonged to al Qaeda, a group led by and composed primarily of Arab Muslims.[52] The Court stated that "[a]s between that 'obvious alternative explanation' for the arrests and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion."[53] Rather, Iqbal's complaint plausibly suggested only

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[45] *Id.*

[46] *Id.* at 1950.

[47] *Id.* at 1950–51 (alteration in original) (quoting *Twombly*, 127 S. Ct. at 1974).

[48] *Id.* at 1951 (alterations in original) (citations omitted) (quoting Complaint, *supra* note 9, at 17–18, 4–5).

[49] *Id.* (omission in original) (quoting Complaint, *supra* note 9, at 10) (internal quotation mark omitted).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 1951–52 (citation omitted) (quoting Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1972 (2007)).

that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."[54] Consequently, the Court reversed and remanded to the court of appeals to decide whether the district court should allow Iqbal to seek leave to amend his complaint.[55]

Justice Souter dissented.[56] He criticized the majority for "eliminating *Bivens* supervisory liability entirely,"[57] despite the fact that Ashcroft and Mueller conceded "that a supervisor's knowledge of a subordinate's unconstitutional conduct and deliberate indifference to that conduct are grounds for *Bivens* liability."[58] Justice Souter also argued that there was no "principled basis" for the majority's conclusion that the allegations regarding Ashcroft's and Mueller's motivations and the discriminatory nature of the detention policies were conclusory but that the allegations regarding the restrictive conditions and Ashcroft's and Mueller's approval of those conditions were not conclusory.[59]

Justice Breyer also dissented, arguing that trial courts can adequately control discovery and that the majority's expansive interpretation of *Twombly* was therefore unjustified.[60]

When the Court decided *Twombly*, it was unclear how broadly its new "plausibility" standard for motions to dismiss would apply. *Iqbal* made it clear that the plausibility standard is indeed the new standard in all civil cases. Furthermore, *Iqbal* subtly strengthened the plausibility standard. In *Twombly*, the Court was careful to point out that the plausibility standard is not equivalent to a "probability requirement"[61] and dismissed a complaint because it was wholly conclusory.[62] However, the *Iqbal* Court, while also stating that the plausibility standard is not akin to a probability requirement, effectively imposed such a requirement.

The Court's opinion in *Iqbal* confirmed that the "no set of facts" test has been retired and that the "plausibility" standard now governs motions to dismiss in all civil cases. Although *Twombly* clearly expressed the Court's dissatisfaction with *Conley*'s "no set of facts" test, it was not immediately clear whether the Court's holding would apply

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[54] *Id.* at 1952.
[55] *Id.* at 1954.
[56] Justices Stevens, Ginsburg, and Breyer joined Justice Souter's dissent.
[57] *Iqbal*, 129 S. Ct. at 1957 (Souter, J., dissenting).
[58] *Id.*
[59] *See id.* at 1960–61.
[60] *Id.* at 1961–62 (Breyer, J., dissenting).
[61] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007).
[62] *Id.* at 1970–74.

outside of the antitrust context.[63] In *Iqbal*, the Court soundly rejected Iqbal's argument that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute."[64] The Court characterized *Twombly* as a "decision . . . based on our interpretation and application of Rule 8," which "governs the pleading standard in all civil actions and proceedings."[65] As a result, the Court concluded that its "decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."[66]

However, in the process of applying the plausibility standard to a new context, the *Iqbal* Court strengthened the standard. In *Twombly*, the Court was faced with a complaint that alleged conduct that was entirely legal, along with a wholly conclusory accusation of illegal conduct. The plaintiffs' complaint alleged that telecommunications companies had engaged in an unlawful "contract, combination or conspiracy."[67] The complaint rested this claim solely upon allegations of "parallel conduct."[68] Justice Souter, writing for the majority, noted that "prior rulings and [the] considered views of leading commentators" established "that lawful parallel conduct fails to bespeak unlawful agreement,"[69] and that "routine market conduct" was a much more likely explanation for the companies' parallel conduct.[70] Because the complaint made an entirely conclusory claim and alleged only facts that could easily be explained by perfectly legal conduct,[71] the Court held that the complaint did not state a plausible claim and should be dismissed.[72]

In dismissing the complaint, the *Twombly* Court stressed that the plausibility standard does not include a probability requirement. Specifically, the Court stated that "[a]sking for plausible grounds to infer [illegal conduct] does not impose a probability requirement at the

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[63] *See, e.g.*, Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 n.5 (9th Cir. 2008) ("At least for the purposes of adequate pleading in antitrust cases, the [*Twombly*] Court specifically abrogated the usual 'notice pleading' rule . . . ."); *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 310 n.51 (2007) ("Some scholars view *Twombly* as primarily an antitrust case.").

