No. 09-16246 & 10-13071

IN THE

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ELOY ROYAS MAMANI, ET AL.,

Plaintiffs-Appellees,

v.

JOSE CARLOS SÁNCHEZ BERZAÍN AND GONZALO SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMANTE,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
THE HON. ADALBERTO JORDAN
CASE NO. 07-22459 & 08-21063

BRIEF OF AMICI CURIAE CIVIL PROCEDURE SCHOLARS IN SUPPORT OF THE PETITION FOR REHEARING AND REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, Counsel for *Amici Curiae* certify that in addition to the parties and entities identified in the Certificate of Interested Persons filed by Petitioners-Appellees, the following persons have or may have an interest in the outcome of this case or appeal:

Aceves, William J. (amicus curiae)

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With the exception of CMST, these individuals are natural persons. CMST has no parent corporations and no publicly-held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page(s)

TABLE OF CITATIONS

Page(s)

CASES

* Citations on which *Amici* principally rely are marked with asterisks.

FEDERAL RULES OF CIVIL PROCEDURE

OTHER AUTHORITIES

INTEREST OF AMICI

Amici curiae are scholars of civil procedure who have an interest in the proper interpretation of pleading standards.[1] In *Amici*'s view, the Panel[2] improperly imposed an elevated pleading standard inconsistent with Rule 8 and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). This error undercuts the liberal pleading regime of the Federal Rules and will impact litigants in a broad range of cases. *Amici* respectfully urge the full Court to review this question en banc. They take no position on any other question presented in this case. A list of *Amici* is attached.

STATEMENT OF THE ISSUE MERITING REHEARING

> Whether the Panel contravened Federal Rule 8(a)(c) and *Iqbal* by adopting an unauthorized pleading standard that demanded the pleading of specific facts; required the Plaintiffs to disprove hypothetical alternative explanations; and mischaracterized concrete factual allegations as legal conclusions.

SUMMARY OF THE ARGUMENT

The Panel applied an elevated pleading requirement bearing little resemblance to the "short and plain statement" required by Federal Rule 8. In doing so, the Panel decision conflicts with *Iqbal*, 129 S. Ct. at 1949, *Randall v. Scott*, 610 F.3d 701, 710 (11th Cir. 2010), and a series of Eleventh Circuit decisions applying Rule 8. The Panel deviated from the authorized pleading

[1] No counsel for a party authored this brief in whole or in part, and no persons other than *Amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] *Mamani v. Sanchez Berzain*, No. 09-16246 (11th Cir. Aug. 29, 2011) ("slip op.").

standard in at least three respects: by requiring the Plaintiffs to plead facts with heightened specificity; by requiring the Plaintiffs to disprove hypothetical alternative explanations; and by mischaracterizing concrete factual allegations as legal conclusions. A holding that "departs in so stark a manner from the pleading standard mandated by the Federal Rules" warrants review. *Erickson v. Pardus*, 551 U.S. 89, 90, 127 S. Ct. 2197, 2198 (2007).

ARGUMENT

I. The Panel incorrectly adopted an elevated pleading standard inconsistent with the Federal Rules and *Iqbal*.

Iqbal stated unequivocally that Rule 8 "governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'" *Id*. at 1953 (citing Fed. R. Civ. P. 1). It thereby affirmed a line of Supreme Court decisions rejecting judge-made departures from the Rule 8 standard. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 997 (2002) (no heightened standard for employment discrimination claims); *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 1163 (1993) (no heightened standard under 42 U.S.C. § 1983).

This Circuit recognized in *Randall* that "[a]fter *Iqbal* it is clear that there is no 'heightened pleading standard' as it relates to cases governed by Rule 8(a)(2)." 610 F.3d at 710. Significantly, *Randall* came on the heels of three Eleventh Circuit precedents that applied a heightened pleading standard in similar cases,

notwithstanding *Leatherman*, *Swierkiewicz*, and *Iqbal*. *Randall* reversed, holding that variable pleading standards were impermissible. 610 F.3d at 710.

The Panel decision here conflicts with *Iqbal* and *Randall* by adopting an elevated standard outside the bounds of the Federal Rules. In particular, the Panel erred in adopting a heightened specificity standard; in requiring the Plaintiffs to disprove hypothetical alternative explanations; and in mischaracterizing concrete factual allegations as legal conclusions. As discussed in Part II below, the Panel's deviations from the notice pleading standard will have a profound impact not only here, but in a broad swath of federal cases.

