

Election Law Pleading

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ABSTRACT

This Article provides the first comprehensive look at pleadings in election law cases after the Supreme Court's jurisprudential shift for pleading in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal. In those cases, the Supreme Court declared that plaintiffs must meet a "factual plausibility" test in their complaints, providing enough factual specificity to explain the basis for their suit. Courts in election cases have tried to follow this formulation. But applying Twombly and Iqbal to election law is incongruent with the main features of election litigation, leading to an awkward and sloppy analysis. There is usually little need to assess whether the plaintiff presented detailed factual allegations in a complaint when everyone usually agrees on how an election practice operates and the real question is whether the election regulation violates some law. A court deciding a motion to dismiss in an election case should therefore focus on the other aspect of Rule 12(b)(6): legal sufficiency.

To do so, this Article proposes a pleading standard that would supplement factual plausibility, which I term "legal plausibility." In addition to requiring sufficient factual allegations—which are often not the crux of an election dispute, at least at the complaint stage—pleading rules should force election law plaintiffs to make a plausible showing that the challenged practice is legally flawed. This requires the plaintiff to plead the requisite mixed question of law and fact that will ultimately determine whether the plaintiff can prevail. Legal plausibility entails three parts: plaintiffs should identify the precise election practice being challenged, explain with particularity how the law impacts that plaintiff, and apply the elements of the cause of action to the manner in which the election regulation operates. This standard will be particularly helpful for litigants and courts when the case at hand exhibits the dual features of timeliness concerns and a lack of viable post-election remedies—which encompasses a lot of election litigation. Although I focus on election cases, legal plausibility could apply to other areas that are similar to election law. Legal plausibility shifts the way in which courts analyze motions to dismiss. It helps courts streamline election litigation by avoiding the doctrinal incongruence that accompanies the application of factual plausibility to election law cases.

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TABLE OF CONTENTS

INTRODUCTION	1967
I. FROM CODE PLEADING TO <i>TWOMBLY</i> AND <i>IQBAL</i>	1971
A. <i>A Brief History of Pleading Law</i>	1971
B. <i>General Goals for Pleading Rules</i>	1977
C. <i>The Effects of the Supreme Court's Recent Pleading Decisions on Civil Litigation</i>	1980
II. <i>TWOMBLY</i> AND <i>IQBAL</i> IN ELECTION LITIGATION	1984
A. <i>Redistricting</i>	1985
B. <i>Ballot Access</i>	1988
C. <i>Campaign Finance</i>	1989
D. <i>Election Administration</i>	1991
III. PROCEDURAL DIFFERENCES IN ELECTION CASES	1994
A. <i>Common Traits of Election Law Cases</i>	1994
1. Government as Defendant.....	1994
2. Limited Factual Development	1997
3. Pre-trial Resolution of Election Law Cases by a Judge	2000
4. Lack of Settlement	2002
B. <i>Specific Goals for Pleading Election Law Cases</i>	2005
C. <i>Previous Proposals for Reforming Twombly and Iqbal—and Why They Will Not Help Election Law Pleading</i>	2008
IV. ELECTION LAW AND LEGAL PLAUSIBILITY.....	2010
A. <i>Defining Legal Plausibility</i>	2011
1. Law Identification	2012
2. Law Particularization	2013
3. Law Application.....	2016
4. Implementation of Legal Plausibility	2018
B. <i>Why Legal Plausibility Makes Sense for Election Law</i>	2021
1. Benefits of the Standard.....	2021
2. Potential Drawbacks.....	2025
C. <i>Legal Plausibility at Work</i>	2029
CONCLUSION	2036

INTRODUCTION

Pleading law is a mess. In two recent cases, the Supreme Court dropped a jurisprudential bombshell on virtually all civil litigation, altering what seemed to be settled practice regarding the level of factual detail needed in a complaint and replacing that standard with a

heightened pleading requirement.¹ Both *Bell Atlantic Corp. v. Twombly*² and *Ashcroft v. Iqbal*³ shifted pleading rules from a fairly liberal “notice pleading” standard to a more rigorous “factual plausibility” regime.⁴ Plaintiffs are now required to provide more “facts” in their complaint to survive a motion to dismiss for failure to state a claim.⁵ Because these cases apply to all civil litigation, the effects in many substantive areas are still being sorted out in both the scholarship and the lower courts. To date, however, no one has explored the impact of these cases on election law, an area that is foundational to our democracy.

This Article analyzes the role of the *Twombly/Iqbal* pleading standard in the fast-growing field of election law, filling a gap in both the civil procedure and election law literature. Federal courts are increasingly asked to wade into a myriad of election law disputes, including those involving redistricting, ballot access, campaign finance, and election administration.⁶ What effect, if any, has the factual plausibility standard from *Twombly* and *Iqbal* had on election law cases? More importantly, does this new standard make sense for this substantive area?

Ultimately, the new factual plausibility scheme established in *Twombly* and *Iqbal* has led courts hearing election cases to focus too much on factual allegations, even when the facts are undisputed and the real question is whether the complaint is *legally* sufficient.⁷ Thinking they need to consider just the *Twombly* and *Iqbal* inquiry of factual sufficiency, courts are either not asking the legal sufficiency question or are considering it obliquely.

Twombly and *Iqbal*, however, answer only part of the question in election cases, and their rule focuses on an issue that is often not in dispute. Frequently, the plaintiff in an election-related challenge should have no problem satisfying *Twombly* and *Iqbal*'s factual plausibility test. The real question is whether, under the law the plaintiff invokes, the plaintiff has a legally viable cause of action. That is, courts are forgetting the other aspect of a complaint: whether the

¹ See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

³ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁴ *Iqbal*, 556 U.S. at 678–80; *Twombly*, 550 U.S. at 555–63.

⁵ *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556–67.

⁶ See *infra* Part II.

⁷ See *infra* Part IV.

plaintiff's claim is legally sufficient.⁸ Analyzing the main goals behind pleading law with the salient features of election litigation demonstrates the incongruence of relying solely on the Supreme Court's new pleading rules for these cases. *Twombly* and *Iqbal*'s factual plausibility standard for deciding a motion to dismiss obscures the main inquiry in a Rule 12(b)(6) motion in an election case: whether, given all of the facts, the plaintiff is still not entitled to any legal recourse under the law. Election disputes, with their primary focus on the law and not the facts, call for a more refined approach.

This Article proposes a more complete standard for analyzing the sufficiency of an election law pleading. This additional pleading threshold, which I term "legal plausibility," requires plaintiffs to provide more "law" in their complaints, demonstrating to a plausible level why the challenged election practice is invalid based on the elements of the cause of action.⁹ Legal plausibility best comports with both the goals of pleading rules and the main features of election law cases. The standard will be particularly helpful for litigants and courts when the case at hand exhibits the dual features of timeliness concerns and a lack of viable post-election remedies—which encompasses a lot of election litigation.¹⁰ Of course, legal plausibility could apply in other substantive settings that share the characteristics of election cases. It also could be useful in providing guidance for courts considering preliminary injunction motions, particularly in last-minute election disputes. This Article focuses on developing and applying legal plausibility for motions to dismiss in election cases as a model for reforming pleading rules for litigation of this kind.

The Article proceeds in four Parts. Part I recounts the history of pleading rules, starting with historical pleading practices and leading up to the Supreme Court's recent reformulation of pleading law in *Twombly* and *Iqbal*. Part I also examines recent studies on the impact of *Twombly* and *Iqbal* in various substantive areas.

Part II discusses courts' use of *Twombly* and *Iqbal* in election law cases. It describes how election cases typically fall into one of four categories: redistricting disputes, ballot access challenges, campaign finance lawsuits, and disputes involving election administration. Part II then considers the effects of *Twombly* and *Iqbal* for each area of election litigation, showing why an analysis of election complaints under

⁸ See *infra* notes 38–41 and accompanying text.

⁹ See *infra* Part IV.A.

¹⁰ See *infra* Part IV.B.1.

Twombly and *Iqbal* is often insufficient to determine whether the plaintiffs actually have a viable claim.

Part III discusses four unique characteristics of election cases that should inform the best pleading rules for this area: the government or a governmental actor is almost always the defendant; plaintiffs often already have the facts they need to assert that an election practice is unlawful, and therefore the cases typically turn on the legal implications of an election rule; there is very often pretrial judicial resolution of the dispute without a full-blown hearing; and the cases rarely, if ever, settle. These traits suggest that the factual plausibility standard from *Twombly* and *Iqbal* is incongruent with the realities of election litigation. Part III also highlights several specific goals to consider in any pleading regime for election law disputes and explains why current proposals for reforming pleading law do not adequately address these issues.

Part IV introduces legal plausibility. In addition to requiring sufficient factual allegations—which are often not the crux of an election dispute, at least at the complaint stage—pleading rules should force election law plaintiffs to make a *plausible* showing that the challenged practice is *legally* flawed. Such a rule would require plaintiffs to plead the mixed question of law and fact that will determine the merits of their case. To do so, plaintiffs should identify the precise election practice being challenged, explain with particularity how the law impacts that plaintiff, and apply the elements of the cause of action to the manner in which the election regulation operates. Legal plausibility would shift the way in which courts analyze motions to dismiss. It would help courts streamline election litigation by weeding out those lawsuits that have no legal merit, allowing courts to spend more time and energy on the salient and difficult cases that require quick resolution before an election. Finally, Part IV demonstrates how legal plausibility would operate in a variety of election law disputes.

The easiest course for adopting legal plausibility is for courts to recognize this standard as a complement to *Twombly* and *Iqbal*. Whereas *Twombly* and *Iqbal*'s factual plausibility regime might make sense for those cases that turn on the underlying factual events, courts could invoke legal plausibility for cases, like many election law disputes, that rest on the legal sufficiency of the allegations. Legal plausibility therefore provides a framework for courts to answer the legal sufficiency question.

Barring judicial action, legal plausibility is also a good candidate for statutory reform. Congress has already recognized the uniqueness

and importance of election litigation by promulgating various procedural rules for election cases.¹¹ Congress could similarly enact legal plausibility as part of a new election law pleading statute. In doing so, Congress can analogize to its previous action in reforming the scope of prisoner litigation in the Prisoner Litigation Reform Act (“PLRA”),¹² which also focuses on whether a plaintiff’s complaint asserts a viable cause of action.¹³ Enacting legal plausibility as a counterpart and supplement to the pleading rules from *Twombly* and *Iqbal* will help courts achieve faster and better decisionmaking in all election cases by giving judges a tool to analyze cases from the outset. It also will help to clarify what plaintiffs should include in a complaint and the proper method of judicial analysis for a motion to dismiss an election case.

I. FROM CODE PLEADING TO *TWOMBLY* AND *IQBAL*

This Part traces the evolution of pleading law from the historical days of code pleading to the Supreme Court’s most recent formulation in *Twombly* and *Iqbal*. It also highlights the main goals our system seeks to achieve in requiring certain kinds of pleadings. Finally, it summarizes recent studies of the effects of *Twombly* and *Iqbal* on civil litigation. It therefore sets the stage for considering the proper rules for pleading in election law cases.

A. *A Brief History of Pleading Law*

Scholars have documented extensively the history of pleading from common law and code pleading to *Twombly* and *Iqbal*.¹⁴ Here, I trace that history briefly to provide a foundation for the discussion of pleading as it relates to election law cases.

Pleading rules initially were a function of common law.¹⁵ A plaintiff first had to fit his or her complaint through a certain “form of

¹¹ See generally Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433 [hereinafter Douglas, *Procedure of Election Law*].

¹² Prison Litigation Reform Act (“PLRA”) of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1321–66 (1996) (codified as amended in scattered sections of the U.S. Code).

¹³ 42 U.S.C. § 1997e(c) (2006).

¹⁴ See, e.g., A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 104–24 (2008) [hereinafter Spencer, *Pleading Civil Rights Claims*]; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 916 (1987); Devon J. Stewart, Note, *Take Me Home to Conley v. Gibson, Country Roads: An Analysis of the Effect of Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal on West Virginia’s Pleading Doctrine*, 113 W. VA. L. REV. 167, 171–79 (2010).

¹⁵ See Subrin, *supra* note 14, at 916.

action,” which, if done incorrectly, resulted in an incurable defect.¹⁶ If the plaintiff’s form of action was proper, the defendant would respond with a specified type of answer, which could be either a demurrer (challenging the legal entitlement to relief), a traverse (challenging the plaintiff’s facts), or a confession and avoidance (asserting additional facts excusing the defendant’s conduct).¹⁷ These pleadings would narrow the case to a single issue of law or fact for a judge to decide.¹⁸ This “scientific” formulaic system allowed the parties to go back and forth as they disposed of various issues until the court was left with a final question that would resolve the case.¹⁹ The process “proved to be excruciatingly slow, expensive, and unworkable. The system was better calculated to vindicate highly technical rules of pleading than it was to dispense justice.”²⁰

Next came code pleading.²¹ Often referred to as the “Field Code,” named after David Dudley Field, who authored the New York Code of 1848,²² code pleading emphasized the presentation of facts.²³ Code pleading required the plaintiff to present only the facts, devoid of evidentiary assertions or conclusions.²⁴ The problem, of course, is that the line between facts, evidence, and conclusions is murky at best, and thus plaintiffs were not clear as to what they needed to plead.²⁵

An Advisory Committee to the Supreme Court promulgated the Federal Rules of Civil Procedure in 1938 to respond to some of the problems of common law pleading and code pleading.²⁶ Rule 8(a)(2), as finalized, requires plaintiffs to provide merely “a short and plain statement of the claim showing that the pleader is entitled to relief.”²⁷ To demonstrate the seeming simplicity of the Rule, Form 11 (formerly Form 9) provides an example: “On [Date], at [Place], the defendant

¹⁶ See *id.* at 917.

¹⁷ See *id.* at 916.

¹⁸ 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Stewart, *supra* note 14, at 172.

²² See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 573–74 (2007) (Stevens, J., dissenting).

²³ Stewart, *supra* note 14, at 172. After New York adopted the Field Code, most other states followed suit. See Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL’Y 1107, 1115–16 (2010).

²⁴ 5 WRIGHT & MILLER, *supra* note 18, § 1202.

²⁵ See *Twombly*, 550 U.S. at 574 (Stevens, J., dissenting).

²⁶ See Spencer, *Pleading Civil Rights Claims*, *supra* note 14, at 104; see also Stewart, *supra* note 14, at 173–74.

²⁷ FED. R. CIV. P. 8(a)(2).

negligently drove a motor vehicle against the plaintiff.”²⁸ Thus, a complaint under the Federal Rules’ “notice pleading” standard simply must assert the background facts (date and place) and “facts which disclose the manner of the occurrence.”²⁹ Only a cause of action for fraud or mistake must state “the circumstances constituting” the alleged wrong “with particularity.”³⁰

The Supreme Court, in *Conley v. Gibson*,³¹ gave credence to the idea that the Federal Rules were intended to liberalize pleading standards.³² The Court held that a plaintiff need not set out the specific factual details of his or her claim.³³ Instead, Rule 8(a)(2) simply requires “a short and plain statement of the claim” that will give the defendant fair notice of what the claim is about and the grounds upon which it rests.³⁴ Further, in the opinion’s most important language, the Court stated that a lower court should not grant a motion to dismiss for failure to state a claim “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”³⁵

So the law stood, for roughly fifty years:

For several decades, *Conley* stood as a guarantor that . . . claimants would at least be able to get into court and on to discovery, not being forced to provide factual details underlying their claims at the pleading stage that they might not have access to prior to discovery.³⁶

Indeed, some lower courts tried to implement heightened pleading standards for certain cases, such as civil rights claims, but the Supreme Court rebuked these efforts and maintained the liberal “notice pleading” standard from *Conley*.³⁷

Moreover, the *Conley* standard recognizes that a complaint may be insufficient for two separate reasons: first, because the facts themselves do not present a claim, even under the liberal notice pleading standard; or second, because the substantive law does not grant any

²⁸ FED. R. CIV. P. Form 11.

²⁹ Stewart, *supra* note 14, at 176.

³⁰ FED. R. CIV. P. 9(b).

³¹ *Conley v. Gibson*, 355 U.S. 41 (1957).

³² *Id.* at 47–48.

³³ *Id.*

³⁴ *Id.* at 47.

³⁵ *Id.* at 45–46.

³⁶ Spencer, *Pleading Civil Rights Claims*, *supra* note 14, at 102.

³⁷ See *id.* (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002), and *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).

right to relief regardless of the factual detail in the complaint.³⁸ For example, in *Haddle v. Garrison*³⁹ the Supreme Court considered whether the Civil Rights Act recognized a cause of action against an employer who fires an at-will employee for being a whistleblower.⁴⁰ The question was not whether the plaintiff's factual content was sufficient, but instead whether the law itself would recognize the plaintiff's claim.⁴¹ The Court did not set out a standard by which to test a complaint's legal sufficiency, however, as it simply declared that the plaintiff had asserted a legally valid cause of action.

Then came *Bell Atlantic Corp. v. Twombly* in 2007, which placed the focus on the factual plausibility of a complaint.⁴² In that case, the Court considered the sufficiency of a complaint alleging an antitrust conspiracy involving regional telephone carriers.⁴³ The Court held that the complaint was insufficient because it did not allege facts that rendered the asserted liability "plausible."⁴⁴ The Court stated that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."⁴⁵ Thus, "[f]actual allegations must be enough to raise a right to relief above the speculative level."⁴⁶

In its opinion, the Court suggested that there are three "zones of pleading."⁴⁷ The first zone includes pleadings that are "conclusory."⁴⁸ The second zone contains pleadings that are "factually neutral."⁴⁹ The final zone encompasses pleadings that are "factually suggestive."⁵⁰ The Court noted that a plaintiff must proceed through each zone "to

³⁸ See Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE W. RES. L. REV. 453, 471 (2011) (noting that the "no set of facts" language from *Conley* relates to legal insufficiency, as opposed to factual insufficiency).

³⁹ *Haddle v. Garrison*, 525 U.S. 121 (1998).

⁴⁰ *Id.* at 122.

⁴¹ *Id.* at 123–25; see also Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127, 128 (2012) (explaining that under *Conley*'s standard "a federal court could dismiss a civil claim under Rule 12(b)(6) only if legally insufficient").

⁴² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

⁴³ *Id.* at 550–51. For a detailed discussion of *Twombly*, see A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008).

⁴⁴ *Twombly*, 550 U.S. at 557.

⁴⁵ *Id.* at 555.

⁴⁶ *Id.*

⁴⁷ See Spencer, *Plausibility Pleading*, *supra* note 43, at 448.

⁴⁸ *Twombly*, 550 U.S. at 557 n.5; Spencer, *Plausibility Pleading*, *supra* note 43, at 448.

⁴⁹ *Twombly*, 550 U.S. at 557 n.5; Spencer, *Plausibility Pleading*, *supra* note 43, at 448.

⁵⁰ *Twombly*, 550 U.S. at 557 n.5; Spencer, *Plausibility Pleading*, *supra* note 43, at 448.

enter the realm of plausible liability.”⁵¹ That is, only “factually suggestive” complaints meet the Court’s new standard for sufficiency. A plaintiff must now plead that liability is more than just possible but instead is plausible, using the alleged facts and not merely the elements of the cause of action.⁵²

In further crafting a new standard for pleading, the Court in *Twombly* “retire[d]” *Conley*’s “no set of facts” language,⁵³ stating: “The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”⁵⁴ Thus, the Court in essence overruled *Conley*’s liberal pleading standard for a more rigid “plausibility” requirement.