[64] *Iqbal*, 129 S. Ct. at 1953 (citing Brief for Respondent Javaid Iqbal, *supra* note 39, at 37–38).

[65] *Id.* (quoting FED. R. CIV. P. 1) (internal quotation mark omitted).

[66] *Id.* (citation omitted).

[67] *Twombly*, 127 S. Ct. at 1970 (quoting Consolidated Amended Class Action Complaint at 19, Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 CIV 10220)).

[68] *Id.*

[69] *Id.* at 1966.

[70] *Id.* at 1971.

[71] *Id.* at 1966 ("Without 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.").

[72] *Id.* at 1974.

pleading stage."[73] Rather, allegations must simply "be placed in a context that raises a suggestion" that the defendant violated the law.[74]

Unlike the *Twombly* complaint, the *Iqbal* complaint did more than simply allege facts consistent with legal conduct along with a conclusory accusation of illegal conduct. The *Twombly* complaint essentially stated: (1) telecommunications companies acted in a parallel manner; and (2) these telecommunications companies engaged in an unlawful contract, combination, or conspiracy. This complaint was not plausible because, although unlawful conduct was conceivable, the mere fact of parallel conduct in no way suggested that a preceding agreement was in place. The *Iqbal* complaint would have been implausible in the same way had it simply stated: (1) Ashcroft and Mueller designed and implemented a policy under which Iqbal, a Pakistani Muslim, was arrested and subjected to harsh treatment; and (2) Ashcroft and Mueller deliberately subjected Iqbal to harsh treatment on account of his race, religion, or national origin. Such a complaint would not be plausible because, although discrimination would be conceivable, the conduct in no way suggests that discrimination has occurred. Discrimination would not simply be less likely than alternative explanations; rather, it would be impossible to infer that Iqbal was subjected to harsh treatment on account of his race simply from the fact that he was subjected to such treatment and happened to be a Pakistani Muslim.

However, the actual complaint in *Iqbal* alleged a lot more. It alleged that: (1) Iqbal is a Pakistani Muslim; (2) Mueller and Ashcroft designed and implemented a policy of detaining terrorism suspects in harsh conditions; (3) every Arab Muslim man arrested in the state of New York — on any charges, whether or not they were related to terrorism — in the months after September 11th was detained in these harsh conditions; (4) Iqbal had no connection to terrorism or the attacks of September 11th, but was simply guilty of other, entirely unrelated crimes; (5) Iqbal was detained under harsh conditions as part of the policy designed by Ashcroft and Mueller even though he had no connection to terrorism; (6) Iqbal was detained under harsh conditions because of his race, religion, or national origin; and (7) Ashcroft and Mueller intentionally subjected Iqbal to harsh conditions on account of his race, religion, or national origin.[75] The complaint thus contained specific facts indicating that Ashcroft and Mueller helped design and implement a policy that caused hundreds of Arab Muslim men — at least some of whom had no connection to terrorism — to be detained in highly restrictive conditions. While the complaint certainly did not

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[73] *Id.* at 1965. The Court further stated that "a well-pleaded complaint may proceed *even if it strikes a savvy judge that actual proof of those facts is improbable*." *Id.* (emphasis added).

[74] *Id.* at 1966.