A. The Panel improperly required heightened specificity.

The hallmark of notice pleading is that a complaint "does not need detailed factual allegations" to survive a Rule 12(b)(6) motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964 (2007). Indeed, "the Federal Rules eliminated the cumbersome requirement that a claimant 'set out *in detail* the facts upon which he bases his claim.'" *Id.*, 550 U.S. at 556 n. 3. The Supreme Court has repeated the critical message that the Panel here ignored: "Specific facts are not necessary" to state a claim for relief. *Erickson*, 551 U.S. at 93; *Iqbal*, 129 S. Ct. at 1949. Rather, "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 550 U.S. at 563; *see also Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011).

The Panel decision broke from *Iqbal* and *Twombly*—and the Circuit precedents applying them—by demanding a degree of specificity that dwarfs the "plausible 'short and plain' statement" required by Rule 8. *Skinner*, 131 S. Ct. at 1296. Plaintiffs here alleged the exact dates, locations, and manner of their injuries. Compl. ¶¶ 8-16, 40, 54-58, 70, 72-73. They further alleged that these injuries were inflicted by sharpshooters and military officers acting under Defendant Lozada's and Defendant Sanchez Berzain's orders and at their direction (*id*. ¶¶ 7, 30, 36-38, 40, 54-58, 69-70, 72-73). In support of their claims for extrajudicial killing—defined as a "deliberated killing" that is not authorized by a regularly constituted court (Petition for Rehearing and Rehearing en Banc ("Petition") at 12, citing 28 U.S.C. § 1350, note)—they alleged that the victims were unarmed civilians, not participating in any protests, who were killed on sight by sharpshooters. *E.g.*, Compl. ¶¶ 1, 40, 55, 58. In support of their claims for crimes against humanity—defined as certain inhumane acts causing great suffering or serious injury when committed as part of a "widespread or systematic attack directed against any civilian population" (Petition at 12, citing *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1161 (11th Cir. 2005))—they alleged that the victims were members of an identifiable ethnic minority, the Aymara; the attacks occurred during a violent campaign in September and October 2003 "intended to terrorize the indigenous Aymara population of the La Paz region"; and the violence left 67 dead and more

than 400 injured, mostly members of the Aymara community. Compl. ¶¶ 1, 17, 98. These allegations unquestionably "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555; *Harrison v. Benchmark Elecs. Huntsville*, 593 F.3d 1206, 1214 (11th Cir. 2010). The allegations satisfy each element of Plaintiffs' claims, stating *what* violation occurred, *when*, and *by whom* it was allegedly carried out. This is sufficient under Rule 8. *Speaker v. U.S. Dep't of Health and Human Servs. Ctr. For Disease Control and Prevention*, 623 F.3d 1371, 1384-85 (11th Cir. 2010). The Panel ignored these parameters when it dismissed the allegations as "lacking sufficient specificity." Slip op. at 8, 12.

The Panel cited no authority justifying its use of a heightened specificity standard in this case. The Panel purported to follow *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739 (2004), but *Sosa* did not create an exception for Alien Tort Statute ("ATS") cases.[3] In fact, *Sosa* did not address pleading standards at all. The "specificity" discussed in *Sosa* concerned something else altogether: the requirement that a cause of action under the ATS "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." 542 U.S. at 725. The Panel took *Sosa*'s discussion out of context to conclude that ATS claims

[3] Nor could it; exceptions to the Federal Rules can only be accomplished through the formal rulemaking process. *See Leatherman*, 507 U.S. at 168.

"lacking sufficient specificity must fail." Slip op. at 8. This conflation of the pleading standard with recognition of an ATS-actionable federal common law cause of action misreads both *Sosa* and *Iqbal*. *Cf. Swierkiewicz*, 534 U.S. at 510 (reversing circuit court for mistaking an evidentiary standard for a heightened pleading requirement). Indeed, the Panel decision conflicts not only with *Iqbal*, but with every prior ATS decision in this Circuit, which uniformly applied the familiar notice pleading standard. *E.g.*, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (factual allegations in an ATS complaint "need not be detailed");[4] *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1253 n.11 (11th Cir. 2005) (applying the notice pleading standard); *Arce v. Garcia*, 434 F.3d 1254, 1257 n.6 (11th Cir. 2006) (citing Rule 8(a)); *accord Baloco v. Drummond Co.*, 640 F.3d 1338, 1344-45 (11th Cir. 2011).

B. The Panel incorrectly required Plaintiffs to disprove alternative explanations and drew inferences against the Plaintiffs.