Although some commentators thought *Twombly* might be a one-off case confined to the antitrust context,⁵⁵ the Court just two years later in *Ashcroft v. Iqbal* made clear that the factual plausibility standard applies to all complaints.⁵⁶ The Court identified a two-step process to review the sufficiency of a complaint. First, a court should “identify[] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”⁵⁷ Second, once the court has disregarded conclusory statements, the court should assume the veracity of well-pleaded factual allegations and “determine whether they plausibly give rise to an entitlement to relief.”⁵⁸ Further, the Court stated that federal judges could use their “experience and common sense” to determine if a complaint alleged sufficiently plausible facts.⁵⁹

The shift from *Conley*’s “no set of facts” standard to *Twombly* and *Iqbal*’s “factual plausibility” test demonstrates the Supreme Court’s concern about the rising cost of litigation, and particularly, of discovery.⁶⁰ As one commentator explains:

If pleading standards are too lenient, plaintiffs without meritorious claims could force innocent defendants to endure the

⁵¹ *Twombly*, 550 U.S. at 557 n.5.

⁵² See Spencer, *Plausibility Pleading*, *supra* note 43, at 448.

⁵³ *Twombly*, 550 U.S. at 562–63.

⁵⁴ *Id.* at 563.

⁵⁵ See, e.g., Spencer, *Plausibility Pleading*, *supra* note 43, at 457–59.

⁵⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

⁵⁷ *Id.* at 679.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1311 (2010).

costs of discovery and, perhaps, extract a nuisance settlement from a defendant who would rather pay the plaintiff to make the case go away. The need to avoid this situation is a commonly asserted policy justification for stricter pleading standards.⁶¹

Through these two cases, the Court has made it harder for many plaintiffs to bring claims because they must support their complaints—before any discovery has taken place—with more specific “plausible” factual allegations.⁶² The cases “reflect[] a certain judicial mood toward litigation, an attitude of hostility and skepticism toward supplicants with alleged grievances against the government or against the powerful who make up the dominant class.”⁶³

As discussed below, various scholars have highlighted the problems inherent in requiring detailed factual pleading when the plaintiff does not have access to the necessary facts without discovery.⁶⁴ What has gone unexplored is the reality that the Court’s focus on heightening the standard for the factual sufficiency of a complaint obscures the other important inquiry in a Rule 12(b)(6) motion: whether the defendant is entitled to judgment as a matter of law.⁶⁵ Even when the facts are established and uncontroverted, the plaintiff still must show that the substantive law supports the claim.⁶⁶ The plaintiff might be able to plead precisely what happened, and yet the law would not recognize legal liability because, even under those facts, the defendant has not violated any law. That is, a complaint can be *legally* insufficient.⁶⁷ For example, the defendant might have breathed the air surrounding the plaintiff, and the plaintiff could allege this fact with particularity, but the law still does not provide the plaintiff with a

⁶¹ *Id.* at 1311 (footnotes omitted).

⁶² *See Iqbal*, 556 U.S. at 678; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

⁶³ A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 200 (2010); *see also* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 876 (2009) (construing *Twombly* as a “court access decision, one that addresses a general problem of institutional design: how best to prevent undesirable lawsuits from entering the court system”).

⁶⁴ *See infra* Part I.C.

⁶⁵ FED. R. CIV. P. 12(b)(6).

⁶⁶ *See* Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 61 (2007) (“The present Federal Rules of Civil Procedure allow a plaintiff’s case to be attacked either for its legal or factual sufficiency.”); Shannon, *supra* note 38, at 468 (explaining that “in addition to *factual* sufficiency, a claim must be *legally* sufficient”); *see also, e.g.*, *Haddle v. Garrison*, 525 U.S. 121, 126–27 (1998) (reversing the grant of a motion to dismiss because, as a legal matter, the Civil Rights Act supported a claim for damages from the firing of an at-will employee).

⁶⁷ *See* Shannon, *supra* note 38, at 467–68.

right to relief because there is no cause of action for breathing someone's air.⁶⁸ *Twombly* and *Iqbal* did not touch upon this part of the Rule 12(b)(6) analysis because the plaintiffs in those cases had valid legal claims, assuming they could present the correct level of facts. But the current discussion surrounding pleading law suggests that this legal inquiry is absent in construing a motion to dismiss.

Indeed, as detailed below, most courts have tried to apply the *Twombly* and *Iqbal* standard to motions to dismiss in election cases, even if what is really in dispute is whether the plaintiff has a legally cognizable claim, not whether the plaintiff can present enough facts.⁶⁹ The Supreme Court invited this confusion by highlighting the importance of *factual* plausibility and declaring that a recitation of the elements of a cause of action will not do.⁷⁰ Lower courts have followed the Supreme Court's lead, focusing solely on the factual sufficiency of a complaint.⁷¹ But not all areas of the law involve cases in which the pleaded facts matter the most. Some areas, such as election law, often depend on whether the plaintiff can allege properly that the substantive law recognizes a cause of action based on the uncontroverted facts. *Twombly* and *Iqbal* do not tell courts how to construe those kinds of cases. This is a significant gap given that there is a cognitive dissonance when courts try to apply *Twombly* and *Iqbal*'s factual plausibility standard to cases that do not require robust factual development. An additional, nuanced standard for testing the legal sufficiency of a complaint is necessary for cases, such as many election law suits, that rest on whether the plaintiff has alleged a legally cognizable cause of action under the substantive law.⁷²

B. General Goals for Pleading Rules

Historically, there were four main goals behind the highly technical common law and code pleading requirements of early pleading law: "(1) giving notice of the nature of a claim or defense; (2) stating the facts each party believes to exist; (3) narrowing the issues that must be litigated; and (4) providing a means for speedy disposition of sham claims and insubstantial defenses."⁷³

⁶⁸ I am indebted to my colleague, Scott Bauries, for this example.

⁶⁹ See *infra* Part II.

⁷⁰ See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 n.5 (2007).

⁷¹ See *infra* Part II.

⁷² See *infra* Part IV.

⁷³ 5 WRIGHT & MILLER, *supra* note 18, § 1202; see also *FEC v. Fla. for Kennedy Comm.*, 492 F. Supp. 587, 598 (S.D. Fla. 1980).

The Federal Rules of Civil Procedure came along in 1938 with the specific goal of increasing court access for plaintiffs.⁷⁴ The notice pleading standard from Rule 8 “was designed to minimize greatly the number of cases dismissed on the pleadings.”⁷⁵ In addition, notice pleading sought to ensure accurate resolution of cases on the merits instead of based on a technical defect in the complaint.⁷⁶ Rule 8, as originally adopted, thus sought to foster fewer dismissals and accurate merits-based decisionmaking.⁷⁷ In recognizing that the purpose of pleadings has varied over time, Charles Clark, the widely acknowledged founder of the Federal Rules of Civil Procedure, summarized: “[I]n common law pleading especial emphasis was placed upon the *issue-formulating* function of pleading; under the earlier code pleading like emphasis was placed upon *stating the material, ultimate facts* in the pleadings; while at the present time the emphasis seems to have shifted to the *notice* function of pleading.”⁷⁸

Professor Spencer adds another goal to notice pleading rules: “the promotion of private efficiency and inexpensiveness.”⁷⁹ As Professor Spencer explains, “[n]otice pleading permits litigants to assert claims without incurring the delay and expense that would accompany an obligation to plead detailed facts.”⁸⁰ Other procedural tenets, such as discovery rules and summary judgment motions, served the purpose of the other historical goals, such as gathering the facts and ensuring the dismissal of frivolous cases before trial.⁸¹

Twombly and *Iqbal* seemingly altered the main goals behind pleading rules:

Iqbal places considerable doubt on the proposition that Rule 8 continues to serve the primary function of notice and broad access to the courts, and strongly suggests that the Court has identified a new direction for the pleading paradigm: that

⁷⁴ See A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 354 (2010) [hereinafter Spencer, *Restrictive Ethos*] (“That the Federal Rules were originally designed to promote access cannot be denied. The very notion of uniformity itself was an innovation designed to make the civil justice system more accessible to litigants.”).

⁷⁵ *Id.*

⁷⁶ *Id.* at 355–56.

⁷⁷ *Id.* at 355.

⁷⁸ Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 518–19 (1925).

⁷⁹ Spencer, *Restrictive Ethos*, *supra* note 74, at 357.

⁸⁰ *Id.* (citing 5 WRIGHT & MILLER, *supra* note 18, § 1202 (“The relevant facts may be determined by discovery The only function left to be performed by the pleadings alone is that of notice.” (footnote omitted))).

⁸¹ *Id.* at 359–60, 362–63.

policy concerns regarding efficient case management, weeding out meritless claims, avoiding prohibitive costs of discovery abuse, and alleviating overcrowded dockets, are now the most important considerations when evaluating the sufficiency of a complaint under Rule 8.⁸²

Thus, *Twombly* and *Iqbal*, with their requirement that complaints demonstrate a factually “plausible” entitlement to relief, call into question whether notice to the defendant is the primary function of pleading law. Surely, Bell Atlantic and the other defendants in *Twombly* knew that they were being sued for antitrust violations and understood the basis of the plaintiff’s suit. But because the plaintiff did not rule out a lawful explanation for the defendants’ conduct, the Court declared that the plaintiff’s complaint did not assert a factually plausible claim for relief.⁸³ This demonstrates how notice is no longer enough to sustain a complaint. Instead, today’s pleading regime encompasses multifaceted goals of “notice-giving, process-facilitating, and merits-screening.”⁸⁴

Additionally, *Twombly* and *Iqbal* undermine the previous goal of ensuring that cases receive adjudication on the merits instead of pre-trial dismissal based on the form of the complaint.⁸⁵ As studies of pre- and post-*Twombly* and *Iqbal* dismissals highlight, courts now toss out more cases at the outset based on insufficient (i.e., factually implausible) pleadings.⁸⁶ This undoubtedly leads to fewer merits-based resolutions of cases.

Twombly and *Iqbal* do help to effectuate one of the goals that Professor Spencer highlighted for a pleading regime: efficiency of the court system.⁸⁷ Although Professor Spencer identified this efficiency in terms of easing the plaintiff’s burden in bringing a case,⁸⁸ the Court has now swung the pendulum the other way. The rules promote efficiency on the defendant’s side by making it easier and faster for defendants to rid themselves of lawsuits against them. That is, *Twombly*

⁸² J. Scott Pritchard, Comment, *The Hidden Costs of Pleading Plausibility: Examining The Impact of Twombly and Iqbal on Employment Discrimination Complaints and the EEOC’s Litigation and Mediation Efforts*, 83 TEMP. L. REV. 757, 779–80 (2011) (footnotes omitted).

⁸³ Bell Atl. Corp v. *Twombly*, 550 U.S 544, 556–57 (2007).

⁸⁴ Steinman, *supra* note 60, at 1347.

⁸⁵ See Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 561 (describing *Twombly* as “the most recent signal of a retreat from the goal of adjudication on the merits”).

⁸⁶ See *infra* Part II.A.

⁸⁷ See Spencer, *Restrictive Ethos*, *supra* note 74, at 357.

⁸⁸ See *id.*

and *Iqbal* still promote efficient resolution of cases, but they do so by cutting off plaintiffs in the first instance.

The procedural pleading goals our system promotes, of course, have a significant substantive impact. Having strict or narrow pleading requirements determines whether plaintiffs can seek redress for alleged injuries and impacts the case load of the courts:

For all intents and purposes, that initial pleading is the key to the courthouse door. If pleading standards are too strict, the door becomes impenetrable. But if pleading standards are too lenient, concerns arise that opportunistic plaintiffs without meritorious claims will force innocent parties to endure the burdens of litigation and, perhaps, extract a nuisance settlement from a cost-conscious defendant who would rather pay to make the case go away.⁸⁹

Through *Twombly* and *Iqbal*, the Supreme Court demonstrated its desire to close the courthouse door because of concerns regarding the cost to defendants of frivolous lawsuits and case manageability.⁹⁰

In sum, although the goals behind pleading rules under the Federal Rules of Civil Procedure—at least from the time of their adoption through *Conley* and its progeny—centered around notice and merits-based decisions, the goals today include cutting off seemingly frivolous claims, cabining discovery costs, and decreasing the federal courts' dockets. Given that *Iqbal* reaffirmed *Twombly*'s application to all cases, the current Court is unlikely to alter these foundational principles for pleading law any time soon. Under this regime, and to ensure a realistic chance of adoption, a reformed system for pleading cases that focuses on the legal operation of a particular rule must keep these current goals in mind.

C. *The Effects of the Supreme Court's Recent Pleading Decisions on Civil Litigation*

What impact have the two recent pleading cases had on civil litigation in general? The story that emerges from recent studies is one of restricted access to the courts for certain kinds of litigants. Indeed, *Twombly* and *Iqbal* have seemed to hurt civil rights plaintiffs in particular.⁹¹ This Section surveys previous studies of *Twombly* and *Iqbal*'s effects to situate the discussion of election law cases into the existing

⁸⁹ Steinman, *supra* note 60, at 1294–95.

⁹⁰ *Ashcroft v. Iqbal*, 556 U.S. 662, 684–85 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559, 562 (2007).

⁹¹ *See infra* note 114 and accompanying text.

scholarly framework. The next Part examines the effect of these cases for plaintiffs alleging election-related claims.

The Federal Judicial Center's ("FJC") compilation of motion to dismiss rates in the aftermath of *Twombly* and *Iqbal* is perhaps the most important study to date.⁹² The FJC looked at the number of motions to dismiss filed and granted in twenty-three district courts both before *Twombly* and after *Iqbal*.⁹³ The study examined the number of motions filed and granted through the federal courts' electronic filing system, Case Management/Electronic Case Filing ("CM/ECF"), instead of using either Lexis Nexis's or Westlaw's electronic databases, in an effort to be more comprehensive and to ward off any bias toward published opinions.⁹⁴ The FJC found that "[t]here was a general increase from 2006 to 2010 in the rate of filing of motions to dismiss for failure to state a claim," to a statistically significant level.⁹⁵ The study demonstrated that prior to *Twombly*, a defendant filed a motion to dismiss for failure to state a claim in 4% of cases, but after *Iqbal* the rate increased to 6.2%.⁹⁶ Construed slightly differently, "[i]n the post-*Iqbal* period it was twice as likely that a plaintiff would face a motion to dismiss."⁹⁷ The FJC determined, however, that "there was no increase in the rate of grants of motions to dismiss without leave to amend" after *Iqbal*.⁹⁸ Similarly, there was no increase in the rate of dismissal grants in civil rights cases, which included voting rights claims—although voting cases constituted only 0.6% of the cases examined.⁹⁹ The only statistically significant change in the success of a motion to dismiss for failure to state a claim was in cases challenging financial instruments.¹⁰⁰

⁹² JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf).

⁹³ See *id.* at 5.

⁹⁴ *Id.* at 2, 5; cf. Elizabeth Y. McCuskey, *Clarity and Clarification: Grable Federal Questions in the Eyes of Their Beholders*, 91 NEB. L. REV. 387, 441–44 (2012) (discussing the pitfalls of conducting comparative case research using only Lexis and Westlaw but recounting the difficulties of using CM/ECF).

⁹⁵ CECIL ET AL., *supra* note 92, at vii, 8 & n.15.

⁹⁶ *Id.* at 8.

⁹⁷ Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 11 (2011), <http://www.fclr.org/fclr/articles/html/2010/Hoffman.pdf>.

⁹⁸ CECIL ET AL., *supra* note 92, at vii.

⁹⁹ *Id.* at vii, 9 n.17.

¹⁰⁰ *Id.* at 21.

The FJC study has not gone without critique. Professor Lonny Hoffman demonstrated that the data in the FJC study may have been incomplete, particularly with respect to the filing rate of motions to dismiss.¹⁰¹ He further suggested that, read carefully, “the study confuses readers into thinking that it demonstrated the Court’s decisions had no impact on dismissal practice,” and he pointed out that the “failure to prove the decisions had an effect is not the same as proof that the decisions had no effect.”¹⁰² Finally, Professor Hoffman posited that the researchers could not detect certain effects from the cases, such as the number of potential plaintiffs who chose not to file a case because of fears of a dismissal under *Twombly* and *Iqbal*.¹⁰³ At minimum, the FJC study shows that *Twombly* and *Iqbal* have had an impact, even if the precise measure and contours of that impact are unclear.

Other researchers also have found that *Twombly* and *Iqbal* have had a substantive effect. One study showed that after *Twombly* there was a 1.81 times greater likelihood of a successful motion to dismiss for failure to state a claim, and after *Iqbal* a grant of a motion to dismiss was four times as likely as under *Conley*.¹⁰⁴ Moreover, the study noted that

in the largest category of cases in which 12(b)(6) motions were filed—constitutional civil rights cases—motions to dismiss were granted at a higher rate (53%) than in all cases combined (49%), and the rate 12(b)(6) motions were granted in those cases increased from *Conley* (50%) to *Twombly* (55%) to *Iqbal* (60%).¹⁰⁵

It is unclear, however, whether any of the “constitutional civil rights cases” included election- or voting-related claims.¹⁰⁶ In a 2012 follow-up to that same study, the newer research showed that the “impact of *Iqbal* has intensified,” as “the odds of the case being entirely dismissed upon the grant of a 12(b)(6) motion without leave to amend

¹⁰¹ Hoffman, *supra* note 97, at 8, 34–35.

¹⁰² *Id.* at 7.

¹⁰³ *Id.* at 29–30. The FJC has responded to these and other critiques. See Joe S. Cecil, Of Waves and Water: A Response to Comments on the FJC Study *Motions to Dismiss for Failure to State a Claim After Iqbal* (Mar. 19, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026103.

¹⁰⁴ Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010).

¹⁰⁵ *Id.*

¹⁰⁶ See *id.* at 591–92 (defining the “civil rights” category but not indicating whether any of the cases were voting rights or election law disputes).

were 1.71 times greater under *Iqbal* than under *Conley*.”¹⁰⁷ The updated study also affirmed the disproportionate effect *Twombly* and *Iqbal* have had on constitutional civil rights cases.¹⁰⁸

Another study, conducted shortly after *Twombly* (but before *Iqbal*) similarly concluded that *Twombly* has had an impact on civil rights cases—although this study also did not state whether the “civil rights” category included any voting or election law claims.¹⁰⁹ The regression analysis showed that a court was 39.6% more likely to dismiss a civil rights case than a random case in the studied set.¹¹⁰ Much like the other commentators, this researcher lamented that “[i]f the lower courts are, as this study suggests, applying the *Twombly* language in such a way as to impose a higher burden on civil rights plaintiffs, the practical effect of this reality is to close the courts to a large number of plaintiffs.”¹¹¹ A study conducted using a different empirical model found that “the rules of *Iqbal* and *Twombly* pose the potential to eliminate cases that have better than a 50% chance of being successful.”¹¹² Finally, one researcher found that dismissals of claims for factual insufficiency have increased but dismissals for legal insufficiency have decreased after *Iqbal*, showing the effects of the Court’s focus on factual plausibility in all cases.¹¹³

Additional research has considered the *Twombly* or *Iqbal* effect on various substantive areas, many of which involved civil rights issues such as disability claims, employment discrimination, and housing discrimination.¹¹⁴ The results have all confirmed that *Twombly* and *Iqbal* have negatively impacted plaintiffs’ ability to vindicate their rights. No scholar, however, has looked at the impact of *Twombly* and *Iqbal* specifically on election law litigation, separate from the general cate-

¹⁰⁷ Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 605 (2012).

¹⁰⁸ *Id.* at 605, 616–18.

¹⁰⁹ Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

¹¹⁰ *Id.* at 1838.