[75] Complaint, *supra* note 9, at 2–5, 10–14, 43–44.

provide proof of illegal conduct and might not necessarily have shown that illegal conduct was likely, it "placed [the allegations] in a context that raise[d] a suggestion" of discrimination.[76]

Although the *Iqbal* Court reiterated the language from *Twombly* that the plausibility standard is "not akin to a 'probability requirement,'"[77] it effectively imposed such a requirement by dismissing a complaint that suggested illegal conduct simply because there were "more likely explanations."[78] With respect to the allegations that Ashcroft and Mueller designed and implemented a policy that resulted in the arrest and detention of thousands of Arab Muslims, the Court stated that "[t]aken 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."[79] Rather than finding the complaint implausible because it failed to provide a context that would suggest unlawful conduct — as the Court did in *Twombly* — the Court instead found the allegations of illegal conduct implausible because the Court believed legal conduct to be a more likely explanation. This reasoning is difficult to square with the Court's statement in *Twombly* 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.'"[80] The *Iqbal* Court's language appears to indicate that a complaint should be dismissed if, given the allegations in the complaint, legal conduct is a more likely explanation than illegal conduct. Such a standard is functionally equivalent to a probability requirement.

By imposing a probability requirement, the Court imposed its own view of the most likely explanation for a set of allegations — performing a role normally reserved for the factfinder — and invited lower courts to do the same. In *Twombly*, the Court dismissed the complaint because there was a long line of precedent and commentary specifically indicating that parallel conduct was, in and of itself, not remotely suggestive of an illegal agreement.[81] By contrast, in *Iqbal* the Court

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[76] *Twombly*, 127 S. Ct. at 1966; *cf. Iqbal*, 129 S. Ct. at 1960–61 (Souter, J., dissenting) ("[T]he[] allegations [that Ashcroft and Mueller designed a policy with an incidental impact on Arab Muslims] do not stand alone as the only significant, nonconclusory statements in the complaint, for the complaint contains many allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates. . . . Viewed in light of these subsidiary allegations, the allegations singled out by the majority as 'conclusory' are no such thing.").

[77] *Iqbal*, 129 S. Ct. at 1949 (majority opinion) (quoting *Twombly*, 127 S. Ct. at 1965).

[78] *Id.* at 1951.

[79] *Id.* (emphasis added).

[80] *Twombly*, 127 S. Ct. at 1965 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

[81] *Id.* at 1965–66 ("In identifying facts that are suggestive enough to render a [Sherman Act] § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators . . . that lawful parallel conduct fails to bespeak unlawful agreement.").

merely asserted, without citing support, that because the September 11th hijackers were Arab Muslims and al Qaeda is led by and largely composed of Arab Muslims, it should therefore "come as no surprise that a legitimate policy . . . [of] arrest[ing] and detain[ing] individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims."[82] While this explanation may be more likely than intentional discrimination, the Court seemed to base this determination on its own intuition and "common sense" rather than on supporting precedent or legal commentary. Judges should not be making fine-tuned probability determinations when deciding a motion to dismiss, especially when they are relying merely on their own intuitions to make those determinations. The *Iqbal* Court effectively stated that federal courts should dismiss a complaint if the allegations do not "ring true."[83]

The *Iqbal* Court did not simply expand *Twombly*'s plausibility standard to all federal cases; it substantially strengthened the standard by adding a probability requirement. Federal courts can now dismiss complaints whenever they think that legal conduct is a more likely explanation for the allegations than is illegal conduct. Such a standard is likely to impose a substantial hurdle on nearly all types of litigation and to provide judges a great deal of discretion to weed out cases before they reach discovery. Plaintiffs will have to plead facts showing why alternative explanations for conduct are not as likely as are their claims — a difficult obstacle at such an early stage of litigation. The decision will be a particularly large obstacle in contexts — such as employment discrimination — in which it is improbable that a plaintiff has concrete evidence of a defendant's wrongdoing and motivation before discovery. Furthermore, *Iqbal* will weaken the truth-seeking function of litigation; paradoxically, plaintiffs will be unable to use discovery to gain information unless they already have access to sufficient information to satisfy the plausibility standard.

B. Federal Preemption of State Law

Preemption of State Common Law Claims. — If the Supreme Court's preemption jurisprudence has been confused up to this point,[1] its intersection with judicial treatment of agency statutory interpreta-

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[82] *Iqbal*, 129 S. Ct. at 1951.

[83] Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10.

[1] *See, e.g.*, William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1576 (2007) ("[T]he Supreme Court's preemption case law . . . has accurately been characterized as a 'muddle.'" (quoting Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000))).