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IQBAL IS NOT A GAME CHANGER FOR DISCOVERY IN CIVIL RIGHTS CASES

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I. INTRODUCTION

In 2009, the United States Supreme Court handed down its decision in *Ashcroft v. Iqbal*.[1] Although the Court's decision in *Iqbal* addressed only the narrow issue of the proper means for assessing the sufficiency of a complaint under Federal Rule of Civil Procedure 8, many defendants, and some federal district courts, view *Iqbal* as a game-changer on discovery in cases in which a defendant has filed a motion for qualified immunity. Courts commonly misinterpret dicta in *Iqbal* as requiring a stay of all discovery upon the filing of a motion for qualified immunity by any defendant. Defendants now routinely argue that once any individual defendant files a motion for qualified immunity, *all* discovery is stayed against *all* defendants, pending the outcome of the qualified immunity motion filed by the one defendant. Some federal district courts have been persuaded by this argument.[2] But this interpretation takes the Court's dictum in *Iqbal* too far. Nowhere in its opinion did the Court indicate that it was undoing long-established precedent that an assertion of qualified immunity shields public officials only from that discovery which is *disruptive* or *overreaching*. Rather, the Court's discussion was limited solely to rejecting Iqbal's contention that the construction of Rule 8 should be tempered in light of the limited discovery afforded by the lower courts.[3] The misinterpretation of the Court's holding in *Iqbal* is problematic because it effectively strips trial courts of their traditional authority to regulate discovery. Given their close proximity to the facts and issues presented, district courts must be able to retain—and exercise—their discretionary control over the discovery process in a case-by-case manner.

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1. 556 U.S. 662 (2009).
2. *See infra* note 78.
3. *Iqbal*, 556 U.S. at 677–87.

Otherwise, courts' efficiency is undermined, contrary to legislative command and long-established judicial practices.[4]

The Court did reiterate through its opinion in *Iqbal* its general understanding that public officials entitled to qualified immunity should not be forced to endure unnecessary and disruptive discovery.[5] The question then is how district courts should assess the type and scope of discovery that should be permitted when a public official has raised the defense of qualified immunity. As explained below, the best practice—and one which considers both the interests of the public official in avoiding the burdens of litigation as well as the plaintiff's right to prosecute her case—is for the trial court to "take a peek" at the dispositive motion raising qualified immunity, and focus discovery accordingly, if necessary. This approach leaves intact trial courts' discretionary power to manage their own dockets.

In Parts II and III, this article will review the concept of qualified immunity and trial courts' historical discretion to decide in what circumstances discovery should be stayed in cases involving qualified immunity. Part IV examines *Iqbal* and the misunderstanding of dicta in that decision. Finally, Part V discusses where to go from here and how the trial courts should leave behind the misunderstanding and return to the well-founded exercise of their discretion in such cases.

II. WHAT IS QUALIFIED IMMUNITY?

A person may bring a civil claim for damages against a state official for violations of the United States Constitution pursuant to 42 U.S.C. § 1983,[6] and against a federal official pursuant to *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*.[7] Although § 1983 and *Bivens* facially appear to provide broad relief against public officials who act unlawfully to deprive a person "of any rights, privileges, or immunities se-

4. *See, e.g.*, Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

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

6. As part of the Civil Rights Act of 1871, Congress enacted 42 U.S.C. § 1983. Section 1983 provides, inter alia, a civil remedy against state actors for any person who suffers a "deprivation of any rights, privileges, or immunities secured by the Constitution. . .." 42 U.S.C. § 1983 (1996).

7. 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held that individual federal officials may be held liable for damages for constitutional violations. *Id.* at 397.

cured by the Constitution," the reach of these liability theories is cabined by the judicially-created doctrine of qualified immunity.[8]

Qualified immunity seeks to balance the remedies afforded by § 1983 and the holding in *Bivens* with the Court's desire to shield public officials "from undue interference with their duties and from potentially disabling threats of liability."[9] Unlike Eleventh Amendment immunity, which bars suits for damages against all states and state agencies, qualified immunity provides immunity for public officials who, in good faith, make mistakes of law or fact.[10] Accordingly, once a defendant has raised the qualified immunity defense,[11] it is incumbent on a plaintiff to demonstrate that it has: (1) pled a constitutional violation of which a reasonable person would have known, and (2) show that the law was clearly established at the time of the violation.[12] A court has discretion in deciding which of the two steps of the qualified immunity analysis should be examined first, depending on the order of decision-making that "will best facilitate the fair and efficient disposition of the case."[13]

Because the Court indicated that the issue of qualified immunity should be decided at the earliest possible stage in litigation,[14] defendants often move to dismiss complaints before discovery, asserting the defense of qualified immunity. In many instances, defendants simultaneously request that the court stay discovery pending the resolution of the defendant's dispositive motion arguing that qualified immunity was intended to obviate "broad-reaching" discovery.[15] A district court is then faced with the task of assessing whether it should stay discovery—or to what extent it should stay it—once a dispositive motion based on qualified immunity is filed. This decision is made difficult given the "confusing signals [sent

8. 42 U.S.C. § 1983 (1996).

9. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

10. Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact."); Butz v. Economou, 438 U.S. 478, 507 (1978) ("Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law.").

11. *Harlow*, 457 U.S. at 815 (citing Gomez v. Toledo, 446 U.S. 635 (1980)) ("Qualified immunity. . .is an affirmative defense that must be pleaded by a defendant official.").

12. *Id.* at 818.

13. *Pearson*, 555 U.S. at 242.

14. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

15. *Harlow*, 457 U.S. at 817–18.

by the Supreme Court] about if and when courts ought to allow discovery on qualified immunity claims."[16]

III. COURTS HAVE TRADITIONALLY BEEN AFFORDED BROAD DISCRETION TO REGULATE DISCOVERY EVEN WHEN PRESENTED WITH A DISPOSITIVE MOTION ASSERTING QUALIFIED IMMUNITY

Traditionally, trial courts have been afforded broad discretion to regulate the progression of their cases, including discovery. Such deference recognizes the common-sense notion that, in light of their proximity to the parties, the pleadings, and the underlying allegations, the trial courts are best equipped to exercise control over their dockets. Well before *Iqbal*, district courts were fully competent in deciding whether a case should proceed—fashioning balancing tests to weigh the competing interests. Factors weighed included: (1) the interests of the plaintiff "in proceeding expeditiously with the civil action and the potential prejudice to plaintiffs of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest."[17]

Pre-*Iqbal*, courts were particularly reluctant to stay discovery, for efficiency reasons, unless a dispositive motion would end the litigation in its entirety.[18] The starting point in recent times is *Harlow v. Fitzgerald*,[19] a

16. Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 231 (2006).

17. String Cheese Incident, LLC v. Stylus Shows, Inc., No. CV 05-01934-LTB-PAC, 2006 U.S. Dist. LEXIS 97388, slip op. at *4–5 (D. Colo. Mar. 30, 2006); Fed. Deposit Ins. Corp. v. Renda, No. 85-2216-O, 1987 U.S. Dist. LEXIS 8305, slip op. at *5–6 (D. Kan. Aug. 6, 1987). *See, e.g.*, Lovelace v. Delo, 47 F.3d 286 (8th Cir. 1995). In *Lovelace*, the Eighth Circuit evaluated the context in which discovery should or should not proceed when the issue of qualified immunity was raised. In doing so, the court held that, when the plaintiff had properly pled a claim for a violation of clearly established law, but there were factual disputes as to what actions the law enforcement officers took, discovery was appropriate on the issue of qualified immunity. *Id.* at 287–88. The discovery would enable the court to decide qualified immunity. *Id.*

18. Wolf v. United States, 157 F.R.D. 494, 495 (D. Kan. 1994) ("The general policy in this district is not to stay discovery even though dispositive motions are pending. However, it is appropriate for a court to stay discovery until a pending dispositive motion is decided, especially where the case is likely to be finally concluded as a result of the ruling thereon. . ..") (citing Kutilek v. Gannon, 132 F.R.D. 296, 297–98 (D. Kan. 1990)); *see also* McCabe v. Foley, 233 F.R.D. 683, 685 (M.D. Fla. 2006) ("In deciding whether to stay discovery pending resolution of a pending motion, the Court inevitably must balance the harm produced by a delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery.")

case arising out of the termination of a Nixon administration official. In *Harlow*, the Supreme Court noted that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of *broad-reaching* discovery."[20] As the Court has since clarified, the primary concern was not whether *any* discovery should be undertaken, but on "broad-reaching" discovery.[21] "*Harlow* sought to protect officials from the costs of 'broad-reaching' discovery. . .and [the court has] recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity."[22]

Thereafter, in *Mitchell v. Forsyth*, the Supreme Court better outlined the contours of permissible discovery in the context of qualified immunity.[23] In that case, Keith Forsyth filed a claim for damages pursuant to § 1983 after he learned that the United States Attorney General, John Mitchell, had authorized a warrantless wiretap on his home.[24] The Court noted that although qualified immunity acted as an immunity from *suit* where a plaintiff sufficiently alleges a violation of an established constitutional right, discovery may nevertheless be permitted to enable the court to assess the facts pertinent to the qualified immunity analysis:

> Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment *if discovery fails* to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.[25]

The Supreme Court re-affirmed this approach in *Anderson v. Creighton*.[26] In *Anderson*, the Creighton family sued Federal Bureau of Investigation

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(citation omitted)); United States v. Cnty. of Nassau, 188 F.R.D. 187, 189 (E.D.N.Y. 1999) (granting stay of discovery during the pendency of a motion to dismiss where the "interests of fairness, economy and efficiency. . .favor[ed] the issuance of a stay of discovery," and where the plaintiff failed to claim prejudice in the event of a stay); Nankivil v. Lockheed Martin Corp., 216 F.R.D. 689, 692 (M.D. Fla. 2003) ("[O]verall stays of discovery may be rarely granted, courts have held good cause to stay discovery exists wherein 'resolution of a preliminary motion may dispose of the entire action.'").

19. 457 U.S. 800 (1982)

20. *Id.* at 817–18 (emphasis added).