¹¹¹ *Id.* at 1846.

¹¹² Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 161 (2011). Instead of evaluating pre- and post-*Twombly/Iqbal* dismissals, this study examined the success of “thinly pleaded” cases from 1990–1999 under *Conley*’s “no set of facts” standard, which, under *Twombly* and *Iqbal*, would now require dismissal from the outset. *Id.* at 133–40.

¹¹³ See Dodson, *supra* note 41, at 132.

¹¹⁴ See Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 239–41 (2012); Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 97 (2010); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014.

gory of civil rights. The next Part examines the somewhat unique effect of the new pleading regime in election law disputes.

II. *TWOMBLY* AND *IQBAL* IN ELECTION LITIGATION

This Part considers the impact of *Twombly* and *Iqbal* on election law cases from a qualitative perspective.¹¹⁵ There are generally four main areas of election litigation: redistricting, ballot access, campaign finance, and election administration (which includes post-election disputes). This Part examines each kind of election law case and discusses how the rules from *Twombly* and *Iqbal* operate in each one.¹¹⁶

Ultimately, the descriptive analysis shows that *Twombly* and *Iqbal* are insufficient to determine whether a plaintiff has a potentially valid claim and therefore properly pleads an election law violation. That is, *Twombly* and *Iqbal* do not ask the right questions for election cases, demonstrating the need for an additional pleading test to supplement this area of the law.

The recent message lower courts seem to be gleaning from the Supreme Court, however, is that district courts should use *Twombly* and *Iqbal* in every Rule 12(b)(6) case.¹¹⁷ Conducting a *Twombly/Iqbal* analysis for every election law dispute, however, does not make much sense, as the plaintiff often does not need to rely on robust factual findings to win these cases. Instead, election cases frequently involve the other inquiry in a motion to dismiss, which tests whether, regardless of factual specificity, the plaintiff can recover under the law he or she invokes. This is not to say that facts are wholly irrelevant in election cases, but that they are not as vital to crafting a valid complaint because the main question is the legal implication of a particular election practice. Indeed, plaintiffs in election cases should be able to satisfy the factual plausibility test fairly easily in many instances.

¹¹⁵ There are not yet enough post-*Iqbal* election cases involving a motion to dismiss for a detailed empirical analysis. A Lexis and Westlaw search for election-related disputes citing *Twombly* or *Iqbal* in 2010, a midterm election year, revealed only twenty-three relevant matches. Similarly, a related search for the year 2006 looking at election cases invoking the prior “any set of facts” standard resulted in only twenty-eight cases. More poignant is the manner in which courts are invoking the new factual plausibility standard in their analysis.

¹¹⁶ Of course, as with any typology, there may be cases that fall within multiple categories or are of a different form than one of the categories. Specifying the four kinds of election litigation helps to focus the discussion of this substantive area.

¹¹⁷ See generally Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 908 (2010) (suggesting that *Twombly* and *Iqbal* “mark out a new era of pleading practice far less charitable to plaintiffs and rewrite several Court precedents on pleading and practice in the civil rights context”).

As the discussion below demonstrates, district courts in election cases are trying too hard to use *Twombly* and *Iqbal*'s factual plausibility standard, failing to realize that the analysis from these cases does not help much in the election setting. Courts are thus often stuck attempting to hew to the *Twombly/Iqbal* line while failing to employ the doctrine faithfully, dismissing cases for factual insufficiency when there are no additional facts a plaintiff could assert. Alternatively, district judges simply reject (usually implicitly) the factual plausibility rule, citing the cases but not actually testing the complaint under *Iqbal*'s two-part framework. This leaves a gap in how courts are supposed to construe motions to dismiss in these cases.

A. Redistricting

In a redistricting case, plaintiffs challenge newly enacted maps that states draw after the decennial census. Plaintiffs typically claim one person, one vote violations,¹¹⁸ racial or partisan gerrymandering,¹¹⁹ or violations under the Voting Rights Act.¹²⁰ Importantly, each of these claims has well-established rules to determine liability. For example, to prove minority vote dilution under section 2 of the Voting Rights Act, a plaintiff must satisfy the three *Thornburg v. Gingles* "preconditions" and demonstrate that, under the totality of the circumstances, the political process is not open to participation by minorities because the map precludes minority voters from electing representatives of their choice.¹²¹ Under *Conley*'s notice-pleading standard, a complaint would have to provide merely enough factual information about the districting to suggest the map's invalidity. As the D.C. Circuit explained:

In order to survive a motion to dismiss under Rule 12(b)(6), appellants were required only to allege that the Ward Redistricting Act dilutes minority voting strength such that minority voters in the relevant wards have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." . . . Appellants were not required on the face of

¹¹⁸ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹¹⁹ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (alleging political gerrymandering); *Shaw v. Reno*, 509 U.S. 630 (1993) (alleging racial gerrymandering).

¹²⁰ See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

¹²¹ See *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994) (citing *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986)).

their complaint to allege every legal element or fact that must be proven in a vote dilution claim.¹²²

But after *Twombly* and *Iqbal*, a bald factual statement alleging vote dilution is unlikely to pass muster, and in any event, it does not help the court in deciding whether the case has any merit. This is because a complaint that states merely that the redistricting “dilutes minority voting strength” presents a conclusory allegation. Instead, under the current pleading regime, the plaintiff will have to provide enough facts to raise a right to relief above the speculative level.¹²³ But what facts are relevant to this inquiry? The plaintiff already has the legislatively enacted map and can conduct his or her own studies on minority representation under the new map. Moreover, reciting the facts about the map’s lines does not go to the real question: does the map improperly thwart minority representation *as a matter of law*? Although certain facts might be relevant to this inquiry, the threshold question is whether the plaintiff can meet the legal elements of the claim, which actually presents a mixed question of fact and law. *Twombly* and *Iqbal* therefore do not help much in the redistricting context: there is little need for a “factual plausibility” showing when a plaintiff already knows all of the facts to state a claim but must establish that those facts will lead to legal liability. The only time when factual development might make a significant difference in a redistricting case is when the plaintiff claims that a jurisdiction adopted a map with a discriminatory purpose,¹²⁴ as that question goes to the same issue present in both *Twombly* and *Iqbal*: subjective intent. In that instance, a court would be correct in determining whether the plaintiff had any factual evidence of the mapmakers’ intent. More often, however, redistricting cases do not involve intent, but instead are about the impact or effect of a particular map,¹²⁵ meaning that the

¹²² *Kingman Park Civic Ass’n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003) (citation omitted).

¹²³ *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

¹²⁴ *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 66–68 (1980) (holding that a plaintiff must show discriminatory intent to prove that a map violates the Fourteenth Amendment); *see also* Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575 (2010) (suggesting a framework for courts to consider allegations of discriminatory purpose in newly passed maps).

¹²⁵ For example, a one person, one vote case, or a vote dilution claim, looks at the effects of a map on particular constituencies, separate from the state’s motivation for enacting that map. *See, e.g., Georgia v. Ashcroft*, 539 U.S. 461 (2003) (considering the effect of a new state legislative redistricting in determining whether to grant preclearance under Section 5 of the Voting Rights Act).

resolution of the case relies on a legal interpretation of those effects, not the presence or absence of certain facts.

Consider *Herdt v. Civil City of Jeffersonville*,¹²⁶ in which the plaintiff challenged the city's redistricting as diluting the strength of his vote in violation of the Equal Protection Clause.¹²⁷ The complaint alleged that the city had drawn new council maps "with disproportionate numbers of citizens in the different councilmanic districts," in violation of Indiana law and the Equal Protection Clause.¹²⁸ In analyzing the city's motion to dismiss, the court quoted from *Twombly* and *Iqbal* at length regarding the factual plausibility standard and then concluded:

The Plaintiff's Complaint does not plead or suggest on its face that the City has failed to follow any mandate of Indiana law or that the data used by the City Council was flawed in any specific manner [U]nder the holdings in *Iqbal* and *Twombly* above, when pleading an equal protection claim under the Constitution, the Plaintiff must do something more than mere notice pleading and must plead facts which are sufficient to establish that there is a plausible claim for dilution of votes, not merely a theoretical claim. Because the Plaintiff has not at this time pled an appropriate plausible claim, the Motion to Dismiss is granted.¹²⁹

The problem with this analysis is that there were no other facts for the plaintiff to plead, and yet the plaintiff still might have asserted a legally valid cause of action. That is, the court made two mistakes: it was wrong in its application of *Twombly* and *Iqbal* because the facts the plaintiff asserted regarding the effects of the map were plausible on their face, and it should not have stopped the analysis there because it did not answer the question of whether the plaintiff might have had a legally viable claim. The plaintiff met the *Twombly* and *Iqbal* standard because he provided all of the relevant facts that he could: the map, as enacted, contained districts of unequal population. There was nothing more the plaintiff could assert that would make the factual allegations more plausible, as the map was enacted with the lines and effects as the plaintiff stated. What we do not know is whether, under those facts regarding the effect of the map, the City

¹²⁶ *Herdt v. Civil City of Jeffersonville*, No. 4:10-cv-140, 2011 WL 1600518 (S.D. Ind. Apr. 27, 2011).

¹²⁷ *Id.*

¹²⁸ Complaint ¶¶ 10, 12, *Herdt v. Civil City of Jeffersonville*, No. 4:10-cv-140, 2011 WL 1600518 (S.D. Ind. Apr. 27, 2011).

¹²⁹ *Herdt*, 2011 WL 1600518, at *2.

violated the Equal Protection Clause in its redistricting as a matter of law. Did the plaintiff make a plausible allegation that the inequality in district sizes violated the Constitution? Using *Twombly* and *Iqbal* does not actually help in determining whether the plaintiff had a valid claim from the start. What the court should have asked was whether, even if all of the plaintiff's facts were true, the plaintiff would have a recognized legal cause of action under the substantive standard appropriate for this case. The court should have either allowed the case to proceed or dismissed it for failing to state a viable *legal* cause of action. Analyzing the factual sufficiency of the complaint through *Twombly* and *Iqbal* and then ending the inquiry is insufficient because there was nothing factually wrong with the complaint.

B. Ballot Access

In cases involving ballot access or candidate nominations, candidates and their supporters challenge state laws that limit eligibility for the ballot. For example, Ohio has seen continued litigation from the Libertarian Party over Ohio's signature-gathering requirements.¹³⁰ These cases usually arise under the First and Fourteenth Amendments and consider whether the laws burden the candidate's and voters' rights to free speech and association in advancing their beliefs and voting effectively for a candidate of their choice.¹³¹ To win a ballot access claim, the plaintiff typically must show that the state's law regulating who may be listed on the ballot imposes a severe burden on the rights of the candidate's supporters and is not narrowly tailored to achieve a compelling state interest.¹³²

Twombly and *Iqbal* have affected the way in which courts analyze these cases. In *Libertarian Party of Virginia v. Virginia State Board of Elections*,¹³³ for example, the plaintiffs challenged as unconstitutional a Virginia law that required ballot circulators to live in the congressional district in which they were collecting signatures.¹³⁴ The court first recounted the familiar severe burden test applicable to this kind of case, asking whether the burden the law imposed on the voters sup-

¹³⁰ See *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Husted*, No. 2:11-cv-722, 2011 WL 3957259 (S.D. Ohio Sept. 7, 2011).

¹³¹ See, e.g., *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

¹³² See, e.g., *Blackwell*, 462 F.3d at 585–86 (defining severe burden standard); see also Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 164–65 (2008).

¹³³ *Libertarian Party of Va. v. Va. State Bd. of Elections*, No. 1:10-cv-615, 2010 WL 3732012 (E.D. Va. Sept. 16, 2010).

¹³⁴ *Id.* at *1.

porting the candidate was “severe” or more minimal.¹³⁵ The court then determined that the plaintiffs had “not alleged any *facts* sufficient to establish . . . a discriminatory [severe] burden in this case” and also had “failed to establish a ‘severe restriction’ on their First Amendment rights.”¹³⁶ The court thus rejected the plaintiffs’ complaint under *Twombly* and *Iqbal* as failing to “assert a plausible entitlement to relief.”¹³⁷

But this analysis asks the wrong questions. Instead of determining whether the plaintiffs had presented a sufficient factual description of the burdens, the court should have considered whether the plaintiffs made a plausible argument that the burdens the plaintiffs did identify rose to the level of “severe” as a matter of law.¹³⁸ The court’s opinion, couched in the factual sufficiency of the complaint, suggests that the plaintiffs might have survived the motion to dismiss if only they had asserted more facts.¹³⁹ But it is unclear what additional factual content the plaintiffs could have provided. If the court meant to state that the plaintiffs could never prevail because these residency requirements for ballot circulators are always valid, then the opinion reads as a summary judgment motion, and the court should have converted the motion to dismiss to a summary judgment motion and allowed the parties to present additional arguments and evidence.¹⁴⁰ Alternatively, the court should have said explicitly that the complaint was legally insufficient and provided reasons for this conclusion—that the burdens, as stated, were not “severe” as a matter of law.¹⁴¹ Trying to apply *Twombly* and *Iqbal* led to an awkward analysis because it skirted over the question of whether the plaintiffs actually needed to provide more facts or if instead the law would not recognize their cause of action.

C. Campaign Finance

Campaign finance cases have been a recent hot-button issue in election law. From the Supreme Court’s decision in *Citizens United v. FEC*¹⁴² to robust lower court litigation,¹⁴³ courts have become mired in disputes regarding the permissible scope of federal and state govern-

¹³⁵ *Id.* at *6–7.

¹³⁶ *Id.* at *7 (emphasis added).

¹³⁷ *Id.* at *11.

¹³⁸ *See id.* at *7.

¹³⁹ *See, e.g., id.* at *11.

¹⁴⁰ *See* FED. R. CIV. P. 12(d).

¹⁴¹ *See Va. State Bd. of Elections*, 2010 WL 3732012, at *7.

¹⁴² *Citizens United v. FEC*, 558 U.S. 310 (2010).

ment regulation of money in politics. Once again, a focus on factual plausibility for a motion to dismiss is incongruent with the main disputes in these cases. Typically, a voter or candidate challenges the constitutionality of a campaign finance limitation. The law might restrict the amount of contributions or expenditures for a candidate or political party or require disclosure of the candidate's or party's donors.¹⁴⁴ Thus, everyone knows what the law does and the limits and mandates it imposes. The only question is whether the law is legally invalid. Judges faced with a motion to dismiss should determine if complaints address this threshold issue.

Courts have at times recognized the difference between factual and legal sufficiency in campaign finance challenges, but they have failed to provide guidance on the proper test to apply when the facts are not in dispute and the case revolves around legal interpretation. In *Schonberg v. FEC*,¹⁴⁵ for example, the district court did not even cite *Twombly* or *Iqbal* in its Rule 12(b)(6) discussion, instead stating, “[a] Rule 12(b)(6) motion tests the legal sufficiency of a complaint” and citing pre-*Twombly* precedents.¹⁴⁶ The court then held that the plaintiff had failed to make a proper legal argument to sustain his claim.¹⁴⁷ The court did not take the bait from *Twombly* and *Iqbal* and consider factual plausibility because the uncontroverted facts were separate from whether the plaintiff could allege a potentially meritorious claim. Put another way, the plaintiff's complaint was factually plausible because the plaintiff pleaded everything possible regarding the operation of the campaign finance law in dispute. The real question was whether the plaintiff had a valid legal argument. But even though the court dismissed the complaint for legal insufficiency—thereby applying a form of legal plausibility—it did so only implicitly, as it failed to articulate clearly the reason the plaintiff's complaint was legally deficient.¹⁴⁸ Therefore, while courts might tacitly recognize that the factual plausibility standard is generally unhelpful for election law cases, this provides little comfort because a future court may not be as deft—especially without clearer guidelines on how to undertake

¹⁴³ See, e.g., *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

¹⁴⁴ See, e.g., *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376 (D. Vt. 2012) (rejecting challenge to Vermont's contribution limit and disclosure law for “political committees”).

¹⁴⁵ *Schonberg v. FEC*, 792 F. Supp. 2d 20 (D.D.C. 2011).

¹⁴⁶ *Id.* at 27 (quoting *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002)).

¹⁴⁷ *Id.* at 28–29.

¹⁴⁸ See *id.*

this inquiry. Moreover, not all courts will resist the current trend of applying *Twombly* and *Iqbal* in every 12(b)(6) case. As discussed below, courts instead should expressly adopt legal plausibility as the framework for construing this kind of case.¹⁴⁹

D. Election Administration

The final category of election cases involves the nuts-and-bolts of voting and tallying the results. This includes litigation about registration and voter eligibility, the mechanics of casting a ballot, and post-election contests.

*Laroque v. Holder*¹⁵⁰ involved a challenge to the Department of Justice's refusal under Section 5 of the Voting Rights Act to "preclear," or preapprove, a proposed amendment to a city charter that would have provided for a non-partisan system of electing the mayor and city council.¹⁵¹ The court spent a paragraph setting out the applicable standard for a Rule 12(b)(6) motion to dismiss, citing both *Twombly* and *Iqbal* and identifying the "'two-pronged approach,' under which a court first identifies the factual allegations that are entitled to an assumption of truth and then determines 'whether they plausibly give rise to an entitlement to relief.'"¹⁵² In the discussion section later in the opinion, however, the court made no mention of the complaint's factual allegations or the plausibility standard.¹⁵³ The court did not even use the word "plausible" *at all* in its Rule 12(b)(6) discussion. Instead, the court considered the plaintiffs' "ability to state a viable cause of action."¹⁵⁴ This sounds nothing like determining whether plausible factual allegations support the cause of action but instead is an analysis of the *legal* sufficiency of the complaint. Citing to *Twombly* and *Iqbal* for the proper standard produced an opinion that was internally inconsistent.¹⁵⁵ That is, without a better standard for how to test the legal sufficiency of a complaint, the court followed the trend of at least citing *Twombly* and *Iqbal* for every 12(b)(6) case, even if that test did not make sense in the context of the

¹⁴⁹ See *infra* Part IV.

¹⁵⁰ *Laroque v. Holder*, 755 F. Supp. 2d 156 (D.D.C. 2010).

¹⁵¹ *Id.*

¹⁵² *Id.* at 164–65 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

¹⁵³ *Id.* at 183–87.

¹⁵⁴ *Id.* at 183.

¹⁵⁵ See *id.* at 164–65; see also *Brody v. N.C. State Bd. of Elections*, 3:10-cv-383, 2011 WL 1843199, at *3–4, *10 (W.D.N.C. May 16, 2011) (granting Rule 12(b)(6) motion because "the claims [were] legally insubstantial," even though the court invoked the factual "plausibility standard" in reciting the mode of analysis).

dispute. The court's analysis exhibited an incongruence present in election cases when courts try to use the latest Supreme Court pleading precedents. *Twombly* and *Iqbal* have blinded district courts, leading to confusion for election litigants about what they must put in their complaints and how courts should analyze them.

Post-election challenges present a slightly different scenario. These cases involve election irregularities, such as disagreements over whether to count certain absentee or provisional ballots.¹⁵⁶ Typically, these disputes remain within the province of state tribunals such as legislatures, courts, or specially created panels, and each state has detailed provisions for how to resolve election contests.¹⁵⁷ A specialized rule for initiating an election contest might make sense depending on which tribunal a state chooses to hear the case. But occasionally those challenging the certified election results bring suit in federal court, thus implicating federal pleading standards.