The Panel interpreted the Supreme Court's holdings in *Iqbal* and *Twombly* to require plaintiffs to demonstrate that their factual allegations were more compelling than the alternative explanations cited by the Panel. Slip op. at 15. This interpretation was incorrect for the reasons discussed below and in the Petition at

[4] While a footnote in *Sinaltrainal* stated that it did not decide whether a heightened pleading standard may be applied in ATS cases, the decision itself expressly applied the notice pleading standard as interpreted by *Iqbal*. 578 F.3d at 1260-61. Moreover, *Randall* subsequently made clear that judge-made heightened pleading standards are impermissible. 610 F.3d at 710.

6-11.

Both *Iqbal* and *Twombly* make clear that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). The decisions reject a "probability requirement," *id.*, and clarify that the likelihood of success is not a requirement, as a well-pleaded complaint "may proceed even if it strikes a savvy judge that actual proof of those facts is improbable" and that recovery is "unlikely." *Twombly*, 550 U.S. at 556; *see also Sepulveda-Villarini v. Dep't of Educ. of P.R.*, 628 F.3d 25, 30 (1st Cir. 2010) (Souter, J.).

Significantly, *Iqbal* and *Twombly* do not require a plaintiff to disprove all alternative explanations at the pleading stage. *See, e.g.*, *Speaker*, 623 F.3d at 1386; *Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278, 281 (6th Cir. 2010); *Sepulveda-Villarini*, 628 F.3d at 30; *Braden v. Wal-Mart Stores, Inc*., 588 F.3d 585, 597 (8th Cir. 2009); *Gonzalez v. Corr. Corp. of America*, 344 F. App'x 984, 986 (5th Cir. 2009). Both decisions only require dismissal where there is an "obvious alternative explanation" for the allegations *and* the plaintiffs failed to allege facts to support a reasonable inference that the defendant is liable. *Iqbal*, 129 S. Ct. at 1951; *Twombly*, 550 U.S. at 567. The possibility that "other, undisclosed facts may explain the sequence better. . . . does not negate plausibility." *Sepulveda-Villarini*,

628 F.3d at 30; *see also* Petition at 11-12.

The Panel here, in contrast, speculated about alternative explanations for the deaths and dismissed the complaint for failing to disprove those alternatives. For instance, the Panel imagined a scenario in which the President and Defense Minister only wanted to "rescue trapped travelers" and restore public order, rather than direct the targeted killing of civilians as the Plaintiffs assert. Slip op. at 12-13. The Panel further speculated that the Defense Minister "may have been directing military personnel *not* to fire at uninvolved civilians," *id.* at 13 n.6, as opposed to "directing military personnel . . . to fire their weapons" at civilians as Plaintiffs specifically alleged. Compl. ¶ 69. Yet, "[n]ot every potential lawful explanation for the defendant's conduct renders the plaintiff's theory implausible." *Braden*, 588 F.3d at 597. The kind of skepticism exhibited by the Panel about a plaintiff's ability to ultimately prove his case is precisely what the notice pleading rules guard against: "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Twombly*, 550 U.S. at 556 (citing *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 1832 (1989)). As this Court has emphasized, a plaintiff "need not prove his case on the pleadings." *Speaker*, 623 F.3d at 1386.

Indeed, *Iqbal* and *Twombly* did not disturb the principle that "[a]t the motion to dismiss stage," the court "must accept all factual allegations as true and construe

them in the light most favorable to the plaintiff." *Baloco*, 640 F.3d at 1344-45 (citations omitted); *see also Twombly*, 550 U.S. at 555 (allegations must be assumed true, "even if doubtful in fact"). As this Court has held, the factual content of a complaint need not compel an inference, but should "allow a reasonable factfinder to draw the inference." *Waters Edge Living, LLC v. RSUI Indem. Co*., No. 08-16847, 2009 WL 4366031, at *4 (11th Cir. Dec. 3, 2009).

The Panel's decision, however, drew inferences against the Plaintiffs, failed to consider the "[c]omplaint as a whole," and ignored other facts that should have been considered. *See Speaker*, 623 F.3d at 1382, 1383 (citations omitted). For example, the Panel reasoned that "the plaintiffs' decedents' deaths could plausibly have been the result of precipitate shootings during an ongoing civil uprising" and did not meet "the minimal requirement for extrajudicial killing." Slip op. at 15. But that conclusion ignored concrete allegations plausibly suggesting that the killings were targeted, including the fact that "no other shots hit the house"; the shootings were directed at civilians; no protestors were present when the shootings took place; the shootings were done by sharpshooters; and the shootings occurred at a great distance from the conflict. Compl. ¶¶ 40, 54-55, 58, 70 and 72-73. Additionally, the Panel inferred that the scale of deaths and injuries was due to "isolated events" as opposed to "sufficiently widespread" or "systematic" violence rising to the level of crimes against humanity. Slip op. at 17. But again, that