21. Crawford-El v. Britton, 523 U.S. 574, 593 n.14 (1998).

22. *Id.* (citing Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987)) (internal citation omitted).

23. 472 U.S. 511 (1985)

24. *Id.* at 513–15.

25. *Id.* at 526 (emphasis added) (citation omitted).

26. 483 U.S. 635 (1987)

(FBI) agents after a warrantless search of their home.[27] FBI agents wrongly believed that a suspected bank robber might have been at the home.[28] The Supreme Court addressed the scope of discovery on remand:

> [I]t should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery.. . .[i]f they are not, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity.[29]

The Court's opinions in *Mitchell* and *Anderson* clarify that, despite the concern over protecting officials from disruptive discovery, some discovery should be allowed to enable the trial court to decide the qualified immunity defense.

Perhaps most notably, the Supreme Court in *Crawford-El v. Britton*[30] explicitly rejected the "categorical rule" approach now adopted by some courts after *Iqbal*. In *Crawford-El*, a "litigious and outspoken" inmate claimed that he was retaliated against due to lawsuits he had filed, and he brought new claims under the First Amendment.[31] The D.C. Circuit Court of Appeals had employed a heightened burden of proof of "clear and convincing evidence" for plaintiffs in unconstitutional motive cases, in part out of concern that governmental officials would undergo discovery.[32] The Supreme Court addressed, "[t]he broad question presented. . .whether the courts of appeals may craft special procedural rules for such cases to protect public servants from the burdens of trial and discovery that may impair the performance of their official duties."[33] In doing so, the Court emphasized that "[d]iscovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but neither that opinion nor subsequent decisions create an immunity from *all discovery*."[34]

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27. *Id.* at 637.
28. *Id.*
29. *Id.* at 647.
30. 523 U.S. 574 (1998).
31. *Crawford-El*, 523 U.S. at 578.
32. *Id.* at 595.
33. *Id.* at 577.
34. *Id.* at 593 (emphasis added)

> [T]he Court of Appeals' indirect effort to regulate discovery employs a blunt instrument that carries a high cost, for its rule also imposes a heightened standard of proof at trial upon plaintiffs with bona fide constitutional claims.[35]

The Supreme Court went on to address the concerns regarding the burden of "insubstantial claims" on governmental officials, explaining the discretionary tools the trial courts had at their disposal, and specifically where an official has pled a qualified immunity defense.[36] The trial court can stay discovery pending the resolution of the initial question of immunity, and thereafter "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery."[37]

> It is the district judges rather than appellate judges like ourselves who have had the most experience in managing cases in which an official's intent is an element. Given the wide variety of civil rights and "constitutional tort" claims that trial judges confront, broad discretion in the management of the factfinding process may be more useful and equitable to all the parties than the categorical rule imposed by the Court of Appeals.[38]

The thrust of this long-established and oft-affirmed Supreme Court precedent emphasizes that trial courts should be the ones that decide the best manner of managing the docket in a specific case, including cases where qualified immunity has been raised. Indeed, the application of informed discretion by the trial courts in determining the scope of discovery permissible after the defense of qualified immunity has been asserted is the most effective and equitable means of balancing the plaintiff's interest in prosecuting its case with the Supreme Court's efforts to shield public officials from burdensome discovery.[39]

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35. *Id.* at 595–96.
36. *Id.* at 597–98.
37. *See id.* at 598.
38. *See id.* at 600–601.
39. *See* Clinton v. Jones, 520 U.S. 681 (1997). Perhaps the most pronounced reinforcement of a trial court's ability to exercise discretionary control over its own docket was found in the infamous matter of Paula Jones's lawsuit against President Clinton. There, the Court addressed whether a public official (even the highest public official) must undergo intrusive litigation. In *Clinton*, the President argued that all proceedings in the case should be stayed until the conclusion of his presidency, citing separation of powers concerns. *Id.* Eight members of the Supreme Court joined in Justice Steven's opinion rejecting the President's argument, and reaffirming the trial court's ability to exercise discretion in a given context:

> As we have explained, "[e]specially in cases of extraordinary public moment, [a plaintiff] may be required to submit to delay not immoderate in extent and

Nevertheless, relying on the misapplication of dicta in *Iqbal*, some courts have held that discovery in civil rights cases is to be stayed categorically merely upon the filing of a dispositive motion asserting qualified immunity. Nothing in the language of the *Iqbal* opinion suggests that the Court intended such a result.

IV. THE CASE OF *ASHCROFT v. IQBAL*

In the wake of the September 11, 2001 terrorist attacks, FBI agents questioned approximately 1,000 individuals about their links to the attacks specifically, and/or about their suspected links to terrorism generally.[40] Of this group, 184 were designated as persons of "high interest" to the investigation and held in a section of the New York City Metropolitan Detention Center called the Administrative Maximum Special Housing Unit (ADMAX SHU).[41] Inmates held in ADMAX SHU were subject to the maximum-security conditions permitted by federal regulations.[42] Those "high interest" detainees held in ADMAX SHU were kept in lockdown twenty-three hours a day and spent the remaining hour outside their cells in handcuffs while being accompanied by a team of four security officers.[43]

> not oppressive in its consequences if the public welfare or convenience will thereby be promoted.". . .Although we have rejected the argument that the potential burdens on the President violate separation-of-powers principles, those burdens are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.