For example, in *Price v. New York State Board of Elections*,¹⁵⁸ plaintiffs challenged a New York law that prohibited voters from voting by absentee ballot for political party county committee elections, even though state law allowed absentee ballots for all other elections.¹⁵⁹ Plaintiffs filed their complaint four days before the 2006 primary election.¹⁶⁰ The district court granted a temporary restraining order that required the county elections board to permit voters to cast an absentee ballot for a particular district, but ordered that the elections board not count these supplemental ballots unless and until the court allowed it.¹⁶¹ The court ultimately granted the defendant government's motion to dismiss and denied the plaintiffs' summary judgment motion.¹⁶² But because the district court stayed its judgment pending appeal, the county board did not declare a winner in the district, and the outcome of the election depended on whether the county board counted the absentee ballots.¹⁶³

The United States Court of Appeals for the Second Circuit, in reversing, mentioned in passing the *Twombly* standard for construing

¹⁵⁶ See, e.g., *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011); *In re Contest of General Election*, 767 N.W.2d 453 (Minn. 2009).

¹⁵⁷ See Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1 (2013) [hereinafter Douglas, *Procedural Fairness*].

¹⁵⁸ *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101 (2d Cir. 2008).

¹⁵⁹ *Id.* at 103–04.

¹⁶⁰ *Id.* at 105.

¹⁶¹ *Id.*

¹⁶² *Id.* at 106.

¹⁶³ *Id.* at 106–07.

a motion to dismiss.¹⁶⁴ But beyond paying lip service to whether “the facts as alleged are insufficient to ‘raise a right to relief above the speculative level,’”¹⁶⁵ the court did not discuss the facts from the complaint. Instead, the court engaged in a legal analysis of whether the New York law imposed a severe burden that the State could justify.¹⁶⁶ This case demonstrates once again how the factual plausibility standard is typically unhelpful for election law because there are often few factual disputes at the pleadings stage. Instead, the court focused on a summary-judgment type analysis in ruling the law unconstitutional. There was less dissonance in this case because the plaintiffs had in fact moved for summary judgment.¹⁶⁷ But the court’s analysis was flawed because it stated the *Twombly* standard for a motion to dismiss but seemed to apply a different test—without identifying precisely what that test was.¹⁶⁸ This case provides little guidance for how a district court should analyze a defendant’s motion to dismiss in a future election case in which there is not also an accompanying summary judgment motion.

* * *

This descriptive analysis demonstrates that most district courts struggle in applying *Twombly* and *Iqbal* to election cases. Some courts improperly fault plaintiffs for not bringing forth enough facts when there are no other facts to present. Other courts try to pigeon-hole their decisions into *Twombly* and *Iqbal* by citing to those cases and the standards they espouse. But the application of those cases becomes awkward because in reality the factual plausibility test usually does not answer the question of whether plaintiffs in election cases have a valid cause of action. The Supreme Court’s recent admonitions regarding the factual sufficiency of a complaint do not mesh with the way in which election cases actually proceed. To achieve congruence in pleading election cases, we need an updated rule that takes into account both the goals behind pleading laws and the main characteristics of an election lawsuit.

¹⁶⁴ *Id.* at 107 (citing *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007))).

¹⁶⁵ *Id.* (quoting *ATSI Commc’ns*, 493 F.3d at 98 (quoting *Twombly*, 550 U.S. at 555)).

¹⁶⁶ *Id.* at 107–12.

¹⁶⁷ *Id.* at 106.

¹⁶⁸ *Id.* at 107.

III. PROCEDURAL DIFFERENCES IN ELECTION CASES

Election law cases have unique procedural features that impact the best pleading rules to adopt for this area. This Part identifies the salient procedural aspects of an election lawsuit that, when combined, make election disputes different from many other civil cases. These features of election law cases suggest that the normal factual plausibility standard is asking the wrong question in election litigation. This Part also identifies several goals we should promote in crafting pleading rules for election disputes. Understanding the procedural processes of election litigation is important for discerning a proper pleading standard for initiating a case. A refined pleading regime for election law disputes also could apply to other areas that might share these traits.

A. *Common Traits of Election Law Cases*

There are four main characteristics common to most election litigation: a governmental entity or governmental official is almost always the defendant; factual development is usually not very robust, or at least is not of the type that will uncover information a plaintiff might need to initiate a case; judges, rather than juries, render the final decisions, usually through pretrial proceedings; and, with some minor exceptions, settlement is rare.

1. *Government as Defendant*

Most election lawsuits involve as a plaintiff an individual voter or candidate, a political party, an interest group or other organization, or even the federal government, who sues a local, state, or federal entity or official, and challenges an election practice as unlawful. This is different from virtually all other substantive areas of law, in which the defendant could be either a government *or* a private organization, entity, or individual.¹⁶⁹ For example, an individual voter might sue a state (or the state's official in charge of the election) to challenge its photo identification requirement.¹⁷⁰ A candidate might allege that a

¹⁶⁹ Administrative cases typically involve a governmental unit as a defendant, but administrative law is not necessarily a specific substantive area. See, e.g., Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484–85 (2010). In addition, school finance cases are most often against governmental units funding schools. Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation*, 18 OHIO ST. J. ON DISP. RESOL. 391, 401–02 (2003).

¹⁷⁰ See, e.g., Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

state is unlawfully keeping him or her off of the ballot.¹⁷¹ A political party could challenge a state's designation of party preference on a ballot.¹⁷² An interest group, such as an organization that wishes to spend money on an election, could argue the unconstitutionality of a federal campaign finance law.¹⁷³ And the Department of Justice could bring an enforcement action against a state or municipality for failing to comply with a statutory command such as the Voting Rights Act, the National Voter Registration Act, or the Help America Vote Act.¹⁷⁴

With a few exceptions, the defendant in these cases is always the government or governmental officials, as the governmental entity administers elections and therefore is the only potential "bad" actor.¹⁷⁵ This distinguishes election law because in most other cases the "bad" actor could be either the government *or* a private party.¹⁷⁶ Private

¹⁷¹ See, e.g., *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004).

¹⁷² See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008).

¹⁷³ See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁷⁴ Voting Rights Act of 1965 § 3, 42 U.S.C. § 1973a (2006); National Voter Registration Act § 11(a), 42 U.S.C. § 1973gg-9 (2006); Help America Vote Act of 2002 § 401, 42 U.S.C. § 15511 (2006).

¹⁷⁵ *Terry v. Adams*, 345 U.S. 461 (1953), which is one of the "White Primary Cases," presents an exception. In that case, the defendant, Mr. Adams, was the president of the Jaybird Democratic Association, a political organization which excluded African Americans from its primary. See *id.* at 464. The winner of the Jaybird's primary virtually always won the Democratic primary and then the general election. *Id.* at 461. The Court held that the Jaybird Democratic Association's action in excluding African Americans was unlawful given that the organization was, in essence, picking the ultimate winner. See *id.* at 476-77. Thus, the Court determined that the Jaybird Democratic Association was a "state actor" for purposes of running the only election that really mattered. See *id.* at 474-76; see also *United States v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007) (involving suit against Chairman of the Noxubee County Democratic Executive Committee for violations of the Voting Rights Act in the administration of the Democratic Party primaries).

These cases demonstrate that there is no per se rule that a governmental unit or official must always be the defendant in an election case. Nevertheless, the fact that there are exceptions is less important than the general observation that defendants are almost always the governmental actor responsible for administering elections. Indeed, in *United States v. Brown*, the court refused to dismiss the local Election Commission as a party even though it found no liability against it because "its presence [may be] needed in order to afford a complete remedy" against the Chairman of the County Democratic Executive Committee who had violated section 2 of the Voting Rights Act. *Brown*, 494 F. Supp. 2d at 486. Thus, I do not argue that it is impossible to sue a nongovernmental actor in an election case, but it is exceedingly rare not to have a governmental unit as part of the suit.

¹⁷⁶ In cases under 42 U.S.C. § 1983 (2006) or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), a private entity may be considered a state actor. See generally Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379 (2006) (explaining the purpose and rationale behind the state action doctrine). Election cases, however, often do not rely on the state action doctrine because the government or governmental official is usually the only possible defendant. That is, the state action doctrine need not apply as

parties are rarely defendants in civil election cases. Even if the named defendant is someone else, such as the opposing candidate, the de facto defendant is a governmental official who is charged with administering the election or counting the ballots.¹⁷⁷ Typically, the only election case in which someone other than a governmental actor is a defendant is a criminal action involving election fraud.¹⁷⁸

Defendants in these cases—governmental entities or officials charged with carrying out an election—usually have only a single interest: running a fair, smooth, and fraud-free election.¹⁷⁹ Defendants, as the ones being sued, will almost always advocate that the court should uphold the statute or governmental action under review. Of course, various government entities advocate policy positions on any number of election rules. But when the government is the defendant in election litigation, it obviously will ask the court to reject the challenge to its electoral practices.¹⁸⁰

This observation might simply be a tautology: the government administers an election, so the only entity for a plaintiff to sue about election impropriety is the government. But it is an important characteristic to recognize when contemplating procedural rules for election law disputes, especially if we use general pleading rules for these cases. That is, the special feature of elections as always government-run, and thus election litigation as always against a governmental en-

often to election law because there are rarely private entities serving a governmental purpose in administering an election. *See* *Smith v. Allwright*, 321 U.S. 649, 659, 663 (1944) (holding that a political party's primary election constitutes state action but explaining that elections fall under the authority of the state rather than private entities); *see also* *United States v. Classic*, 313 U.S. 299, 314–15 (1941) (explaining that actions of state and local election officials are considered state actions).

¹⁷⁷ In *Bush v. Gore*, 531 U.S. 98 (2000), for example, the original defendant was Kathryn Harris, the Florida Secretary of State, and Al Gore challenged her decision to certify Florida's electoral votes for George W. Bush. *See* *Gore v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4, 2000). Bush was substituted as a named party when the case reached the U.S. Supreme Court. *See* *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁷⁸ *See, e.g.*, *United States v. Thomas*, 510 F.3d 714 (7th Cir. 2007) (reviewing a criminal conviction involving election fraud); *United States v. Turner*, 465 F.3d 667 (6th Cir. 2006) (same); *United States v. Slone*, 43 F. App'x 738 (6th Cir. 2002) (reviewing conviction for vote buying).

¹⁷⁹ *See* Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179, 183 (2011) (noting that “a distinguishing characteristic of election claims is that they are often structural constitutional claims against state defendants”).

¹⁸⁰ *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 402 n.7 (2010) (Stevens, J., dissenting) (“Like every litigant, the Government would prefer to win its case outright; failing that, it would prefer to lose on a narrow ground.”); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (“The State has identified several state interests that arguably justify the burdens that SEA 483 imposes on voters and potential voters.”).

tity, calls into question whether general procedural rules make sense for this area.

A procedural pleading rule for election cases should take into account the fact that these cases typically involve a governmental actor as the defendant, and the government's interest is almost always to maintain the status quo in running the election. Importantly, because the government is the defendant, the notice-giving function of a complaint is less important than in other cases, as the governmental entity running the election knows how the challenged law operates. What the government defendant may not understand from the beginning of litigation is why the operation of that practice is allegedly unlawful. This suggests that a plaintiff should have to identify, at an early stage, the precise election regulation being challenged and the reasons why the court should interfere with the way in which the government administers an election.

2. *Limited Factual Development*

Election litigation often does not require detailed factual findings, as the cases are usually about the lawfulness of an election practice and not about disputes over what happened. Accordingly, election plaintiffs typically do not need to rely on the government defendant for factual information that would enable the plaintiff to make out a prima facie case.

In pre-election lawsuits, the parties will want to gather evidence regarding the burden of a law on the plaintiff or those like the plaintiff, such as evidence on whether the government may restrict certain people from voting or must place a candidate on the ballot. But the plaintiff usually does not need to obtain information from the government defendant to develop his or her own case. For example, in the photo identification litigation from Indiana that eventually reached the Supreme Court, the parties (the plaintiffs who challenged the law and the State of Indiana) engaged in limited discovery specifically regarding the burden on certain voters in obtaining photo identification.¹⁸¹ This is unlike discovery in typical civil cases that is focused on the underlying factual events that gave rise to the suit. Moreover, the factual development in the photo ID case was largely plaintiff-driven, in that the plaintiffs unilaterally obtained affidavits from voters re-

¹⁸¹ See *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006), *aff'd sub nom.* *Crawford v. Marion Cnty. Election Bd*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

garding the difficulty of obtaining an ID.¹⁸² The main discovery that the plaintiffs sought from the State was information about the extent of fraud that existed in Indiana, which went to the State's justification for the law.¹⁸³ The State also presented affidavits of its own regarding the enforcement of the voter ID law.¹⁸⁴ Thus, the plaintiffs' discovery was less about obtaining evidence from the defendant to assert the facts about what happened and more about learning the other side's substantive defenses. Put differently, the plaintiffs did not need any information that was solely in the State's possession to draft a viable complaint.

Similarly, in a challenge to a redistricting plan, such as a case invoking one person, one vote or vote dilution, the plaintiff usually does not require information exchange to develop a case, at least at the outset.¹⁸⁵ In the initial three-judge district court decision involving Texas's 2003 mid-decade redistricting, for example, there was little necessity for the plaintiffs to obtain information from the State to have enough facts for their lawsuit.¹⁸⁶ The plaintiffs could rely on their own studies or analysis to allege unlawful gerrymandering. In any event, the defendant's evidence, through testimony at the hearing, was mostly relevant to the State's proffered justification for the redistricting, not to the underlying elements of the plaintiffs' cause of action.¹⁸⁷

Post-election contests are a little different, and because of their posture they may warrant their own unique pleading rules. In a post-election dispute about who won, discovery usually consists of obtaining information about the eligibility of particular ballots or providing the court with information regarding the standards used to accept or reject certain votes. The disputed 2008 U.S. Senate election from Minnesota presents a good example of the kind of discovery necessary for an election contest.¹⁸⁸ The court explained that the parties had

¹⁸² *Id.* at 791–92 (describing affidavits the plaintiffs filed from various individuals).

¹⁸³ *Id.* at 792–93 (discussing a response to interrogatories in which the State conceded it did not have evidence of in-person voter fraud in Indiana).

¹⁸⁴ *Id.* at 794–95.

¹⁸⁵ If, however, the plaintiff alleges discriminatory purpose or intent, then the government defendant might possess evidence that the plaintiff needs to make its initial case, as the question will include an issue over the map drawers' subjective intent. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded* 133 S. Ct. 2885 (2013).

¹⁸⁶ *See Session v. Perry*, 298 F. Supp. 2d 451, 471–72 (E.D. Tex. 2004), *vacated and remanded sub nom. Henderson v. Perry*, 543 U.S. 941 (2004).

¹⁸⁷ *Id.*

¹⁸⁸ Trial Order, *In re Sheehan v. Franken*, No. 62-CV-09-56, 2009 WL 981934 (Dist. Ct.

submitted “1,717 individual exhibits,”¹⁸⁹ many of which related to the written materials about voting absentee in the state, the training of election workers, and the efforts to determine which absentee ballots the state had counted.¹⁹⁰ This is likely information the plaintiffs could not have obtained on their own without discovery, demonstrating how election contests are often different in kind than other election disputes.

From the perspective of the factual allegations needed to initiate a case, election contests are unique from other election challenges for two main reasons. First, the underlying issues are typically more fact based than a pre-election dispute about a particular election practice. As opposed to a legal challenge regarding the operation of an election regulation, the determination of the winner is usually dependent on whether certain ballots are valid and whether those ballots clearly identify a chosen candidate—both fact-laden questions.¹⁹¹ Second, in all fifty states, separate statutes explicitly govern the procedures for election contests.¹⁹² Indeed, many election contests do not even go to the judiciary.¹⁹³ That is, election contests often operate under a completely different statutory scheme, which makes the comparison to other kinds of lawsuits harder.

The Supreme Court has explained that “[t]he discovery provisions of the Federal Rules of Civil Procedure . . . are designed to encourage open exchange of information by litigants in federal courts.”¹⁹⁴ But election litigation—particularly a pre-election dispute about an issue of election administration—does not require much exchange of information that the other side does not already have to enable a plaintiff to start the case, as the evidence is often publicly available or generated by the parties themselves through affidavits or

Minn. Apr. 13, 2009). This case is commonly known as *Coleman v. Franken* after the two candidates involved, Norm Coleman and Al Franken.

¹⁸⁹ *Id.* ¶ 24.

¹⁹⁰ *See, e.g., id.* ¶¶ 33, 36, 37, 41, 47, 57, 71, 72, 76.

¹⁹¹ *See* Edward B. Foley, *How Fair Can Be Faster: The Lessons of Coleman v. Franken*, 10 ELECTION L.J. 187, 190–91 (2011); *see also, e.g.,* Di Benio v. Panaro, 230 N.Y.S. 2d 642, 645 (N.Y. Sup. Ct. 1962).

¹⁹² *See, e.g.,* MINN. STAT. § 209.021 (2012); *see generally* Douglas, *Procedural Fairness*, *supra* note 157 (describing the various procedures for election contests among all fifty states and across types of elections).

¹⁹³ *See* Douglas, *Procedural Fairness*, *supra* note 157, at 8. As just one example, several states have a nonjudicial body decide election contests for gubernatorial elections. *See* N.H. REV. STAT. ANN. § 665:5 (2008); R.I. GEN. LAWS § 17-7-5(a)(11) (2011); S.C. CODE ANN. § 7-17-250 (2012).

¹⁹⁴ *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982).

studies. To be sure, the parties eventually must obtain this information from the other side to understand the arguments against them and prepare their own arguments in response. But unlike in the more typical *Twombly* or *Iqbal* context, the parties do not necessarily need evidence that is only in their opponent's possession to make out their initial case.

What does this mean for election law pleading? One common criticism of the Supreme Court's decisions in *Twombly* and *Iqbal* is that the Court cut off the ability of plaintiffs at the outset to engage in discovery to gather evidence and thereby develop their case.¹⁹⁵ That is, it is impossible for a plaintiff to assert a claim that is factually plausible under a heightened standard without obtaining some information from the defendant through discovery. But in election law cases, the plaintiff usually does not need much information from the defendant to state a factually sufficient claim. Instead, the plaintiff will most often rely on his or her own studies or evidence regarding the burden of a particular election law or practice. Moreover, the focus of the lawsuit is on the law, not the facts, because the facts are often not in dispute. If anything, discovery in election cases is most useful to understand and respond to the opposing side's legal arguments, not to initiate the case. Accordingly, *Twombly* and *Iqbal* are not necessarily *bad* for election law; they are just *insufficient*, as they answer only part of the inquiry—and the part that is often less important to the ultimate resolution of the case. As discussed below, this observation is important for selecting the proper pleading rules for election litigation or other cases that share these same characteristics.

3. *Pre-trial Resolution of Election Law Cases by a Judge*

A third feature of election law cases is that they rarely, if ever, reach a jury and instead are resolved by a judge before trial. This by itself does not make election law unique, but it is still important to recognize when determining the best procedural rules for these cases. Most of the time, a case is dismissed at the pleadings stage,¹⁹⁶ disposed of through a grant or denial of a preliminary or permanent injunction,¹⁹⁷ or decided on summary judgment.¹⁹⁸ Certainly, it is possible

¹⁹⁵ Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 54–71 (2010).

¹⁹⁶ See *supra* Part II.B.

¹⁹⁷ See, e.g., *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011).

¹⁹⁸ See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

for some cases to make it to a bench trial—particularly if it is a special case that requires resolution by a three-judge trial court panel, such as a redistricting dispute.¹⁹⁹ But the more common approach is for a court to dispose of a case primarily on the parties' written submissions and any hearings related to those motions.