conclusion ignored Plaintiffs' allegations that the killings were part of a month-long operation that spanned several towns and left 67 people dead and over 400 injured. Compl. ¶¶ 1, 8-16, 31, 74. Such allegations plausibly suggest that the killings were sufficiently "widespread" or "systematic" to state a claim.[5] *See Cabello*, 402 F.3d at 1161 (the killing of 72 civilians supported a claim for crimes against humanity). Had the Panel considered Plaintiffs' factual allegations together, accepted them as true, and drawn the reasonable inferences in Plaintiffs' favor, it would have found them sufficient to survive a Rule 12(b)(6) motion to dismiss.

Finally, even under an elevated pleading standard imposed by statute, like that of the Private Securities Litigation Reform Act (PSLRA), the Supreme Court has held, contemporaneously with *Twombly* and *Iqbal*, that the inference favoring the plaintiff need only be "at least as compelling" as an opposing inference. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1324 (2011); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 312-16, 127 S. Ct. 2499, 2504-05 (2007). Neither the PSLRA standard nor the particularity standard required for fraud allegations under Rule 9(b) requires a plaintiff's theory to be

[5] Indeed, a day after the Panel's dismissal, Bolivia's highest court convicted five former top military commanders and two former cabinet ministers of genocide and complicity in the same spate of killings that gave rise to Plaintiffs' claims. The Defendants in the instant case were indicted for those killings, but did not return to Bolivia to face trial. *See Bolivia: 5 Officers Guilty of Genocide*, N.Y. Times, Aug. 30, 2011, http://www.nytimes.com/2011/08/31/world/americas/31briefs-Boliviabrf.html?_r=1; Compl. ¶¶ 75-77.

more convincing than any other. *Id.* at 2507-10. It was therefore particularly improper for the Panel here to require that Plaintiffs' inferences be *more* compelling than the alternative explanations it imagined. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 341 n.42 (3d Cir. 2010); *W. Va. Inv. Mgmt. Bd. v. Doral Fin. Corp.*, 344 F. App'x 717, 721 (2d Cir. 2009).

C. The Panel miscategorized key facts as "conclusory" allegations, contrary to *Iqbal*.

While purporting to follow the Supreme Court's approach in *Iqbal*, the Panel wrongly characterized several factual allegations in the complaint as mere "[l]egal conclusions" not entitled to an assumption of truth. Slip op. at 10-12.

The Supreme Court has explained that federal courts need not accept as true allegations that are "no more than conclusions" or a "formulaic recitation of the elements" of the claim. *Iqbal*, 129 S. Ct. at 1949-50. "Allegations of discrete factual events," however, "are not 'conclusory' in the relevant sense." *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 15 (1st Cir. 2011). Such allegations may not be dismissed as legal conclusions and must be taken as true. *Id*.

The Panel mischaracterized at least two important factual allegations as "conclusory" and improperly excluded them from its analysis. Plaintiffs alleged that the Defendants "order[ed] Bolivian security forces, including military sharpshooters armed with high-powered rifles and soldiers and police wielding

machine guns, to attack and kill scores of unarmed civilians." Compl. ¶ 1. Plaintiffs further alleged that the Defendants "met with military leaders [and] other ministers in the Lozada government to plan widespread attacks involving the use of high-caliber weapons against protesters." Compl. ¶ 81. With little explanation, the Panel held that these allegations were merely "statements of legal conclusions" and disregarded them. Slip op. at 11.

But these allegations are fundamentally different from the assertion in *Twombly* that the defendants "entered into a contract, combination or conspiracy to prevent competitive entry," or the assertion in *Iqbal* that the defendants "knew of, condoned, and willfully and maliciously agreed to subject" the plaintiff to abuse. *Iqbal*, 129 S. Ct. at 1950-51. Here, the Plaintiffs' statements speak of factual events: meetings the Defendants held and orders the Defendants issued that precipitated Plaintiffs' injuries. They tie the Defendants to the series of wrongful acts alleged in the complaint. These allegations "are not barren recitals of the statutory elements, shorn of factual specificity." *Speaker*, 623 F.3d at 1384. In fact, they closely resemble *Iqbal*'s *factual* allegations, *taken as true*, that the policy of holding detainees in restrictive confinement "was approved by Defendants . . . in discussions in the weeks after September 11, 2001." *Iqbal*, 129 S. Ct. at 1951 (citations omitted).[6] Plaintiffs' factual allegations were not conclusory and were

[6] The allegations in *Iqbal* were insufficient because they failed to show that the

entitled to a presumption of truth that the Panel failed to afford them. This error, like the others, is a serious deviation from the Federal Rules that justifies review.