Clinton, 520 U.S. at 706–07 (1997) (quoting Landis v. N. Am. Co., 299 U.S. 248, 256 (1936)). The Supreme Court held that it was an abuse of discretion to defer the trial until after the President left office, noting that such an approach ignored Ms. Jones's interests in the entirety, and that "delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party." *Id.* at 707–708. Finally, the Court emphasized it was the proponent of a stay who bears the burden of establishing the need for the stay, and the burden had not even been examined by the trial court in that case. *Id.* The Supreme Court's holding in *Clinton* directly reaffirmed the importance of the trial court's discretion to govern the proceedings. Given the public official in that case, the Court's affirmance of a trial court's discretionary powers should ring all the more loudly in cases where the public officials arguably hold offices of lesser public import.

40. *See Iqbal*, 556 U.S. at 666–68 (2009).

41. *See id.* at 667.

42. *See id.*

43. *See id.* at 668.

Javaid Iqbal was one of the "high interest" targets arrested by the FBI.[44] During the FBI's investigation into Iqbal's suspected connection with terrorism, he was charged with falsifying identification documents and conspiring to defraud the United States.[45] Iqbal pled guilty to the charges and was subsequently deported to his native country, Pakistan, following service of his prison sentence.[46] After his release, Iqbal filed a *Bivens* action against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, Director of the FBI.[47]

In his complaint, Iqbal alleged that the FBI, under the direction of Mueller, adopted a discriminatory policy that unlawfully designated persons as "high interest" targets based on their race, religion, or national origin.[48] Iqbal alleged that the policy of holding persons of high interest in "highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants [Ashcroft] and [Mueller]" and that they "each knew of, condoned, and willfully and maliciously agreed to subject" him to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."[49] Ashcroft and Mueller raised the defense of qualified immunity and moved to dismiss the complaint "for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct."[50] Relying on the holding in *Conley v. Gibson*,[51] the district court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against petitioners."[52] The district court denied the motion.

Thereafter, Ashcroft and Mueller invoked the collateral order doctrine and exercised their right to an immediate appeal for a denial of

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44. *See id.* at 667.

45. *See Iqbal*, 556 U.S. at 667 (2009).

46. *See id.* at 668.

47. *Id. See supra* note 7 for an explanation of *Bivens*.

48. *See Iqbal*, 556 U.S. at 668–69 (2009).

49. *See id.* at 669. Iqbal also brought claims against correctional officers, the jail warden, and others with whom he had day-to-day contact claiming that he was subjected to violence and unnecessary body-cavity searches while confined in ADMAX SHU. *Id.* Those claims, however, were not at issue in the Supreme Court's decision. *Id.*

50. *See id.* at 668.

51. *Conley*, 355 U.S. 41 (1957).

52. Elmaghraby v. Ashcroft, No. 04-CV-1809, 2005 U.S. Dist. LEXIS 21434, at *95. (E.D.N.Y. Sept. 27, 2005) (internal quotations omitted), *aff'd in part, rev'd in part by* Iqbal v. Hasty, 490 F.3d 134 (2d Cir. 2007).

qualified immunity motion.[53] While the appeal was pending, the Supreme Court decided the case of *Bell Atlantic Corp. v. Twombly*, which set out a new and heightened pleading standard by which complaints are to be assessed on a motion to dismiss.[54] On appeal, the Second Circuit Court of Appeals acknowledged the Supreme Court's holding in *Twombly*.[55] Nevertheless, it ruled that it was precluded from imposing a heightened pleading standard for civil rights claims alleging racial animus based on the Supreme Court's ruling in *Crawford-El v. Britton*.[56] Iqbal's claims were therefore permitted to move forward.

The Second Circuit did not, however, allow Iqbal's claims to go unchecked. "Mindful of the need to vindicate the purpose of the qualified immunity defense by dismissing non-meritorious claims against public officials at an early stage of litigation[,]" the court of appeals instructed the district court to "exercise its discretion in a way that protects the substance of the qualified immunity defense. . .so that officials [or former officials] are not subjected to unnecessary and burdensome discovery or trial proceedings."[57] Given the high-ranking position of defendants Ashcroft and Mueller, the court went one step further and suggested that all discovery to them could be postponed until discovery of the "front-line officials" was complete.[58]

Notwithstanding the limitations placed on discovery against them, Ashcroft and Mueller petitioned the U.S. Supreme Court for a writ of certiorari. The Court granted their petition.[59]

In addressing the issue before it, the Court noted that Iqbal's "account of his prison ordeal could, if proved, demonstrate unconstitutional

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53. *Iqbal*, 556 U.S. at 669. The Supreme Court has held that a district court's denial of a motion for qualified immunity is subject to immediate review under the collateral order doctrine because it is one of the "small class of district court decisions that, though short of final judgment, are immediately appealable because they finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Behrens v. Pelletier, 516 U.S. 299, 305 (1996) (internal quotation marks omitted).