That observation means, in turn, that detailed factual findings are usually not the driving force behind the resolution of many election law cases.²⁰⁰ Instead, a court focuses on the legal implications of the electoral scheme under review. Factual findings are relevant mainly to explain the operation of the law in dispute²⁰¹ or to determine which ballots to count in a post-election contest.²⁰² That is not to say that factual findings are nonexistent or completely irrelevant. Instead, factual findings take on less prominence than the legal conclusions regarding the operation of the law, particularly because the material facts often are not in dispute. As the previous section noted, factual development is muted in an election case, as both sides often will agree on how a law operates in practice.²⁰³ If the main disputes are legal in nature, then courts can decide them without a drawn-out hearing process.

It is extremely rare to have a jury involved in an election dispute. In fact, some states explicitly forbid juries to play any role in post-election litigation about the correct winner.²⁰⁴ In other cases, there is no need for a jury because the parties agree on the facts and focus their arguments on the legality of the election practice. Thus, from a structural perspective, resolution of election law litigation is judicial in nature, in the sense that the judge is the decisionmaker for all issues. There is little role for a separate factfinder.

¹⁹⁹ See, e.g., *Perry v. Perez*, 132 S. Ct. 934 (2012); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

²⁰⁰ But see *Easley v. Cromartie*, 532 U.S. 234 (2001) (reversing based on lower court's erroneous factual findings). This case considered whether race was the "predominant factor" in the redistricting, thus considering the legislature's underlying intent in passing a new map—an inherently fact-based inquiry. *Id.* at 240–44.

²⁰¹ For example, in the Indiana photo identification case, the parties agreed that the law required all voters to show identification to vote, and the factual findings demonstrated the effect of that law on certain groups of voters. See *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 792 (S.D. Ind. 2006).

²⁰² The Coleman-Franken dispute, for example, rested in part on determining which absentee ballots to count. *In re Contest of General Election*, 767 N.W.2d 453, 456–58 (Minn. 2009).

²⁰³ See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983) ("The facts are not in dispute.").

²⁰⁴ See, e.g., N.J. STAT. ANN. § 19:29-5 (West 2013). But see MONT. CODE ANN. § 13-36-207 (2011) (allowing a judge to empanel a jury to resolve questions of fact in an election contest).

This is different from run-of-the-mill civil litigation. In a normal negligence case, for example, a plaintiff must plead that “[o]n *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.”²⁰⁵ This provides notice to the defendant as to the underlying factual scenario that gave rise to the lawsuit. The parties will then engage in discovery to determine what actually happened that might lead to the defendant’s liability. Ultimately, if there are factual disputes, a judge or jury will make findings of fact to resolve the case. But in election cases, particularly over issues of election administration, there is rarely a need for that factual resolution because the facts are usually not in dispute. The legality of the election practice is the crux of the case. It follows that the pleadings should exist to do something more than just tell the defendant (the government) that it could be liable—because the government will automatically know this simply by having a plaintiff assert a challenge to a law. Indeed, a plaintiff might need very few facts to initiate a viable election-related lawsuit. The pleadings should instead set out the legal contentions from the outset because they will be the main basis for the court’s decision, and they will determine whether the plaintiff has a plausible entitlement to relief.

4. *Lack of Settlement*

A final feature of election litigation is that cases rarely settle. This contrasts with the trend of most litigation, in which settlement is the most likely outcome.²⁰⁶ If a plaintiff files suit challenging an election practice, it necessarily seeks a ruling that the practice is unlawful. The government, defending the law, wants to keep the law intact. There is usually little middle ground.²⁰⁷ Either the law (or its applica-

²⁰⁵ FED. R. CIV. P. Form 11.

²⁰⁶ See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1956 n.184 (2009) (explaining that current trial levels stand at about one percent, down from about twelve percent in the 1960s); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 771 n.170 (2011) (citing studies finding that almost two-thirds of cases are settled and that the rate of settling has increased); Gregg D. Polsky & Dan Markel, *Taxing Punitive Damages*, 96 VA. L. REV. 1295, 1335 & n.103 (2010) (citing JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 40 (2d ed. 2008) (stating that “[a]n extremely large percentage of tort cases . . . settle under current law” and citing a study showing that only three percent of tort cases reach a jury)).

²⁰⁷ This is not to say that we should not encourage negotiation and settlements in election cases. I have previously advocated for the incorporation of alternative dispute resolution techniques as a mechanism to foster greater civility in election litigation. See Joshua A. Douglas, *Election Law and Civil Discourse: The Promise of ADR*, 27 OHIO ST. J. ON DISP. RESOL. 291 (2012) [hereinafter Douglas, *Election Law and Civil Discourse*]. But the reality is that most election litigation presents either/or questions that make settlement difficult.

tion) is or is not permissible. It is hard to fathom a compromise solution in these situations, especially when money is not in dispute.²⁰⁸ It follows that most cases are resolved through a judicial decision—and, as noted earlier, one that the judge (not a jury) will resolve. Moreover, the resolution will entail a decision on the substantive legal interpretation, not on competing versions of the underlying facts.

This is not to suggest that settlement is impossible. The Federal Election Commission (“FEC”) has an Alternative Dispute Resolution Program, in which it encourages parties to settle complaints before the FEC through nontraditional enforcement or litigation processes.²⁰⁹ Similarly, the U.S. Department of Justice enters into consent decrees with state or local governments regarding particular election practices.²¹⁰ The number of consent decrees appears to have risen in recent years: one commentator found that during the 1990s the DOJ “obtained orders or consent decrees remedying violations of the Voting Rights Act in three cases,” but that number had increased to more than thirty during the 2000s.²¹¹ An agreement will often specify that the jurisdiction is not admitting liability but will alter its electoral practices to fall within the strictures of the particular law.²¹² Ultimately, the governmental unit agrees to conform its election scheme to the DOJ’s interpretation of a federal election law to avoid protracted litigation.²¹³

Outside of that narrow context for settlements, however, there is little room for non-judicial resolution of election law cases. For example, if a plaintiff is challenging a state’s newly enacted voter identification law as unconstitutional, there is likely little wiggle room: the

²⁰⁸ Laurel Brubaker Calkins, Tom Schoenberg & Travis Poling, *Texas Voter Map Fight Eludes Settlement, U.S. Court Is Told*, BLOOMBERG BUSINESSWEEK (Feb. 16, 2012), <http://www.businessweek.com/news/2012-02-16/texas-voter-map-fight-eludes-settlement-u-s-court-is-told.html>.

²⁰⁹ See *Alternative Dispute Resolution Program*, FED. ELECTION COMMISSION (Feb. 2010), <http://www.fec.gov/em/adr.shtml>.

²¹⁰ A list of current DOJ Voting Section Settlements is available at *Recent Voting Section Settlements*, U.S. DEP’T OF JUST., http://www.justice.gov/crt/about/vot/litigation/recent_settlements.php (last visited Oct. 5, 2013).

²¹¹ Mark A. Flores, *English Only?—The “Power” of Kentucky’s Official Language Statute*, 98 KY. L.J. 855, 883 (2009–2010).

²¹² See, e.g., *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 572 (1997) (approving redistricting settlement agreement that disclaimed any unconstitutionality but still redrew the legislative lines in Florida).

²¹³ See, e.g., Memorandum of Agreement Between the United States of America and Shannon Cnty., S.D. (Apr. 23, 2010), available at http://www.justice.gov/crt/about/vot/sec_203/documents/shannon_moa.pdf (detailing the changes Shannon County would make to its language assistance voting practices to comply with the Voting Rights Act and Help America Vote Act).

plaintiff is not going to be satisfied with a ruling other than one striking down the law, at least as applied to that voter, and the state is going to argue in favor of the application of the law.²¹⁴ Indeed, a Texas court recently cajoled the parties in a redistricting dispute to try to reach a settlement to no avail.²¹⁵ Similarly, it is extremely difficult to fathom a satisfactory compromise resolution to a post-election contest regarding the correct winner.²¹⁶ Of course, there can be mini-settlements within a particular case, such as agreements on whether to count certain ballots but not others.²¹⁷ But an overall nonjudicial resolution of an election case is unlikely because there is little give-and-take for the parties to offer.

The upshot is that parties' initial submissions in an election case take on heightened importance given that a court will finally resolve almost all disputes. Plaintiffs are unlikely to initiate an election challenge with the ultimate goal of coercing a settlement, as might be the situation with a private tort or contract case—which was one of the concerns that animated the Court's adoption of a heightened pleading standard in *Twombly* and *Iqbal*.²¹⁸ Obtaining monetary damages is almost never the goal in election litigation, so there is less concern that a plaintiff will bring an election challenge without truly wanting judicial resolution. The lack of settlement, combined with the rarity of a jury trial in an election case, means that the judge will decide the dispute one way or the other largely based on the parties' written submissions. The pleadings thus take on a role beyond just providing notice to the defendant and the court as to the nature of the suit. They become part of the legal arguments the court will consider as it necessarily decides the case on the merits.

This section has highlighted four procedural features of election law litigation: the government or a governmental actor is almost always the defendant; factual development is typically not very robust;

²¹⁴ See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

²¹⁵ See *Perez v. Perry*, 835 F. Supp. 2d 209 (W.D. Tex. 2011) (three-judge court), *vacated and remanded*, 132 S. Ct. 934 (2012); see also Cameron Joseph, *Texas Redistricting Settlement on Verge of Collapse, Delaying Primaries*, HILL (Feb. 3, 2012, 4:20 PM), <http://thehill.com/blogs/ballot-box/house-races/208607-texas-redistricting-settlement-on-verge-of-collapse-delaying-primaries>.

²¹⁶ See Douglas, *Election Law and Civil Discourse*, *supra* note 207, at 309. But see Rishi Batra, *Resolving Disputed Elections Through Negotiation*, 27 OHIO ST. J. ON DISP. RESOL. 371 (2012).

²¹⁷ See, e.g., Trial Order ¶ 80, *In re Sheehan v. Franken*, No. 62-CV-09-56, 2009 WL 981934 (Dist. Ct. Minn. Apr. 13, 2009) (“The parties agreed that 933 of the absentee ballots identified by the counties as wrongfully rejected should be opened and counted.”).

²¹⁸ See Steinman, *supra* note 60, at 1295.

pretrial resolution by a court without a jury or full fact finding is most common; and the parties rarely settle. Although any one of these characteristics might describe other substantive areas, in combination they separate election litigation from most other kinds of cases. For example, administrative law disputes also usually have the government as the defendant, but the underlying facts—and thus the discovery process—are more important in resolving the case.²¹⁹ First Amendment litigation also might not need a jury trial or full hearings on the merits, but it is more likely for private parties, serving as state actors, to be the defendant.²²⁰ These features suggest that election litigation—or any other substantive area that might happen to share these same traits—should have refined pleading rules tied to the unique features of these cases. That is, any update to the current pleading regime must take into account the unique traits of election litigation and the specialized goals and considerations of having the judiciary involved in running an election.

B. Specific Goals for Pleading Election Law Cases

The features of election cases discussed above, as well as other structural aspects of election litigation,²²¹ suggest specific goals to consider in evaluating a pleading regime for election law. First, election law cases require quick adjudication. Election challenges raise inherent timeliness and efficiency concerns that are not present in typical private disputes.²²² Although most private litigants certainly want fast resolution of their cases, there is no structural reason for quick decisionmaking.²²³ Election law cases, however, tell the parties how to administer an upcoming election.²²⁴ If the courts do not resolve the case quickly, the government will not receive the answer on whether a

²¹⁹ John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419, 438–39 (2001) (“The ALJ must give reasons for every essential element of a decision and these reasons must be specifically derived from fact, law, and the application of law to fact.”).

²²⁰ See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 507–09 (1946) (holding that the First Amendment protects speech on the sidewalk of a privately owned town); *Hall v. Am. Nat’l Red Cross*, 86 F.3d 919, 921 (9th Cir. 1996) (explaining that the First Amendment applies to a private entity that has a “sufficient structural or functional nexus to the government”); see also Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2052, 2057–58 (2004) (arguing that the First Amendment should protect freedoms of creation and design in privately run “virtual” worlds often seen in online gaming).

²²¹ See generally Douglas, *Procedure of Election Law*, *supra* note 11 (discussing three different procedural mechanisms under which federal courts decide election-related disputes).

²²² See *id.* at 438.

²²³ *Id.*

²²⁴ See, e.g., *Desena v. Maine*, 793 F. Supp. 2d 456 (D. Me. 2011) (holding that Maine’s

particular election rule is lawful for that upcoming election, and citizens could have their rights curtailed. In addition, there are few viable post-election remedies for a violation of someone's right to vote. Once the election passes, there is no way to go back and vindicate the rights of those who suffered the effect of the challenged law. As I have argued elsewhere, because of these concerns election litigation uniquely requires timeliness.²²⁵ Pleading rules for election law cases must reflect this concern.

On the other hand, election cases require heightened accuracy, perhaps even more so than a regular private dispute. As previously explained:

If a court is incorrect in a private contract dispute or a tort case, the parties themselves will be aggrieved and the public may have a poor view of the courts. But, as a whole, society will not necessarily suffer unless the rule somehow negatively affects business transactions or has other widespread consequences beyond that case. Moreover, the courts can eventually reverse their position on an incorrect legal rule with little long-term implications. If, however, the courts are wrong on a matter of election law, there are resulting widespread societal concerns: e.g., the wrong person could be elected, citizens could be incorrectly denied their right to vote, or improper influences could taint the election process.²²⁶

Thus, election cases carry a particular concern for accuracy. There is no way to "go back" and correct a mistake once an election has passed. This means that the procedural rules for election litigation must foster the most accurate decisionmaking possible.

Election litigation presents a balance between allowing voters, candidates, and others to challenge potentially unlawful election practices and a state's role in administering elections. Under the Constitution, states must regulate the "Times, Places, and Manner" of holding elections.²²⁷ For every election lawsuit, the state potentially cannot effectively administer its election as it waits for a resolution. Moreover, as Professor Rick Hasen has demonstrated, the amount of election litigation has risen dramatically in the past decade.²²⁸ Indeed, one

congressional redistricting was unconstitutional and that the state must redraw the lines before the 2012 election).

²²⁵ Douglas, *Procedure of Election Law*, *supra* note 11, at 438.

²²⁶ *Id.* at 439.

²²⁷ U.S. CONST. art. I, § 4, cl. 1.

²²⁸ Richard L. Hasen, *The Supreme Court's Shrinking Election Law Docket, 2001–2010: A*

goal for election law pleading should be to reduce the amount of non-meritorious election-related litigation. On the other hand, the Constitution, through the Equal Protection Clause, provides a right against unconstitutional infringement of the right to vote,²²⁹ and voters also have statutory rights, such as those under the Voting Rights Act and the Help America Vote Act.²³⁰ A pleading system therefore has to balance these competing concerns: a state's need to manage elections with a plaintiff's ability to vindicate his or her fundamental rights, all in the context of requiring a faster-than-normal resolution.

Part of achieving this balance lies in weeding out frivolous claims. But it also requires open access to courts for individuals who are suffering or will suffer an infringement of their right to vote. Thus, neither *Conley*'s liberal "no set of facts" standard²³¹ nor *Twombly* and *Iqbal*'s strict factual plausibility rule²³² suffice. Both the *Conley* and the *Twombly/Iqbal* standard are too focused on the notice-giving and factual development features of a complaint.

Most election cases, by contrast, do not necessarily require particularized notice to the government defendant or detailed fact finding for prompt resolution. As discussed above, *Twombly* and *Iqbal* actually impede fruitful analysis of whether a court should dismiss an election case from the outset because they ask the wrong questions.²³³ Election law needs a supplement to existing pleading rules that recognizes the way these suits operate. The pleading scheme should effectuate the goals of timeliness, accuracy, lack of post-election remedies, and recognition of both a state's need to administer an election and an individual or candidate's rights to electoral equality. It also must acknowledge the reality of how election litigation proceeds, with a governmental actor as the defendant, little necessity for initial discovery for a plaintiff to assert a valid legal claim, the primacy of legal arguments over factual contentions, pretrial judicial resolution, and the unlikelihood of settlement. The next Section explains why previously offered reforms to the pleading problem do not suffice for election

Legacy of Bush v. Gore or Fear of the Roberts Court?, 10 ELECTION L.J. 325, 325–26 (2011); see generally Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865 (2013).

²²⁹ See, e.g., Douglas, *Is the Right to Vote Really Fundamental?*, *supra* note 132.

²³⁰ Voting Rights Act § 2, 42 U.S.C. § 1973 (2006); Help America Vote Act of 2002 § 402, 42 U.S.C. § 15512 (2006).

²³¹ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

²³² *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

²³³ See *supra* Part II.

law. Part IV then proposes a solution that satisfies these considerations.

C. *Previous Proposals for Reforming Twombly and Iqbal—and Why They Will Not Help Election Law Pleading*

Legal scholars lamenting the consequences of the Supreme Court's decisions in *Twombly* and *Iqbal* for the vindication of individual rights have offered various suggestions to cure the perceived doctrinal defects, but none of them go to the incongruence of applying *Twombly* and *Iqbal* to election law cases. As one commentator explains, there are several possible means of reform:

The judicial and legislative alternatives are those aiming to accomplish one or more of five things: (1) judicially clarify plausibility; (2) judicially utilize current Federal Rules that enable fair case management and screening of claims; (3) legislatively specify pleading standards for specific claims; (4) amend the Federal Rules to include claim-specific standards; or (5) amend the Federal Rules to include a uniform standard that somehow accommodates the discovery and case management complexities of modern civil litigation.²³⁴

The most commonly suggested reforms focus on going back to the *Conley* “notice pleading” standard, altering discovery or other structural litigation processes, or changing the rules for the factual sufficiency of a complaint in a different manner.²³⁵

But with respect to election disputes, it is not so much that either the *Conley* standard or the *Twombly/Iqbal* test does or does not work, but that they are both usually irrelevant for these kinds of cases. As discussed above, a complaint in an election law case tells the government defendant which electoral practice is being challenged.²³⁶ In that sense, it serves to put the government on “notice,” but it is a different kind of notice than that contemplated by *Conley* and notice pleading. The goal of traditional notice pleading is to tell the defendant the *facts* that might give rise to the defendant's liability.²³⁷ An election law pleading, by contrast, should tell the governmental defendant what *law* or election administration issue is purportedly illegal, and why.

²³⁴ Ryan Mize, Comment, *From Plausibility to Clarity: An Analysis of the Implications of Ashcroft v. Iqbal and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1248 (2010).

²³⁵ For a useful overview of various proposed reforms, see Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 PENN. ST. L. REV. 1191, 1219–39 (2010).

²³⁶ See *supra* Parts III.A–B.

²³⁷ See *supra* Part I.B.

Put differently, a complaint that says “On November 6, 2012, I was improperly denied my right to vote under the First and Fourteenth Amendments because I did not present identification at my polling location as required under state law”²³⁸ seems factually sufficient to put the government on notice regarding the allegedly wrongful conduct—refusing to allow the plaintiff to vote because of a lack of photo identification—but it does not give the government notice as to the legal contentions, which comprise the real substance of the controversy. It instead simply recounts a constitutional right that the defendant allegedly infringed, without any additional information. A “factual” notice pleading standard therefore does not give the defendant or the court enough information to determine if the plaintiff is actually asserting a plausible claim. This kind of complaint would need additional information for the plaintiff to establish how and why the government defendant infringed the voter’s First and Fourteenth Amendment rights. *Conley*’s notice pleading standard does not do enough to assist the resolution of election law cases.