II. The improper elevation of pleading standards is a question of exceptional importance.

A. The Panel's overbroad reading of *Iqbal* and *Twombly* undercuts the liberal pleading regime of Rule 8 and inhibits access to justice.

The Panel's departure from *Iqbal* and *Twombly*, detailed above, threatens "the liberal pleading" regime of Rule 8, *Erickson*, 551 U.S. at 94, which was designed to "lower the entry barriers for federal plaintiffs." *Wynder v. McMahon*, 360 F.3d 73, 78 (2d Cir. 2004). In fact, the Panel's decision erects such barriers not just for ATS plaintiffs, but for all plaintiffs.

"Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 230 (3rd Cir. 2008). A 12(b)(6) motion, when erroneously granted, locks a plaintiff with a meritorious claim out of court without requiring defendants to even respond denying the allegations. Fed. R. Civ. P. 12.

Overbroad applications of *Iqbal* and *Twombly* of this kind would limit the access to court for many plaintiffs with plausible claims. This is an issue of exceptional importance. *See Phillips*, 515 F.3d at 230. Accordingly, en banc review is necessary to correct the errors discussed above and to make sure that the

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defendants were motivated by racial animus, an essential element of the plaintiffs' constitutional claims. *Id*. at 1952. Discrimination is not at issue in the instant case.

doors to the federal courthouse remain open to plaintiffs with plausible claims.

B. Departures from Rule 8 violate the preference for reaching the merits.

There is a "preference expressed in the Federal Rules of Civil Procedure . . . for resolving disputes on their merits." *Krupski v. Crociere S. p. A.*, 130 S. Ct. 2485, 2494 (2010). The pleading standard in particular was designed to further that goal. As the Supreme Court explained in *Swierkiewicz*, "[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." 534 U.S. at 514; *see also Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962) (the "purpose of pleading is to facilitate a proper decision on the merits").

In light of this important interest, the Supreme Court has cautioned against applying too high a standard "before discovery has unearthed relevant facts and evidence." *Swierkiewicz*, 534 U.S. at 507. Detailed information necessary to prove a claim is often in the defendant's exclusive possession. *See, e.g., Hosp. Bldg. Co. v. Trustees of the Rex Hosp.*, 425 U.S. 738, 746, 96 S. Ct. 1848, 1853 (1976); *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010); *Braden*, 588 F.3d at 598; *Bracewell v. Nicholson Air Servs., Inc.*, 680 F.2d 103, 105 (11th Cir. 1982). Because of this imbalance, requiring a plaintiff to prove his case before discovery would result in the dismissal of meritorious cases before the parties had an opportunity to develop the record. *Speaker*, 623 F.3d at 1384 & n.12. Such a

practice would defy the Supreme Court's instruction that "[p]leadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end." *Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 200, 58 S. Ct. 507, 509 (1938).

The Panel's decision disregarded this preference for reaching the merits by holding the Plaintiffs to an improper standard that requires a plaintiff to plead his case with heightened specificity and to disprove alternative explanations (*supra* Part I). Such a high standard will be unattainable in many cases in which information essential to the claim resides predominantly with the defendant. In a broad range of cases, therefore, the Panel decision would result in dismissal before affording the plaintiff a good-faith opportunity to marshal facts and present his case on the merits.

Further, the Panel's unauthorized pleading standard will disproportionately affect cases for which there is less judicial precedent—for instance, claims that are brought infrequently or arise under recent statutes. These types of cases are more likely to fall outside of judges' "judicial experience," *Iqbal*, 129 S. Ct. at 1950, where the misapplication of an elevated pleading standard can do the most harm.

CONCLUSION

For these reasons, this Court should grant the Petition.

September 28, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Maureen E. McOwen, hereby certify that a true and accurate copy of the Brief of *Amici Curiae* Civil Procedure Scholars in Support of the Petition for Rehearing and Rehearing En Banc was dispatched to a third-party commercial carrier on September 28, 2011, for delivery to the Clerk on September 29, 2011. I further certify that a true and accurate copy of the Brief was served by the same means upon the following counsel of record:

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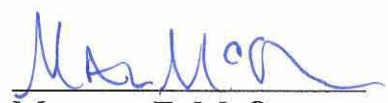

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