54. 550 U.S. 544 (2007). Under *Twombly*, courts are no longer to apply the *Conley* test in determining whether the plaintiff has set forth any set of facts entitling her to relief. Rather, courts are directed to assess whether the plaintiff has set forth sufficient factual allegations in the complaint to give rise to a "plausible" claim for relief. *Id.*, 550 U.S. at 556.

55. Iqbal v. Hasty, 490 F.3d 143, 155–56 (2d Cir. 2007)

56. *See id* at 175 (discussing Crawford-El v. Britton, 523 U.S. 574 (1998)).

57. *Iqbal v. Hasty,* 490 F.3d at 158–59 (alteration in original).

58. *See id.* at 178.

59. Ashcroft v. Iqbal, 554 U.S. 902 (2008).

misconduct by some governmental actors."[60] However, the Court stated that the issue before it presented a "narrower question: Did [Iqbal], as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that [Ashcroft and Mueller] deprived him of his clearly established constitutional rights?"[61]

In addressing this narrow issue, the Supreme Court built on its holding in *Twombly*.[62] The Court explained that *Twombly* set forth two working principles by which a complaint is to be assessed. First, a court need not take as true conclusory statements or legal conclusions that simply present "[t]hreadbare recitals of the elements of a cause of action."[63] Second, only those complaints that set forth a "plausible" claim for relief will survive a motion to dismiss.[64] Determination of plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[65]

Applying this approach to Iqbal's claims, the Court concluded that Iqbal's complaint failed to "nudge[ ] his claims of invidious discrimination across the line of conceivable to plausible."[66] Specifically, the Court found that many of the allegations forming the heart of Iqbal's claims were "nothing more than a formulaic recitation of the elements of a constitutional discrimination claim."[67] The Court ruled that Iqbal had failed to provide any factual allegations "sufficient to plausibly suggest petitioners' discriminatory state of mind."[68] Accordingly, the Court determined that Iqbal's complaint as stated could not entitle him to relief.[69]

After resolving the "narrow" issue presented, the Court addressed, in dicta, Iqbal's contention that the "construction of Rule 8 should be tempered where [ ] the Court of Appeals has instructed the district court to cabin discovery in such a way as to preserve petitioners' defense of qualified immunity as much as possible in anticipation of a summary judgment motion."[70] The Court rejected this argument, stating that a

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60. Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009).
61. *Id.*
62. 550 U.S. 544 (2007).
63. *Iqbal*, 556 U.S. at 678.
64. *Id.* at 678–79.
65. *Id.* at 679.
66. *Id.* at 680 (alteration in original).
67. *Id.* at 681 (internal quotation marks omitted).
68. *Id.* at 683.
69. *Id.* at 684. The Court, however, expressly stated that it was making no ruling on any of the claims or issues pertaining to the other defendants in the case. *See id.*
70. *Id.* at 684. The Court also addressed two other issues in its post-holding dicta. First, the Court ruled that its holding in *Twombly* was not limited solely to antitrust cases. *Id.* at 684–85. Second, the majority rejected Iqbal's contention that Rule 9,

claim that fails to present a plausible claim for relief may not go forward even under a "careful-case-management approach."[71] This is because the "basic thrust of the qualified immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery."[72] Accordingly, in light of this concern, a complaint that fails to state a claim for relief does not survive the Rule 8 inquiry simply because discovery may be tightly circumscribed to factual issues underlying qualified immunity.[73]

> We decline [Iqbal's] invitation to relax the pleading requirements on the ground that the Court of Appeals promises [Ashcroft and Mueller] minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must neither be deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.[74]

The Court also addressed Iqbal's related argument that the concerns about discovery in the context of qualified immunity were inapplicable to the facts presented because the "Second Circuit directed that discovery against petitioners shall only take place after all other discovery is complete and then only if discovery from other sources establishes the need to seek information personally from [Ashcroft and Mueller]."[75] The Court stated:

> It is no answer to these concerns to say that discovery for [Ashcroft and Mueller] can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure that the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if [Ashcroft and Mueller] are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.[76]

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which allows general allegations of "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally," expressly permitted him to provide conclusory allegations of racial animus. *Id.* at 686.

71. *Id.* at 685.
72. *Id.*
73. *See id.*
74. *Id.* at 686.
75. Brief for respondent at 2, No. 07-1015, Ashcroft v. Iqbal, 556 U.S. 662 (2009).
76. *Iqbal*, 556 U.S. at 685–86.