Using a reformed *Twombly/Iqbal* standard regarding factual specificity also would not help. The main concern with *Twombly* and *Iqbal* is that plaintiffs often will not have enough information to allege a factually plausible claim unless they engage in some discovery, because only the defendant has the relevant factual information.²³⁹ This is particularly true because the paradigmatic *Twombly/Iqbal* case involves issues of the defendant’s state of mind.²⁴⁰ *Twombly* and *Iqbal* cut off the plaintiff’s ability to secure information from the defendant through discovery unless the plaintiff already alleges a factually plausible claim. Plaintiffs are thus stuck between needing to assert a factually plausible claim to reach discovery and needing discovery to be able to allege a factually plausible claim. The difference for election cases, however, is that most election litigation is not about the *exchange* of factual information.²⁴¹ It is instead about the legality of a particular election rule and how that rule affects certain kinds of voters or other political actors. Thus, facts are not irrelevant, but most often plaintiffs already have most of the facts they need to allege a violation, or they can commission a study or hire an expert to obtain that information. Altering the discovery rules for election law there-

²³⁸ Cf. FED. R. CIV. P. Form 11.

²³⁹ See Miller, *supra* note 195, at 43.

²⁴⁰ See Spencer, *Plausibility Pleading*, *supra* note 43, at 459.

²⁴¹ See *supra* Part III.A.

fore would not achieve the balance of streamlining the pleading process while still giving plaintiffs the ability to vindicate their rights.

What is missing from these solutions is the recognition that, even at the pleadings stage, an election law case is more about the legal implication of a particular election rule than the facts of what occurred. Plaintiffs typically do not need information from the government defendant that they cannot obtain without court-ordered discovery to assert a factually plausible case in the first pleading. Instead, plaintiffs often have all the factual information they need to bring a claim: the government has a law or electoral practice, and that practice allegedly infringes on the plaintiffs' rights in some way. At most, to allege a factually plausible claim the plaintiff will need to find his or her own experts or conduct a study on the effect of the law, but that does not require the government defendant to disclose information through court-ordered discovery. Indeed, most election law complaints should easily meet the *Twombly/Iqbal* factual plausibility standard. The real question at the pleadings stage, which courts now fail to consider explicitly because of *Twombly* and *Iqbal*, is whether the plaintiff has alleged a sufficient legal claim that the government's electoral action is unlawful.²⁴² This inquiry implicates the other part of Rule 12(b)(6), which asks whether the law supports the plaintiff's assertion of a legal wrong.²⁴³ It is here that the concept of legal plausibility becomes most useful.

IV. ELECTION LAW AND LEGAL PLAUSIBILITY

Although *Twombly* and *Iqbal* purport to apply to all civil litigation, the factual plausibility standard by itself does not mesh well with how most election cases proceed. Moreover, Congress has singled out election disputes for special procedures, demonstrating the need for quick resolution and clear rules in this area.²⁴⁴ It follows that the manner in which parties initiate election litigation also requires special attention and particularized guidelines that recognize the features of election law cases. Given the increased scrutiny on pleading standards for all civil cases in the wake of *Twombly* and *Iqbal*, it is time to consider the proper pleading rules for election cases.

This Part proposes a rule for election law pleading; using the lexicon from *Twombly* and *Iqbal*, I term it "legal plausibility." Put simply, legal plausibility requires more detailed pleading of the plaintiff's

²⁴² See *supra* Part II.

²⁴³ FED. R. CIV. P. 12(b)(6).

²⁴⁴ See Douglas, *Procedure of Election Law*, *supra* note 11, at 434.

legal theories. This approach borrows from and complements *Twombly* and *Iqbal*'s factual plausibility standard, but tweaks it to focus on the legal as opposed to the factual allegations. Instead of testing complaints solely to discern if they plead enough *facts* to show a plausible claim for relief, legal plausibility asks whether the complaint pleads the requisite *law* to demonstrate a plausible claim of an election wrong to that specific plaintiff. It requires a plaintiff to allege with sufficient specificity how an election practice will affect the plaintiff *unlawfully*. In that sense, a legally plausible claim will demonstrate both that the plaintiff has standing to bring the suit and that the operation of the election practice likely satisfies the elements of the plaintiff's cause of action—which is actually a mixed question of law and fact. Although a complaint for an election law case cannot omit all facts, factual allegations are less important than the legal assertions surrounding the operation of the law. This is because most election complaints should easily meet the standard for factual sufficiency.²⁴⁵ Legal plausibility is a useful supplement to notice pleading and factual plausibility because it ties more directly to the features of election litigation and the goals behind pleading election cases. Thus, an election complaint must satisfy both factual plausibility (which should be easy in most cases) and legal plausibility. Of course, legal plausibility could apply to other areas that share common characteristics and goals with election law, such as a primary focus on the law instead of the facts, the combination of pretrial resolution and lack of settlement, and the heightened need for both accuracy and timeliness with a corresponding lack of adequate post-litigation remedies. I use the setting of election law to develop and extrapolate how the standard would operate, and conclude with examples of the legal plausibility test at work for specific election disputes.

A. *Defining Legal Plausibility*

The Supreme Court in *Iqbal* explained that “[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”²⁴⁶ The legal plausibility standard for election law cases uses this invitation from the Court to allow “legal conclusions”—or more accurately, sufficiently detailed legal allegations—to serve as the framework of a complaint. But, going a step further, so long as the plaintiff can explain in the complaint how the election law at issue plausibly infringes on the rights of that particular

²⁴⁵ See *supra* Part III.A.2.

²⁴⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

plaintiff, the complaint should be sufficient, separate from whether there are detailed factual allegations. Legal plausibility acts as a counterpart to factual plausibility, giving courts the tools they need to determine if an election complaint is sufficient. As noted above, courts in election cases typically invoke *Twombly* and *Iqbal* in dismissing an election case, even though there are no other facts the plaintiff could plead and the real question is whether the plaintiff's claim is legally sufficient.²⁴⁷ Legal plausibility fills this gap by providing a test for courts to employ in construing an election complaint that turns on the legality of the election practice.

A legally plausible claim will have three main elements. First, it must set out what electoral practice is being challenged. This requirement of *law identification* is fairly straightforward: the plaintiff must merely identify what specific law or regulation is allegedly unlawful. Second, the complaint must explain how that law actually affects the plaintiff, or put another way, *law particularization*. In some ways, this is similar to a requirement that the plaintiff allege at the outset that he or she has standing to bring the case.²⁴⁸ Finally, and most importantly, the plaintiff must present the basis for the legal challenge, or *law application*, explaining how the law in operation satisfies a legal claim for relief. In essence, the plaintiff must *apply* the law to the challenged electoral practice using the elements of the cause of action. This prong recognizes the nature of election issues as presenting mixed questions of law and fact, with the emphasis on the legal analysis. If a plaintiff can allege plausibly that the application of the challenged rule will likely satisfy the legal elements of a claim, the complaint is legally sufficient. This section discusses each prong. It then concludes with a plea for courts to recognize legal plausibility but also suggests that Congress could pass a new statute defining the legal plausibility standard for election law cases, similar to what it has done for prisoner litigation through the PLRA.

1. *Law Identification*

The first element requires the plaintiff to identify the precise election practice he or she is challenging. This gives the government defendant notice of the basis of the suit. A plaintiff should be able to identify with specificity what election law or regulation is allegedly unlawful. This is necessary under *Twombly* and *Iqbal* to provide sufficient notice, and there is no reason not to retain this requirement for

²⁴⁷ See *supra* Part II.D (discussing *Laroque v. Holder*, 755 F. Supp. 2d 156 (D.D.C. 2010)).

²⁴⁸ See *Allen v. Wright*, 468 U.S. 737, 751 (1984).

legal plausibility. Election-related lawsuits involve an electoral law, regulation, or practice. A complaint that fails to identify with specificity what law or practice the court should review is patently insufficient to move beyond the pleadings stage. This is also a very easy requirement for a plaintiff to meet.

2. *Law Particularization*

The second element requires the plaintiff to demonstrate a particularized injury *to that plaintiff*. This is important because it ensures that the plaintiff is not challenging a law in the abstract but instead is tying his complaint to the actual operation of the law. Here the plaintiff must provide some facts to show how the law would impact that plaintiff, but the tenor of the plaintiff's factual development is different than in the *Twombly/Iqbal* context. As opposed to requiring the assertion of plausible facts regarding what happened (including the refutation of alternative explanations for the underlying facts or the pleading of the defendant's state of mind, as in *Twombly*),²⁴⁹ this prong asks the plaintiff merely to demonstrate that the election practice applies in some improper way to that plaintiff directly. The difference is in the focus of the plaintiff's assertions: instead of needing detailed facts about the underlying events, the plaintiff would present an argument that the application of the election practice affects that plaintiff's rights in some unlawful way. Law particularization requires the pleading of an individualized harm. This will help the court identify, as early as possible, precisely what alleged legal wrong is at issue. Unlike in the *Twombly/Iqbal* context, then, the plaintiff will either already have all of the facts he or she needs or the ability to obtain those facts independently (through studies, expert witnesses, etc.).

In essence, the plaintiff must assert, with specificity, the elements of standing in the complaint: that the plaintiff suffered (or will suffer) an actual or imminent injury, that the governmental practice is causing that injury, and that the court can redress the injury by striking down the operation of the law.²⁵⁰ Most importantly, this means that the plaintiff must allege specifically how the law is affecting that plaintiff. The plaintiff must demonstrate that he or she is suffering a "legally cognizable" injury.²⁵¹

²⁴⁹ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

²⁵⁰ See, e.g., *Allen*, 468 U.S. at 752.

²⁵¹ See *Bennett v. Spear*, 520 U.S. 154, 167 (1997).

For example, Justice O'Connor cogently explained why plaintiffs alleging unlawful racial gerrymandering usually must live in the district subject to the challenge:

Demonstrating the individualized harm our standing doctrine requires may not be easy in the racial gerrymandering context, as it will frequently be difficult to discern why a particular citizen was put in one district or another. Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action. Voters in such districts may suffer the special representational harms racial classifications can cause in the voting context. On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference. Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.²⁵²

Law particularization explicitly incorporates this standing requirement into the plaintiff's pleading burden.

Sometimes satisfying the standing requirement can be difficult in a case involving an upcoming election, particularly when the precise identity of who will suffer an injury is unknown until the election actually occurs and the voter is denied the ability to vote.²⁵³ But the Court has granted standing to plaintiffs who assert these kinds of "probabilistic harms," "framing them . . . as attributable to individual plaintiffs."²⁵⁴ Asserting a probabilistic harm is tantamount to alleging that the law presents a heightened risk of impacting that person specifically.²⁵⁵ Similarly, so long as a plaintiff can identify how the law is likely to affect that plaintiff by articulating a legally cognizable injury-in-fact, the plaintiff will meet the law particularization prong. Standing law—asserted with particularity—serves as a cogent proxy for satisfying this prong of legal plausibility. Moreover, because plaintiffs already must meet the standing requirements, it makes sense to recog-

²⁵² *United States v. Hays*, 515 U.S. 737, 744–45 (1995) (citations omitted).

²⁵³ *See* Zipkin, *supra* note 179, at 203.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 206.

nize explicitly the plaintiff's burden in any pleading regime that is focused on the plaintiff's legal assertions.

This requirement recognizes what courts already do in their merits decisions in most election law cases, albeit spelling it out explicitly and requiring it earlier in the process. The Court has increasingly rejected facial challenges to election laws, instead requiring plaintiffs to demonstrate how the law actually works in practice as applied to that plaintiff.²⁵⁶ That is, on the merits plaintiffs have generally lost when they have brought facial challenges to laws involving election administration.²⁵⁷ Instead, the Court has left the door open to as-applied challenges, encouraging piecemeal litigation but refusing to use the judiciary to mandate wholesale changes in how states administer elections.²⁵⁸ These decisions typically occur at the summary judgment stage. For example, the Court in *Crawford v. Marion County Election Board*²⁵⁹ rejected a facial challenge to Indiana's voter identification law in part because none of the plaintiffs had sufficiently asserted that the law would affect them directly.²⁶⁰ Under legal plausibility, the district court could have granted a motion to dismiss, signaling that the proper plaintiff would be someone who could demonstrate that the law would actually infringe upon his or her right to vote. The requirement of law particularization incorporates current practice in election law, in which a plaintiff must allege that the law in question is invalid as applied to that plaintiff.²⁶¹ But it improves judicial resolution because it explicitly requires this showing from the outset of the litigation by placing the burden on a plaintiff to identify how the law is actually injuring (or is likely to injure) that plaintiff.

Law particularization poses few practical hurdles for a potential plaintiff because the plaintiff has all of the information he or she needs to invoke his or her own standing. This prong simply requires plaintiffs to assert their own standing with particularity and from the outset. Additionally, it addresses the need for courts to narrow cases only to those that might have substantive merit as quickly as possi-

²⁵⁶ See Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635 (2009) [hereinafter Douglas, *Significance of the Shift*].

²⁵⁷ *Id.* at 637–38. The Court, however, has been more sympathetic to striking down a campaign finance regulation in its entirety. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010) (rejecting as-applied challenges and striking down a portion of the Bipartisan Campaign Reform Act on its face). *But see* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (striking down a provision of the Voting Rights Act on its face).

²⁵⁸ Douglas, *Significance of the Shift*, *supra* note 256, at 639.

²⁵⁹ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

²⁶⁰ *Id.* at 187.

²⁶¹ See *id.* at 200.

ble—helping to achieve the necessary timeliness that election litigation requires.

3. *Law Application*

Once the plaintiff has identified the electoral practice in question and demonstrated how the law produces a particularized effect on that plaintiff, the final step is to show that the law, as applied, can plausibly meet the elements of the alleged cause of action. That is, the plaintiff should discuss its legal theories regarding how the election practice is unlawful by establishing how the plaintiff will likely meet the elements of its claim. A legally plausible complaint is one that couches its arguments as a mixed question of law and fact, or, borrowing from Professor Henry Monaghan, “law application.”²⁶² Professor Monaghan explains that law application “is residual in character. It involves relating the legal standard of conduct to the facts established by the evidence.”²⁶³ Given the unique features of election litigation, it makes sense to require plaintiffs to engage in this law application from the outset and explain how the operation of the law is legally problematic. Once the plaintiff satisfies the law identification and law particularization prongs, law application would allow a plaintiff to support his or her complaint by identifying each element of the plaintiff’s claim and asserting how the government’s use of the election practice likely meets that element.

For example, a plaintiff might want to challenge a state’s requirement that voters show identification at the polls as unconstitutional. Once the plaintiff identifies the voter ID law in question and shows how that law affects the plaintiff (because, for example, the voter plaintiff is unable to obtain an ID and therefore may be ineligible to vote), this final step requires the plaintiff to apply the legal standard for unconstitutionality to the law in question. It is well established that laws that infringe the fundamental right to vote are subject to the “severe burden” test.²⁶⁴ If the burden on the voter is severe, then the law must survive strict scrutiny review—that is, the government must demonstrate that the law is narrowly tailored to achieve a compelling state interest.²⁶⁵ A complaint challenging a voter ID law is legally sufficient if it demonstrates that, as applied to that plaintiff, it is likely

²⁶² Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 236 (1985).

²⁶³ *Id.*

²⁶⁴ See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); see also Douglas, *Is the Right to Vote Really Fundamental?*, *supra* note 132.

²⁶⁵ *Burdick*, 504 U.S. at 434.

that the law imposes a severe burden and that there is no obvious narrowly tailored compelling governmental interest. Put another way, for this third prong the plaintiff must demonstrate *why* the law presents a severe burden on voters who cannot obtain IDs and why the government is not justified in imposing this requirement. Importantly, the plaintiff does not have to *prove* legal liability at this stage; rather, the pleading must simply show, to a sufficient level, why the government's electoral practice is unlawful.²⁶⁶ A plaintiff can meet this prong by discussing in its complaint the elements it must ultimately satisfy to win its case.

The law application prong of legal plausibility requires a plaintiff to offer allegations that are directly tied to what the plaintiff ultimately will have to prove to prevail. This is different from both *Conley* and *Twombly/Iqbal*. *Conley* simply required plaintiffs to plead sufficient facts to put the defendant on notice as to what the case was about.²⁶⁷ By “retiring” the “no set of facts language” of *Conley*, the Court now expects complaints with more factual information about the underlying events that give rise to the claim.²⁶⁸ Pleading more facts, however, is separate from the plaintiff's burden of asserting a legally sufficient claim—and plaintiffs in election cases should be able to meet the factual plausibility standard most of the time anyways. Law application focuses on the legal sufficiency of the complaint, requiring the plaintiff to allege that the way the law operates is unlawful based on the elements of the cause of action. If the plaintiff can make a plausible argument that ultimately it will be able to satisfy each element of its claim, then the case should move forward. On the other hand, if the plaintiff cannot even make a plausible legal argument

²⁶⁶ This requirement is similar to the pleading burden the common law imposes on defamation claimants to make an “innuendo,” which is a reasonable allegation that the statement it is challenging is defamatory. See GEORGE C. CHRISTIE & JOSEPH SANDERS, *ADVANCED TORTS: CASES AND MATERIALS* 495–96 (2d ed. 2012). That is, defamation plaintiffs must allege in their complaint why they believe the statement meets the legal element of being defamatory. *Id.* “In this regard, it is a question for the court, in the first instance, whether reasonable people could so construe the challenged statement.” *Id.* Only after the plaintiff meets this initial burden may a jury answer the question of whether a reasonable person would have actually construed the statement as defamatory. *Id.*

In the same sense, under legal plausibility for election cases, it is for the court in the first instance to pass upon whether the plaintiff can make a plausible claim of legal invalidity under the facts as stated. If the plaintiff meets that initial burden, the claim can proceed for further development and an ultimate resolution on the mixed question of law and fact.

²⁶⁷ See *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

²⁶⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

under one of the elements, there is no point in allowing the case to proceed.

The three components of legal plausibility are not new. In some ways they are simply reorganized components of what a plaintiff always must show. But the emphasis on legal arguments, and the mixed questions of law and fact that are at the crux of election disputes, is important. By recognizing the significance of the *legal* sufficiency question at the outset, courts will be better equipped to handle election cases more quickly and without the doctrinal incongruence that currently exists.

Legal plausibility allows courts to dismiss election law claims that have no chance of success. It also gives plaintiffs a better roadmap to draft more refined complaints. This ensures stability in the election process, reduces the amount of unnecessary election litigation, and allows meritorious claims to receive robust judicial treatment. Although the concept of “plausibility” is similar to the rule from *Twombly* and *Iqbal*, the standard is different because it focuses on the development of the legal claim as opposed to the factual sufficiency of the plaintiff’s allegations. I use the term “plausibility” to align the doctrine with current Supreme Court jurisprudence, but perhaps it is better to think of it as simply a heightened focus on legal sufficiency and the application of the facts to the law in question to tie election pleading to the main features of most election litigation.

4. *Implementation of Legal Plausibility*

Given the analog of factual plausibility to legal plausibility, the best course is for courts to embrace legal plausibility within the preexisting *Twombly/Iqbal* framework. Courts could recognize that most election complaints easily satisfy *Twombly* and *Iqbal* because that standard is most relevant when a case turns on the facts, and that legal plausibility is a separate requirement that makes more sense when the case focuses on the legal implication of a government-imposed rule. It answers the legal sufficiency part of the Rule 12(b)(6) analysis—which is often the main crux of an election case. Yet courts currently have no standard by which to test a complaint’s legal sufficiency. Legal plausibility is flexible enough to coincide with *Twombly* and *Iqbal*’s factual plausibility standard because it addresses a different question for a different kind of case. Accordingly, courts should adopt this new pleading rule for cases that are not about resolving factual disputes but instead are more “legal” in nature. Courts could start out by limiting the standard to election law cases, but, as noted earlier, legal

plausibility could also apply to other substantive areas that share the same traits as election litigation.

Barring judicial development of legal plausibility, however, statutory action is possible. Congress has previously enacted specific procedural reforms for certain areas, including election law,²⁶⁹ so it is not outside of Congress's realm to adopt legal plausibility as part of a new pleading regime. In promulgating this standard, Congress can look to the Prisoner Litigation Reform Act ("PLRA") as an analog of a statute that focuses on streamlining litigation and quick decisionmaking.²⁷⁰ Under the PLRA, courts must take an initial look, *sua sponte*, at any complaints from prisoners against a governmental entity or officer.²⁷¹ The purpose of this screening is to weed out frivolous cases or those that fail to state a legally valid claim²⁷² "as soon as practicable."²⁷³ The court then applies the normal Rule 12(b)(6) standard to the complaint—without waiting for a motion to dismiss from the defendant—and must dismiss complaints that fail to comply with proper pleading standards.²⁷⁴ A prisoner's complaint is frivolous if it "lacks an arguable basis either in law or in fact."²⁷⁵ For example, a court will dismiss a prisoner's case if "it is based upon an indisputably meritless legal theory."²⁷⁶

Congress's goal in passing the PLRA was "primarily to curtail claims brought by prisoners" because courts routinely dismissed these claims as frivolous anyway.²⁷⁷ It thus serves as a time- and resource-saving mechanism to weed out meritless cases, thereby giving courts

²⁶⁹ *See supra* note 174.

²⁷⁰ 28 U.S.C. § 1915A(a) (2006). Similarly, Congress has reformed pleading rules for other substantive areas, such as heightening the pleading standard for cases involving securities fraud. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

²⁷¹ 28 U.S.C. § 1915A(a) ("The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.").

²⁷² *Id.* § 1915A(b) ("On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted . . .").

²⁷³ *Sudler v. Danberg*, 635 F. Supp. 2d 356, 358 (D. Del. 2009).

²⁷⁴ *Id.*

²⁷⁵ *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (interpreting the predecessor of the PLRA).

²⁷⁶ *Williams v. Hopkins*, 983 F. Supp. 891, 894 (D. Neb. 1997) (internal quotation marks and citation omitted).

²⁷⁷ *Santana v. United States*, 98 F.3d 752, 755 (3d Cir. 1996).

the ability to spend more time on those cases that do have merit.²⁷⁸ One of the reasons Congress singled out prisoner litigation for special treatment at the complaint stage was because “[p]rison litigation differs substantively from the types of issues and parties typically heard in civil court,”²⁷⁹ especially given that, much like in election law, the government is always a defendant in these cases.

In the same vein, courts can review election law complaints *sua sponte* to determine if they are legally sufficient because election litigation is different both substantively and procedurally from typical civil cases.²⁸⁰ Unlike in the prisoner litigation setting, however, the goal is not necessarily to reduce the number of cases being filed. Instead, the purpose is to speed up the process and ensure that those cases that are meritorious are not lost in the sea of cases that have no legal basis, which is particularly important in the time-sensitive period before an election. It also gives judges and litigants a clear understanding of what exactly an election plaintiff should plead to move the case forward. It fills a hole in current jurisprudence by providing context and guidance for determining whether an election complaint is legally sufficient and fixes the incongruence of applying *Twombly* and *Iqbal* to election cases.

Accordingly, assuming the judiciary will not adopt legal plausibility on its own as a counterpart to factual plausibility, Congress should pass a new statute to set out clear guidelines on pleading an election law case. As explained earlier, Congress already has singled out election cases as requiring unique procedural mechanisms,²⁸¹ and election law cases differ from regular civil litigation in several respects. The statute should be limited to those cases against a government official or entity that implicate the running or administration of an election. Further, although the PLRA mandates that district judges dismiss poorly pleaded complaints without the defendant first filing a motion to dismiss, the election law pleading statute should make this discretionary: a district court may dismiss an election law complaint *sua sponte* (with leave to amend), but it also could allow a defendant to file a motion to dismiss if it will assist the court in construing the complaint and if the time and context so allow. This is because election law cases are often quite complicated, so Congress should not tie the

²⁷⁸ See Caitlin Overland, Note, *Permissive Joinder Under the Prison Litigation Reform Act: More than Just a Procedural Tool*, 15 LEWIS & CLARK L. REV. 289, 296 (2011).

²⁷⁹ *Id.* at 300.

²⁸⁰ See *supra* Part III.A.

²⁸¹ See *supra* note 174.

courts' hands in handling a complaint in the way that makes the most sense to the court. Instead, the election law pleading statute will give courts a workable tool—which is missing from current pleading doctrine—to answer the actual question presented in most election-related motions to dismiss: whether the plaintiff's claim has legal merit.

B. Why Legal Plausibility Makes Sense for Election Law

1. Benefits of the Standard

Legal plausibility provides an interpretative lens through which to answer the legal sufficiency part of a Rule 12(b)(6) motion. It recognizes that election cases require a different kind of pleading than other civil cases. The standard has at least four main virtues to recommend it.

First, the resolution of legal questions is the most important aspect of election cases, so it makes sense in the election setting for courts to engage in this activity as soon as they can.²⁸² It is less common for factual findings alone to drive the outcome like they might in a typical tort or contract dispute, because the mixed question of law and fact—that is, the legality of the election practice itself—is at the crux of the issue.²⁸³ Most often the court will rule that the election practice is either lawful or unlawful through a procedural mechanism such as a motion to dismiss, preliminary or permanent injunction, or summary judgment.²⁸⁴ It follows that the plaintiff should bear the burden of asserting its legal contentions as early as possible in the litigation so that the court may allow meritorious claims to move forward and dismiss cases in which the plaintiff's argument is not even legally plausible. Improving the ability of courts to recognize which election cases have legal merit at the earliest instance is perhaps legal plausibility's greatest virtue, as it allows courts to devote their resources to the appropriate election cases. Courts must be able to decide election disputes quickly, particularly when an election is imminent. Many plaintiffs may already be making their legal arguments in their complaint. Legal plausibility allows courts to recognize this explicitly, supplementing the way in which courts construe motions to dismiss, speeding

²⁸² See Douglas, *Procedure of Election Law*, *supra* note 11, at 436.

²⁸³ See, e.g., *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 891, 893 (9th Cir. 2002) (finding employment contract's arbitration clause unconscionable on remand from the Supreme Court).

²⁸⁴ See Zipkin, *supra* note 179, at 219–20 (noting that election claims often arise through a request for preliminary injunction); see, e.g., *Obama for America v. Husted*, 888 F. Supp. 2d 897 (S.D. Ohio 2012) (granting preliminary injunction to stop Ohio from eliminating early voting for nonmilitary voters on the last weekend before Election Day).

up both the dismissal of nonplausible claims and the legal resolution of ostensibly meritorious lawsuits.

Second, it makes sense to recognize that election law pleadings should have a focus beyond notice giving. There is little need for robust notice of what the lawsuit is challenging in an election law case given that a governmental entity is almost always the defendant.²⁸⁵ When the plaintiff alleges the invalidity of a particular election regulation, everyone knows what law is under review and, accordingly, the main facts underlying the case. What the government may not know, however, are the plaintiff's legal theories. Moreover, requiring solely a simple factual allegation on how an election law works might encourage litigation because it presents a fairly low threshold for a plaintiff to satisfy; although many courts are dismissing election cases supposedly under the factual plausibility standard, in reality these cases are factually sufficient but likely legally flawed.²⁸⁶ The factual plausibility of most election law complaints would suggest that courts should be denying motions to dismiss under the current pleading regime. Courts instead are pigeonholing what amounts to a decision that the plaintiff's case lacks legal sufficiency through *Twombly* and *Iqbal*'s standard. Pleading rules for election law should reflect what is actually going on, requiring plaintiffs to present the main legal elements of their case, to a plausible level, in the first pleading.

Third, legal plausibility could provide a useful framework for courts construing a request for a preliminary injunction. Courts resolve many election cases through preliminary injunctions, not a full merits trial, especially when the issues arise soon before an election is to take place.²⁸⁷ But beyond considering generally whether the plaintiff might ultimately win, courts exhibit confusion on the proper standard by which to examine a preliminary injunction motion.²⁸⁸ Courts deciding whether to grant a preliminary injunction could look to legal plausibility as a guide to the plaintiff's burden in demonstrating "a

²⁸⁵ See *supra* Part III.A.1.

²⁸⁶ See *supra* Part III.A.

²⁸⁷ See, e.g., *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1157 (N.D. Fla. 2012) (granting preliminary injunction in part to prevent the implementation of Florida law involving voter registration); *Tomei v. Finley*, 512 F. Supp. 695, 699 (N.D. Ill. 1981) (granting a preliminary injunction prior to an election as a result of a campaigning dispute).

²⁸⁸ See generally Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1537–46 (2011) (explaining the continued confusion among circuit courts regarding the correct standard for considering a motion for a preliminary injunction).

strong likelihood of prevailing on the merits.”²⁸⁹ Preliminary injunctions may present their own unique considerations, but legal plausibility is at least a cogent starting place for providing clarity in that procedural mechanism. Indeed, the focus of legal plausibility—on whether the plaintiff has a plausible argument from the outset that the election law in question violates some constitutional provision or statute—is similar to the preliminary injunction inquiry regarding whether the plaintiff has a likelihood of success on the merits.²⁹⁰

Finally, legal plausibility is neutral as to the litigants, which is a significant improvement over the existing standards. Legal plausibility is not plaintiff friendly or defendant friendly in the way we might consider *Conley* to be pro-plaintiff and *Twombly* and *Iqbal* to be pro-defendant.²⁹¹ Because election litigation does not rely heavily on the exchange of information through a formalized discovery process, there is little worry that a rule that requires a particularized *legal* showing will harm plaintiffs who otherwise would have meritorious cases. One of the biggest criticisms of *Twombly* and *Iqbal* is that they cut off the ability of plaintiffs to learn enough information through discovery to make factually plausible allegations.²⁹² But this concern is largely absent in election litigation: plaintiffs typically already have enough information about the operation of the law or can hire their own experts or conduct their own studies to obtain this information. None of this must occur through a formalized discovery process that requires the government defendant to provide information. And political parties or advocacy groups are well positioned to incur any plaintiff-driven costs. To be sure, the government will have some information that will be useful to the plaintiff in making his or her case as the litigation moves forward, particularly if the plaintiff’s claim involves proving the legislature’s intent. But it is not essential for the plaintiff to have this information at the outset to make a plausible legal claim that the challenged election practice is unlawful.

²⁸⁹ See, e.g., *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008); *League of Women Voters*, 863 F. Supp. 2d at 1167.

²⁹⁰ The precise scope of how legal plausibility would operate in the context of a preliminary injunction request is beyond the scope of this Article because preliminary injunctions have their own unique considerations. See generally Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 389–93 (2005) (surveying the traditional theories underlying preliminary injunctions and offering a new approach based on economic efficiency).

²⁹¹ See Miller, *supra* note 195, at 14–15.

²⁹² *Id.* at 16.

Legal plausibility is different from what the Court required in *Twombly* and *Iqbal*. One commentator suggests that, as between factual and legal plausibility, the Court settled on the latter in these cases:

Under a factual plausibility test, courts would simply ask whether the conduct alleged was likely to have occurred at all. For example, a court testing *Twombly*'s complaint for factual plausibility would ask whether an antitrust conspiracy actually existed. By contrast, courts reviewing for legal plausibility would inquire whether the facts alleged in the complaint describe illegal conduct. Thus, a court reviewing *Twombly*'s complaint would determine if the alleged conduct amounted to an illegal agreement. Ultimately, the Court settled on legal plausibility.²⁹³

Legal plausibility in that context, however, focuses on the *factual sufficiency* of the complaint. In essence, the Court was requiring the pleading of enough *facts* to demonstrate the potential for legal liability.²⁹⁴ By contrast, legal plausibility as construed for election cases requires the pleading of enough *law*, separate from the specificity of factual allegations, as applied to the particular plaintiff. It is factual plausibility captured by a rule of law. It goes to the part of Rule 12(b)(6) that asks if the plaintiff has a valid cause of action even if the plaintiff's asserted facts are not particularly detailed. As noted above, a complaint cannot omit all facts, as the plaintiff must demonstrate how the law affects her particularly. But for legal plausibility, the plaintiff can simply plead that the application of the election law satisfies each element of the claim, focusing on the legal theories as opposed to the factual development of the record. It requires pleading the mixed question of law and fact from the outset.

This formulation is not wholly outside of *Twombly* and *Iqbal*'s prescriptions. As Professor Steinman suggests, *Twombly* and *Iqbal* merely require that

[a] plaintiff's complaint . . . provide an adequate transactional narrative, that is, an identification of the real-world acts or events underlying the plaintiff's claim. When an allegation fails to concretely identify what is alleged to have hap-

²⁹³ Kilaru, *supra* note 117, at 910.

²⁹⁴ See Miller, *supra* note 195, at 19 (explaining that *Twombly* and *Iqbal* "impos[ed] a more demanding standard that requires a greater factual foundation than previously was required or originally intended").

pened, that allegation is conclusory and need not be accepted as true at the pleadings phase.²⁹⁵

Under this “plain pleading” regime, a plaintiff may couch the complaint’s “crucial elements” in legal conclusions, so long as the plaintiff plainly identifies the acts and events that give rise to the plaintiff’s claim.²⁹⁶ Similarly, legal plausibility for election cases requires the plaintiff to state the manner in which the challenged election regulation affects the plaintiff’s rights, as seen through the elements of the cause of action. Put in Professor Steinman’s taxonomy, legal plausibility requires a “transactional narrative” of the “real-world” impact of the electoral practice.²⁹⁷ The difference, however, is that the sufficiency of the complaint does not rest on whether the plaintiff properly pleaded “what is alleged to have happened;” a legally plausible election law claim need not have detailed factual evidentiary support. Instead, the key inquiry is whether the plaintiff plausibly explained why the application of the election practice to that plaintiff is unlawful.²⁹⁸ Put differently, the question is whether the plaintiff’s case is legally—as opposed to just factually—supportable.

2. *Potential Drawbacks*

There are, of course, objections to legal plausibility. For one, the Supreme Court rejected a rule that focuses on legal submissions over factual allegations. As one commentator states in explaining the Court’s decision in *Twombly*,

Nor can the plausibility requirement be viewed as testing the plausibility of a legal theory. A judge’s job on a motion to dismiss is to determine whether the legal theory or theories supporting a complaint are correct, not whether they are merely plausible. A motion to dismiss would serve remarkably little purpose if the legal basis for the complaint only had to be plausible rather than correct.²⁹⁹

But requiring a plaintiff to demonstrate how the election rule plausibly infringes on that plaintiff’s rights is entirely consistent with the tenor of most election litigation: to determine if a particular law is valid. In other words, requiring legal plausibility in a case that is

²⁹⁵ Steinman, *supra* note 60, at 1334.

²⁹⁶ *Id.* at 1339–40.

²⁹⁷ *See id.*

²⁹⁸ *Id.* at 1346.

²⁹⁹ Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 483 (2010).

mostly about the operation of the law parallels requiring factual plausibility in a case that is mostly about the facts, such as a typical tort case. In a tort case, the plaintiff is first charged with demonstrating that the allegedly tortious activity actually took place and, only after establishing what happened, that the conduct amounts to a tort. In that context it might make sense to require the plaintiff to allege enough facts to suggest a plausible entitlement to relief in the first pleading. In the same vein, in an election case the plaintiff ultimately must demonstrate that the operation of an election law is legally invalid. The plaintiff should therefore present enough legal argument in a complaint to show at least plausibly that the election practice is unlawful with respect to that plaintiff.

Another concern is that legal plausibility might obscure the distinction between a motion to dismiss under Rule 12(b)(6) and a summary judgment motion under Rule 56.³⁰⁰ If all that matters in the complaint is the sufficiency of the legal allegations, then granting a motion to dismiss for failure to state a claim looks like a substantive ruling that “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”³⁰¹ Put differently, how is legal plausibility any different from a plaintiff’s legal memorandum in response to a defendant’s motion to dismiss?

There are four responses. First, legal plausibility comports with a Rule 12(b)(6) motion alleging that the law does not recognize the plaintiff’s asserted cause of action. *Twombly* and *Iqbal* shifted the discussion of a complaint’s sufficiency too far toward factual plausibility, misleading lower courts into forgetting to analyze this other component of a motion to dismiss. There is still a role for lower courts to test the legal sufficiency of a complaint, which is even more important in cases involving election litigation because they are most often only about the legal validity of the election practice in dispute.³⁰² Legal plausibility provides a standard for courts to decide legal sufficiency.

Second, election law cases themselves collapse the difference between legal and factual allegations because unlike in many other kinds of disputes, legal allegations typically drive the decision. As Professor Miller explains, the concern with “morphing” a summary judgment motion into a motion to dismiss is that “this effectively denies any

³⁰⁰ See Miller, *supra* note 195, at 18, 28, 51–52; see also Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 18 (2010) (“The motion to dismiss is the new summary judgment motion.”).

³⁰¹ FED. R. CIV. P. 56(c).

³⁰² See *supra* Part III.A.

hope of investigating and properly developing [the plaintiffs'] claims, and leads to judicial decisionmaking without a meaningful record."³⁰³ But the ultimate resolution in an election law case usually does not depend on facts that the plaintiff could not glean absent court-ordered discovery. Instead, the case is most often about the impact of the law on the plaintiff and whether that effect is itself unlawful. This inquiry is factual in nature, to be sure, but it is unlike cases that rely on facts that a plaintiff uncovers during discovery in regular civil litigation regarding what occurred. Thus, there should be little concern with requiring plaintiffs to satisfy a burden to plead legal arguments at the pleadings stage when the final resolution is dependent on the plaintiff's ability to demonstrate the election practice's invalid impact as a question of law.

Further, legal plausibility is not simply a return to the days of code pleading and demurrer, which "focused exclusively on the legal sufficiency of the plaintiff's statement of each substantive element of a cause of action, and did not involve a judicial assessment of the case's facts or actual merits."³⁰⁴ Including the law particularization and law application prongs avoids the rigid pre-Federal Rules code pleading standards. This is because the law particularization and law application prongs require the plaintiff not simply to recite the elements of the cause of action but to *apply* the facts of the plaintiff's circumstance to the challenged law. The plaintiff must explain how the facts operate within the legal framework of the case. The plaintiff's assertions might be nonfactual in nature, but they also cannot simply contain a list of the elements of the cause of action. In fact, legal plausibility recognizes that the distinction between factual allegations and legal conclusions is often murky at best,³⁰⁵ instead requiring the plaintiff to plead the requisite mixed question of law and fact that will go to the crux of the dispute.

Third, even legal plausibility requires the pleading of some facts with respect to the law particularization and law application prongs, meaning that there could well be a factual dispute regarding the way in which the law impacts the plaintiff. Thus, there would still be a role for a 12(b)(6) motion regarding factual sufficiency that is separate from a summary judgment motion, especially if the plaintiff insufficiently alleges the actual effects of the law. It is the plaintiff's burden

³⁰³ Miller, *supra* note 195, at 51.

³⁰⁴ *See id.* at 22.

³⁰⁵ *See id.* at 25–26 (suggesting that based on the lower court case law after *Iqbal*, "like the Emperor in the well-known fable, the fact-conclusion dichotomy has no clothes").

to provide facts regarding the operation of the electoral scheme. The difference is that the plaintiff in an election case almost always has all of those facts at his or her disposal. Factual plausibility should be easy for most election plaintiffs to satisfy. Legal plausibility therefore works in tandem with factual plausibility.