Thus, the Court refused to lower the newly-minted pleading standard it had adopted in *Twombly* simply because discovery as to Ashcroft and Mueller would be minimally intrusive or that they would not be subject to any discovery until all other discovery had been completed.[77]

Although the thrust of the Court's discussion regarding discovery in *Iqbal* is plain, many courts—and defendants—have cited the post-holding dicta in the opinion to impose a per se bar on discovery once a defendant has filed a motion for qualified immunity.[78] Implicit in this interpretation of the Court's opinion is an assumption that *Iqbal*'s dicta was intended to overrule prior jurisprudence set forth in *Harlow* and *Mitchell*.[79] However,

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77. *Id.*

78. *See* Chavez v. Cnty. of Larimer, No. CV 11-00988 MSK/MEH, 2011 U.S. Dist. LEXIS 105592, slip op. at 6 n.2 (D. Colo. Sept. 16, 2011) ("Defendants also suggest that, pursuant to the Supreme Court's opinion in [*Iqbal*], a stay of discovery is proper where a government defendant asserts the plaintiff's claims fail pursuant to Fed. R. Civ. P. 8."); Morgan v. Albuquerque Pub. Sch., No. CV 10-1212 WJ/LFG, at *1–2 (D.N.M. Mar. 30, 2011) (Doc. 25, Order Granting Motion for Protective Order and Stay of Discovery Pending Decision on Motion to Dismiss No. II) (citing *Iqbal* and holding that "the Court's discretion is limited when a qualified immunity motion is before the Court. . .[W]hen a motion to dismiss based on qualified immunity is before the Court, as it is here, the Court is required to stay discovery."); Yazzie v. Moya, No. CV 10-00962, PJK/WDS, at *2 (D.N.M. Feb. 7, 2011) (Doc. 28, Order granting Motion to Stay Discovery) ("Permitting discovery on claims against codefendants not entitled to qualified immunity would likely subject any defendants who are entitled to immunity to the burdens of discovery. . .This would constitute an end-run around immunity protection."; Tamburo v. Dworkin, No. 04 C 3317, 2010 U.S. Dist. LEXIS 121510, slip op. at 3–4 (N.D. Ill. Nov. 17, 2010) (citing *Iqbal* for the proposition that a stay of discovery is appropriate "pending resolution of qualified immunity claims"); Seeds of Peace Collective v. City of Pittsburgh, No. 09-1275, 2010 U.S. Dist. LEXIS 76612, slip op. at 3 (W.D. Pa. July 28, 2010) ("Defendants contend that the United States Supreme Court, in [*Iqbal*], established that all discovery must be stayed pending the resolution of a motion to dismiss based on qualified immunity."); S.D. v. St. Johns Cnty. Sch. Dist., No. CV 09-250-J-20TEM, 2009 U.S. Dist. LEXIS 110198, slip op. at 4 (M.D. Fla. Nov. 24, 2009) ("Defendants maintain that the *Iqbal* decision provides 'clear directions regarding stays of discovery while questions of sovereign immunity are being decided.'"); Kiowa Ass'n v. King, No. CV 09-0467 MV/WPL, at *2 (D.N.M. Oct. 1, 2009) (Doc. 32, Order granting Motion to Stay) ("In a suit with multiple defendants, only some of whom assert qualified immunity, all discovery should be postponed pending a ruling on qualified immunity."; Schwartz v. Jefferson Cnty. Dep't of Human Servs., No. CV 09 00915-WYD-KMT, 2009 U.S. Dist. LEXIS 66331, slip op. at 3 (D. Colo. July 10, 2009) ("Claims of immunity. . .grant an entitlement not to stand trial or face the other burdens of litigation.").

79. Such an interpretation runs afoul of traditional notions of stare decisis. As Justice Kennedy, who authored the majority opinion in *Iqbal*, once famously stated: "If a precedent of this Court has direct application in a case. . .the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of

the Court's four-paragraph rebuttal of Iqbal's argument provides no support for this proposition.[80] There is no express statement by the Court indicating that it was taking the drastic step of reversing the body of caselaw developed over the preceding three decades, nor did it provide any of the "special justification[s]" generally offered for a departure from prior caselaw.[81] As the language of the opinion makes pellucid, the only question addressed by the Court was whether the bar for assessing the sufficiency of Iqbal's complaint should be lowered in light of the limitations the Second Circuit placed on discovery in the case. Nothing in the Court's opinion suggests that it intended to overrule prior jurisprudence pertaining to the propriety of discovery in the context of qualified immunity.[82]

V. THE WAY FORWARD: RECONCILING THE NEED TO LIMIT BURDENSOME DISCOVERY AGAINST PUBLIC OFFICIALS WITH A PLAINTIFF'S NEED FOR DISCOVERY TO PROVE UP ITS CLAIMS

While *Iqbal* adds little to the topic of discretion of lower courts and their ability to manage discovery in specific cases, some courts are clearly struggling with the notion—grounded in their misreading of *Iqbal*—that some additional scrutiny should be employed in deciding whether to permit discovery in a case where a defendant pleads qualified immunity. How *should* courts heed the concerns expressed by the Supreme Court in *Iqbal* regarding the burdens of discovery on governmental actors? The best approach takes into account the concerns of the Court set forth in *Iqbal*, but keeps discretion where it is, where it has been historically, and where it should remain: with the trial courts. Accordingly, courts should "take a peek" at the dispositive motion and do a preliminary review. Courts should then exercise their discretion, employing the factors they have used for decades: (1) the interests of the plaintiff in proceeding expeditiously with the civil action and the potential prejudice to plaintiffs of a delay; (2) the burden on the defendants; (3) the convenience to the

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overruling its own decisions." Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

80. *See Iqbal*, 556 at 684–87.