Finally, to the extent that a legally plausible complaint is similar to a plaintiff's response to a motion to dismiss, it is still beneficial to adopt a standard that speeds up the resolution process. Election cases are unique in that they require timely decisions so that governmental entities can administer elections using proper legal rules and individuals do not suffer an irreversible violation of their right to vote.³⁰⁶ Any streamlining of a court's analysis is beneficial in achieving this goal. Legal plausibility makes it clear from the outset what the plaintiff must allege, bringing the legal issues to the forefront earlier in the process.³⁰⁷ It also permits the court to skip the motion to dismiss stage altogether because it can evaluate the complaint *sua sponte* if timeliness is especially important. The approach allows courts to review all election law complaints when filed and dismiss those that are insufficient, much like courts already do under the PLRA.³⁰⁸ In this way, legal plausibility can help to weed out frivolous claims because plaintiffs will know precisely what they must include in their complaints, and defendants will have an easier time pointing out which aspects of a plaintiff's complaint are legally insufficient. This will free up courts to decide those cases that actually have a plausible chance of success.

Ultimately, legal plausibility addresses the incongruence between the current pleading regime and the reality of election cases. It is possible that the adoption of this standard would not change the eventual substantive outcome of many disputes. But that is not a reason to reject the approach. Legal plausibility aligns the Supreme Court's focus on pleading rules with how election cases actually proceed. Currently, lower courts in election cases either ignore, pay lip service to, or misconstrue the Court's new pleading standards. As discussed above, it makes little sense to stop at factual plausibility in election cases because, if applied properly, it tells us very little about whether the plaintiff has a valid case. Legal plausibility streamlines the litigation process and clarifies for litigants in cases that turn on the law how they should write a complaint in a way that is consistent with today's federal pleading goals.

³⁰⁶ See Douglas, *Procedure of Election Law*, *supra* note 11, at 455.

³⁰⁷ See *supra* Part IV.A.

³⁰⁸ See *supra* Part IV.A.4.

C. *Legal Plausibility at Work*

Recall that election litigation typically involves one of four substantive issues: redistricting, ballot access, campaign practices/campaign finance, and election administration.³⁰⁹ Each kind of election law case would benefit from legal plausibility.

First, consider a lawsuit involving new legislative lines, typically redrawn after a decennial census. Litigants might challenge the new map under section 2 of the Voting Rights Act for racial discrimination or vote dilution.³¹⁰ Under legal plausibility, the plaintiff must provide more than a conclusory statement that “the map unlawfully discriminates.” Instead, the plaintiff will have to apply the facts of the map to the well-known standards under section 2 to demonstrate a legally plausible claim.

In doing so, the plaintiff must establish the three prongs of legal plausibility in the context of the elements of a section 2 claim.³¹¹ First, under law identification, the plaintiff would have to identify which specific districts allegedly violate the Voting Rights Act. This ensures that the plaintiff tailors his or her complaint specifically to the portion of the map that is allegedly diluting minority voting strength. This requirement weeds out abstract, general challenges to maps as a whole.³¹² Second, under law particularization, the plaintiff would have to demonstrate that the map actually affects that specific voter. A plaintiff should not be allowed to move forward unless there is a plausible allegation that the map will actually dilute the voting strength of that particular voter or group of voters in the challenged districts. Typically, this requires the plaintiffs to live in the challenged district.³¹³ Finally, under law application, the plaintiff would have to use the well-established doctrine for section 2 violations to make a plausible claim that the specific districts under review violate the law. The plaintiff would have to show, to a plausible level, (1) that the minority group is sufficiently large and geographically compact to constitute a single-member district, (2) that the minority group is politically cohesive, and (3) that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority’s preferred candidates.³¹⁴ Again follow-

³⁰⁹ See *supra* Part III.A.

³¹⁰ See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 409 (2006).

³¹¹ See *supra* Part IV.A.1–3.

³¹² Of course, a plaintiff might challenge every district, thereby de facto challenging the entire map. See, e.g., *Ariz. Indep. Redistricting Comm’n v. Fields*, 75 P.3d 1088, 1093 (Ariz. Ct. App. 2003).

³¹³ *United States v. Hays*, 515 U.S. 737, 744–45 (1995).

³¹⁴ *Thornburg v. Gingles* 478 U.S. 30, 50–51 (1986).

ing the plaintiff's ultimate burden in a section 2 case, he or she would also have to allege that the totality of the circumstances plausibly suggests the inability of minority voters to participate in the political process and elect representatives of their choice.³¹⁵ The plaintiff could meet the legal plausibility threshold for these elements through his or her own studies or experts.

This regime might require plaintiffs to present more in a complaint than under *Conley* or *Twombly* and *Iqbal*, but it is the kind of information that the plaintiff already has (or can obtain fairly easily),³¹⁶ and it is the type of data that is crucial to determine whether the court should use its limited resources in allowing the case to move forward. Legal plausibility achieves the pleading goals of providing notice to the government defendant, opening the courthouse door to meritorious claims, and weeding out frivolous lawsuits. It takes what the plaintiff ultimately will have to prove to win the case and forces the plaintiff to present a sufficient amount of that information at the beginning of the litigation.

Courts construing partisan gerrymandering claims already use a form of legal plausibility because plaintiffs must provide, from the outset, a judicially manageable standard to prove improper partisan gerrymandering. The Supreme Court has indicated that partisan gerrymandering claims might be justiciable, but it has not coalesced around an applicable standard.³¹⁷ As an Illinois federal court put it, "political gerrymandering claims remain justiciable in principle but are currently 'unsolvable' based on the absence of any workable standard for addressing them."³¹⁸ A plaintiff's burden, under legal plausibility, is to provide a manageable standard for partisan gerrymandering and then to apply it to the specific facts of the districting in dispute. As one court explained:

In their Second Amended Complaint, the Plaintiffs have alleged a broad array of facts that, if true, plausibly suggest that the redistricting plan was enacted in large part to give Democrats a partisan advantage. But the challenge is to explain how these facts fit together to violate an administrable

³¹⁵ *Johnson v. DeGrandy*, 512 U.S. 997, 1007 (1994).

³¹⁶ *See supra* Part III.A.2.

³¹⁷ *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

³¹⁸ *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5868225, at *2 (N.D. Ill. Nov. 22, 2011).

and non-arbitrary standard for governing political gerrymandering claims *generally*.³¹⁹

This is just another way of saying that, even in the complaint, the plaintiff must make a plausible argument for how the law applies to the facts at hand or suffer dismissal. The problem, according to this court, was that the plaintiff's proposed standard was not judicially workable.³²⁰

Legal plausibility is flexible enough to allow a plaintiff to make an argument to expand or reinterpret a particular application of a law given the factual circumstances of that case. So long as the plaintiff has met the three requirements of legal plausibility, the claim should move forward. For example, in *Metts v. Murphy*,³²¹ the plaintiffs alleged that reducing the African-American population in a district from twenty-six percent to twenty-one percent violated section 2 of the Voting Rights Act.³²² This case arose a few years before the Supreme Court determined that section 2 requires plaintiffs to show that minorities constitute an actual majority in a district, excluding crossover votes from the white majority.³²³ Given this ambiguity at the time, the court of appeals reversed the district court's decision to grant the defendant's motion to dismiss.³²⁴ The appellate court noted that "[t]he burden of inquiry is on the plaintiffs—they are the ones challenging the redistricting plan—but in this case they are entitled (within ordinary limits) to develop the evidence that they think might help them."³²⁵ In essence, the court was saying that there was a *legally plausible* argument that the plaintiffs could make out a section 2 claim, even if it required a novel argument under the law.³²⁶ As the court explained:

It is no accident that most cases under section 2 have been decided on summary judgment or after a verdict, and not on a motion to dismiss. This caution is especially apt where, as here, we are dealing with a major variant not addressed in *Gingles* itself—the single member district—and one with a relatively unusual history. As courts get more experience

³¹⁹ *Id.* at *3.

³²⁰ *Id.* at *3–5; *see also* *Woods v. Bocz*, No. 11-1146, 2011 WL 4368831, at *5 (E.D. La. Sept. 19, 2011) (dismissing complaint alleging illegal redistricting because the plaintiffs failed to address the three main elements of a vote dilution claim in their complaint).

³²¹ *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc).

³²² *Id.* at 9.

³²³ *See Bartlett v. Strickland*, 556 U.S. 1, 17–20 (2009).

³²⁴ *Metts*, 363 F.3d at 9.

³²⁵ *Id.* at 12.

³²⁶ *See id.*

dealing with these cases and the rules firm up, it may be more feasible to dismiss weaker cases on the pleadings, but in the case before us we think that the plaintiffs are entitled to an opportunity to develop evidence before the merits are resolved.³²⁷

Thus, plaintiffs must present a legally plausible claim at the pleadings stage, but, much like what is permissible under Rule 11 of the Federal Rules of Civil Procedure, that showing can include a plausible argument for the expansion, modification, or reversal of the law.³²⁸ Legal plausibility does not preclude plaintiffs from making arguments to overrule prior rules or alter an interpretation of a law. So long as the argument is plausible from a legal perspective, the case should move forward.

Challenges to ballot access laws similarly would benefit from legal plausibility. These laws place various requirements, such as gathering a certain number of signatures, for securing a spot on the ballot.³²⁹ The main facts a plaintiff would need to allege are that the jurisdiction enforces this law and that the potential candidate, for whatever reason, was not able to meet the requirements. Most litigants would easily meet this “factual plausibility” standard. But this says little about whether the plaintiff is actually alleging a valid cause of action.

Recall *Libertarian Party of Virginia v. Virginia State Board of Elections*, discussed above, which involved a Virginia law regulating who could collect signatures for ballot access.³³⁰ The court in that case construed the complaint under *Twombly* and *Iqbal*, asking whether the plaintiff had presented enough facts.³³¹ But the facts were not the problem. Instead, the court should have asked whether the plaintiffs had asserted a legally plausible claim. To do so, the plaintiffs would have to: (1) identify which specific law they were challenging (the ballot circulator law), (2) establish that the law actually affected them because it precluded them from ensuring their candidate of choice would appear on the ballot, and (3) apply the severe burden test, demonstrating that they had a plausible claim of unconstitutionality.

³²⁷ *Id.* at 11.

³²⁸ *Cf.* FED. R. CIV. P. 11 (requiring that a party’s “claims, defenses, and other legal contentions [be] warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law”).

³²⁹ *See supra* Part II.B.

³³⁰ *Libertarian Party of Va. v. Va. State Bd. of Elections*, No. 1:10-cv-615, 2010 WL 3732012 (E.D. Va. Sept. 16, 2010); *see also supra* notes 133–41 and accompanying text.

³³¹ *Id.* at *2–3.

Under this third “law application” prong, the plaintiffs would have to demonstrate to a plausible level that Virginia’s residency requirement severely infringed their rights by making it too difficult to gather the required number of signatures to put their candidate on the ballot. To do so, the plaintiffs would use the standards courts have crafted for determining whether an election practice imposes “severe” burdens.³³² They also would have to plausibly refute any obvious justification that the state would assert to support the law (such as protecting against fraud). It is likely that the plaintiffs provided a strong enough legal argument that it was at least plausible that the ballot circulator law imposed a severe burden on voters and candidates, and therefore the court should have allowed the case to proceed. Then, in a summary judgment motion or other hearing, the court could have determined based on a fuller development of the parties’ arguments and any additional evidence—such as studies or testimony from the state on the extent to which the law addresses fraud—whether the plaintiffs’ legal theories were not just plausible, but correct.

Perhaps, however, the court’s decision would have been the same in granting the motion to dismiss even under legal plausibility, especially if ballot circulator residency requirements are always constitutional. In some circumstances, adopting legal plausibility would not be a sea change but an alteration of the lens through which courts consider motions to dismiss for failure to state a claim, particularly when plaintiffs already include their legal arguments in their complaints. But the court erred in faulting the plaintiff for failing to present enough facts given that it was not the facts, but the law, that mattered. More specifically, the most important question is whether there is a plausible legal argument on how controlling law applies to the specific facts relating to that plaintiff. That, after all, goes to the basis of the court’s ultimate merits decision, so it makes sense to construe the plaintiff’s initial submission under this guise.

Campaign finance cases, the third main kind of election dispute, present the same analysis. In these cases, the plaintiff would have to identify which specific provision of the challenged campaign finance regime allegedly imposes an unconstitutional burden.³³³ The plaintiff would also have to show that the law adversely affects him or her. For example, an allegation that a disclosure law simply “might” lead to harassment will be insufficient to satisfy the law particularization

³³² See *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005) (discussing the severe burden test); *Norman v. Reed*, 502 U.S. 279, 288–89 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

³³³ See *supra* Part II.C.

prong because the plaintiff has not demonstrated to a plausible level that the disclosure requirement actually has or will adversely affect that plaintiff.³³⁴ Once again, then, a complaint cannot be devoid of all factual allegations, but the plaintiff will already have the evidence it needs to meet the prongs of legal plausibility. Finally, the plaintiff will have to make a plausible showing, using the elements of the alleged constitutional wrong, that the law is invalid. For example, if the plaintiff is challenging a disclosure requirement, then the complaint must include a discussion of the exacting scrutiny standard and an explanation of why the law is not sufficiently tailored to satisfy an important governmental interest.³³⁵

In some ways, this approach for constitutional cases is similar—although not identical—to what happens at summary judgment. Indeed, the incongruence between campaign finance challenges and the *Twombly/Iqbal* standard is likely one reason why courts have resolved most recent campaign finance cases based on a summary judgment motion, not a motion to dismiss.³³⁶ Functionally, legal plausibility and a defendant's summary judgment motion do very similar things by testing the legal sufficiency of the plaintiff's case. The standards, however, are not identical; a court must deny a motion to dismiss if the allegations are legally plausible, while the court must grant summary judgment if, ultimately, the movant is entitled to a judgment as a matter of law.³³⁷ Put differently, legal plausibility asks whether the plaintiff is *likely* to have a valid legal claim, given the existing facts at the plaintiff's disposal when initiating the case, while summary judgment considers whether the plaintiff *actually does* have a valid claim based on all of the evidence in the record after discovery. Therefore, legal plausibility does not replace summary judgment. It supplements it by allowing courts to dismiss cases at the outset that have no plausible legal argument. Because assessing the merits of the legal contentions

³³⁴ This is consistent with the Supreme Court's ruling that disclosure laws are valid unless plaintiffs can show actual evidence of threats or reprisals stemming from the disclosure. See *Citizens United v. FEC*, 588 U.S. 310, 371 (2010); *John Doe No. 1 v. Reed*, 130 S. Ct. 2811 (2010).

³³⁵ See, e.g., *Family PAC v. McKenna*, 685 F.3d 800, 805–06 (9th Cir. 2012) (“Disclosure requirements are subject to exacting scrutiny. To survive such scrutiny, the disclosure requirements must be substantially related to a sufficiently important governmental interest.” (internal citation and quotation marks omitted)).

³³⁶ See, e.g., *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *Thalheimer v. City of San Diego*, No. 09-cv-2862, 2012 WL 177414 (S.D. Cal. Jan. 20, 2012); *Ctr. for Individual Freedom, Inc. v. Tennant*, 849 F. Supp. 2d 659 (S.D. W. Va. 2011); *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011).

³³⁷ See *supra* Part IV.B.2.

are the key to resolving the dispute, it makes sense to incorporate explicitly a legal plausibility standard as early in the process as possible for these types of cases. This will help to ensure faster resolution, which will improve efficiency and cost. Adopting this approach also will untether courts hearing election law disputes from the awkward application of factual plausibility, a motion to dismiss standard that is simply ineffective given the nature of the case.

Finally, to the extent that plaintiffs bring constitutional challenges to voter eligibility requirements or other election administration issues, such as a voter ID law,³³⁸ the analysis will proceed much as it would in the cases mentioned above: the plaintiff must identify specifically which law he or she is challenging, explain how the law actually affects that plaintiff, and apply the elements of the cause of action to demonstrate a legally plausible claim. The wide range of pre-voting election administration challenges fit nicely within the legal plausibility framework discussed above. In addition, as mentioned earlier, legal plausibility could work for pre-election requests for a preliminary injunction regarding an electoral practice.³³⁹

The one election area in which *Twombly* and *Iqbal*'s factual plausibility standard provides the most help is post-election disputes about the actual winner of an election. Most election contest cases, however, do not include motions to dismiss because courts and parties recognize that expediency requires a relaxation of formal litigation rules. Instead, courts resolve declaratory judgment actions or requests for injunctions on the substantive merits themselves as much as they can. For instance, in Joe Miller's challenge of Lisa Murkowski's election to the U.S. Senate from Alaska in 2010, the district court accepted Miller's amended complaint as filed even though the state defendants had not filed an answer "due to the [federal court's initial] stay in this matter and subsequent time constraints."³⁴⁰ Similarly, in a contest involving an election for Hamilton County Juvenile Court Judge in Ohio, the federal courts were faced with preliminary injunction motions, not motions to dismiss.³⁴¹

These cases show that when timing is of utmost importance—such as when a court must resolve an issue involving disputed ballots that will determine who won the election so that the person may take office—litigants and courts often skip the motion to dismiss stage and

³³⁸ See *supra* Part II.D.

³³⁹ See *supra* notes 287–90 and accompanying text.

³⁴⁰ Miller v. Treadwell, 736 F. Supp. 2d 1240, 1241 (D. Alaska 2010).

³⁴¹ Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 222 (6th Cir. 2011).

move to the merits. This might be in part because we do not want to decide elections based on the seemingly technical aspects of whether a complaint is factually sufficient. It provides another reason, however, for adopting legal plausibility for election cases. Election contests might be the one area in which the facts of what happened are disputed or unknown at the pleadings stage because the losing candidate might not have information on precisely how the state handled the ballots on Election Day.³⁴² But so long as the plaintiff can allege to a plausible level how, given the facts as the plaintiff knows them, the tabulation of the votes violated some law, the court should move on to deciding the merits of the dispute or at least allow discovery to proceed. The last thing we want is an election contest resolved on the procedural “technicality” of whether a complaint is drafted properly. Legal plausibility provides a framework for a plaintiff to make its merits-based argument at the outset of a legal challenge to an election result. Under legal plausibility, the plaintiff must couch its allegations of election irregularity through the elements of the cause of action. This approach also ensures that sore losers are not incentivized to challenge the election unless they can make a plausible legal argument that something went awry.

CONCLUSION

The Supreme Court’s recent focus on pleading rules, combined with an increase in election litigation, suggests that it is important to understand the proper pleading standards for this substantive area. Applying *Twombly* and *Iqbal* to election law is incongruent with the main features of these cases. There is little need to assess whether the plaintiff presented detailed factual allegations in a complaint when everyone usually agrees on how an election practice operates. Instead, either the federal courts or Congress should adopt a new pleading rule for election law cases that focuses on a complaint’s legal plausibility. This regime would require a court to ensure that a plaintiff’s initial submission identifies the specific election practice being challenged, describes how the rule actually affects that plaintiff, and explains why, using an application of the elements of the cause of action, the law is plausibly invalid. A court must allow a legally plausible claim to proceed but may dismiss, even sua sponte, complaints that do not make a legally plausible allegation. Legal plausibility provides

³⁴² See, e.g., *In Re Contest of General Election*, 767 N.W.2d 453 (Minn. 2009).

a framework for courts to analyze the legal sufficiency of a complaint. The approach will harmonize the goals behind pleading law with the main features of election law cases.