81. Arizona v. Rumsey, 467 U.S. 203, 212 (1984) ("Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification.").

82. *See* Maxey v. Fulton, 890 F.2d 279, 283 (10th Cir. 1989).

court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.[83]

As an example, Seventh Circuit Judge Richard Posner considered the Supreme Court's concern over whether to permit discovery in a *complex* case, but implied that the court should preliminarily decide whether the plaintiff's case is "substantial" enough to warrant discovery.

> *Bell Atlantic Corp. v. Twombly*,. . .teaches that a defendant should not be burdened with the heavy costs of pretrial discovery that are likely to be incurred in a complex case unless the complaint indicates that the plaintiff's case is a *substantial one*.[84]

How would a court know whether a case is a substantial one? How would a court know if discovery should be stayed pending its decision on a motion to dismiss based on qualified immunity? These determinations can be made by the trial courts conducting an initial review of the dispositive motion.

Some courts are at least implicitly adopting this approach, taking an initial review of the dispositive motion, assessing the merits preliminarily, and exercising their discretion to stay, not to stay, or to focus discovery.[85]

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83. Spencer Trask Software & Info. Servs., LLC v. RPost International Ltd., 206 F.R.D. 367, 368 (S.D.N.Y. 2000) (granting stay of discovery pending determination of a motion to dismiss where court found defendants presented "substantial arguments" for dismissal of many if not all of the claims in the lawsuit); Feldman v. Flood, 176 F.R.D. 651, 652–53 (M.D. Fla. 1997) ("Courts should 'take a preliminary peek' at the merits of the motion to dismiss to see if it appears to be clearly meritorious and truly case dispositive.").

84. Beck v. Dobrowski, 559 F.3d 680, 682 (7th Cir. 2009) (emphasis added). *See also, e.g.,* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves."). The Civil Justice Reform Act of 1990, 28 USC § 471, adopted one year after Judge Easterbrook's article was published, has changed the way that trial courts manage their dockets, compelling them to adhere to stricter timelines. Regardless, whether the trial courts effectively manage discovery is a different issue from the one taken up here, that is, whether *Iqbal* denies trial courts the discretion to do so in cases where the defense of qualified immunity is raised.

85. Cloverleaf Golf Course v. FMC Corp., No. 11-cv-190-DRH, 2011 U.S. Dist. LEXIS 76658, at *12 (S.D. Ill. July 15, 2011) ("at first blush" the defendants' motion to dismiss did not appear "well-founded"); Hicks v. Evans, No. C 08-1146 SI (pr), 2011 U.S. Dist. LEXIS 72762 (N.D. Cal. July 7, 2011) (quickly reviewing the motion to dismiss to confirm that it did indeed raise a qualified immunity defense and discovered an apparent problem in the supporting evidence for the motion to dismiss); Fosselman v. Caropreso, No. C 09-0055 PJH (PR), 2011 U.S. Dist. LEXIS 28816, at *4 (N.D. Cal. Mar. 18, 2011) ("Because defendants' qualified immunity ground is so weak, and would not dispose of the entire case, the motion [to stay] will be denied.");

The approach permits the court to weigh the competing interests of the parties and to manage its docket efficiently. As an example, say that a plaintiff files a Fourth Amendment unlawful arrest case against an officer for an arrest without probable cause. In response, the officer raises qualified immunity, arguing that the law was not clearly established at the time of the violation. However, the law is clear that probable cause is necessary for an arrest. Thus, the qualified immunity motion would be frivolous on its face under the first prong of qualified immunity. The court, by taking a quick review of the motion, can see that it is frivolous, and therefore should deny a motion to stay discovery.[86]

Now take a closer case: assume that an inmate is held at a public prison for twelve hours in a cold shower room and files a claim for cruel and unusual punishment under the Eighth Amendment. The defendant warden files a motion to dismiss based on qualified immunity. The issue is whether the law is clearly established that that challenged act was "serious" enough to rise to the level of cruel and unusual punishment under the Eighth Amendment.[87] The court may look at the warden's motion to dismiss based on qualified immunity and decide that it is a close call. In that case, the court should proceed to employ the historic factors weighed in such circumstances: (1) the interests of the plaintiff in proceeding expeditiously with the civil action and the potential prejudice to plaintiffs of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.[88]

Another less obvious case would be where individual defendants are all fact witnesses to claims against the defendant state, and they each

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Tamburo v. Dworkin, No. 04 C 3317, 2010 U.S. Dist. LEXIS 121510, at *6 (N.D. Ill. Nov. 17, 2010) ("*Twombly* and *Iqbal* do not dictate that a motion to stay should be granted every time a motion to dismiss is placed before the Court.") (citing Solomon Realty Co. v. Tim Donut U.S. Ltd., Inc., No. 08-cv-561, 2009 U.S. Dist. LEXIS 75813, slip op. at 3 (S.D. Ohio August 11, 2009) ("Despite the defendants' interpretation of new pleading standards in the wake of *Twombly* and *Iqbal*, the Court is not persuaded that this case presents any need for departure from the general rule that a pending motion to dismiss does not warrant a stay of discovery.").

86. *See, e.g.,* Miller v. Van Boening, No. C10-5712 RBL/JRC, 2011 U.S. Dist. LEXIS 25814, at *12–13 (W.D. Wash. Feb. 11, 2011) ("Defendants move to stay discovery. Discovery should normally be stayed pending a ruling of qualified immunity. Here, however, the court is not inclined to stay discovery as the claim is for a violation of clearly established law. The motion to stay discovery should be DENIED."). *See also Cloverleaf Golf Course*, 2011 U.S. Dist. LEXIS 76658, at *13–14 ("The Court just refuses to stay this case for an indefinite period of time based upon mere speculation.").

87. Hope v. Pelzer, 536 U.S. 730 (2002).

88. *See supra* note 83.

raise the defense of qualified immunity. The state, which is not entitled to qualified immunity, has filed a motion to dismiss based on sovereign immunity. In the circumstances of the specific case, whether the state has waived its immunity is unclear. The trial court can "take a peek" at the motion to dismiss, and note that, even if dismissed, the individual defendants will have to undergo discovery as fact witnesses. Hence, the burden on defendants is the same—or substantially similar—regardless of the outcome of the dispositive motion based on qualified immunity: they will have to undergo discovery as fact witnesses. In that event, the court can review the motion and decide whether discovery should proceed, examining the entirety of the motion to dismiss.[89]

A different situation may arise where the plaintiff has failed to adequately plead facts to defeat qualified immunity, but the trial court takes a peek and judges that, upon amendment, she likely will be able to do so. In such situations, "[d]ismissal, without an opportunity to file an amended complaint, is rare."[90] The interest of the plaintiff and the convenience to the court—expeditious resolution—outweigh any benefit that the defendant receives from the delay that comes with waiting for the plaintiff to amend its pleading. Accordingly, staying discovery is likely to be pointless.

Still another situation is where the court reviews the motion to dismiss based on qualified immunity and surmises that it will likely need *some* facts developed in order to be adjudicated, and then only under Rule 56 as a motion for summary judgment. The court in that situation may decline to stay all discovery, but order that it be limited to the issue of qualified immunity.[91]

On the other end of the spectrum from the first hypothetical, imagine a case where the plaintiff's claims are such that they simply do not, and cannot, plead a violation of the constitution. For example, a plaintiff sues an officer under the First Amendment for citing him for shouting

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89. *See, e.g.*, Thomas v. Hood, No. CV 10-05369-RJB-JRC, 2010 U.S. Dist. LEXIS 133034, at *3 (W.D. Wash. Dec. 16, 2010) ("While claims against the State and Defendant Hood in his official capacity are barred by the Eleventh Amendment, dismissal of the claims against Mr. Hood in his personal capacity is not appropriate at this early stage of the proceedings. Accordingly, the Court should. . .strictly limit discovery to whether Mr. Hood had an improper motive or intent in denying plaintiff the use of the recording machine in recreation and what the Department of Corrections considered during the grievance procedure.").

90. *Cloverleaf Golf Course*, 2011 U.S. Dist. LEXIS 76658, at *12 (citing Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745, 749 (7th Cir. 2005)).

91. *See, e.g.*, Finch v. City of Indianapolis, No. CV 08-0432-DML-RLY, 2011 U.S. Dist. LEXIS 67577 (S.D. Ind. June 23, 2011).

"fire!" in a crowded movie theatre. The plaintiff clearly has not pled a constitutional violation.[92] Accordingly, the defendant files a motion to dismiss. The court can take a peek, see that the case is frivolous, and note that the defendant is absolutely entitled to be free from the burden of *any* discovery, given the apparent frivolousness of the claims. Discovery should be stayed in this instance.

This approach is consistent with the Civil Justice Reform Act's direction that civil disputes be resolved in a "just, speedy, and inexpensive" manner.[93] But above all it emphasizes the inherent discretionary power of the trial court judge to govern the litigation process toward that end. Therefore, the dicta in *Iqbal* should be read as a reiteration of the need to balance the interests in discovery and not be construed to abrogate the trial courts' important discretionary role in managing discovery.

VI. CONCLUSION

Over eighty years ago, Justice Cardozo explained the importance of trial courts' inherent power to manage their own docket:

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment which must weigh competing interests and maintain an even balance.[94]

Throughout the years, the Supreme Court has affirmed the notion that trial courts are best suited to assess the permissible scope of discovery, including discovery in cases where qualified immunity issues are raised. Nothing in *Iqbal* can be read to change that, nor should it. A categorical approach that usurps the trial court's discretion is inefficient and unfair. In a case where a well-founded defense of qualified immunity has been raised, the trial court may cabin discovery accordingly. In a case where the defense of qualified immunity is frivolous, the trial court should reject any limits on discovery. In close cases, the trial court is best able to assess the extent to which discovery may proceed, or whether it should proceed at all. After *Iqbal*, trial courts still retain their right to exercise this discretion, as well they should.

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92. Schenk v. United States, 249 U.S. 47 (1919).

93. 28 U.S.C. § 471 (1991) ("The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.").

94. Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936).