No. 00-1853

In the Supreme Court of the United States

AKOS SWIERKIEWICZ, PETITIONER

v.

SOREMA N.A.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record

RALPH F. BOYD, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

NICHOLAS M. INZEO
Acting Deputy General Counsel

PHILLIP B. SKLOVER
Associate General Counsel

JOHN F. SUHRE
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether a complaint in an employment discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, must plead specific facts establishing a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and rules:

In the Supreme Court of the United States

No. 00-1853

AKOS SWIERKIEWICZ, PETITIONER

v.

SOREMA N.A.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents an important question concerning the application of Federal Rule of Civil Procedure 8, which outlines the required content of a complaint, to employment discrimination claims arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* The Attorney General and the Equal Employment Opportunity Commission (EEOC) share responsibility for enforcing Title VII against public and private employers. In addition, the EEOC has primary responsibility for administering and enforcing the Age Discrimination in Employment Act. The Court's decision in this case thus is likely to affect

the enforcement responsibilities of the EEOC and the Attorney General. Furthermore, Title VII and the Age Discrimination in Employment Act apply to the federal government in its capacity as the nation's largest employer. 42 U.S.C. 2000e-16 (1994 & Supp. V 1999); 29 U.S.C. 633a; 2 U.S.C. 1311(a)(2).

STATEMENT

1. This case concerns the adequacy of a complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* In relevant part, Title VII makes it unlawful for an employer to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). The ADEA, in nearly identical terms, makes it unlawful for an employer to discharge or otherwise discriminate against an individual "because of such individual's age." 29 U.S.C. 623(a)(1).

Federal Rule of Civil Procedure 8 governs the content of pleadings in all suits of a civil nature in the United States district courts. See Fed. R. Civ. P. 1, 8. Rule 8(a) directs that a complaint initiating a civil action "shall contain" a statement of jurisdiction, a demand for relief, and "a short and plain statement of the claim showing that the pleader is entitled to relief." The rule further provides that "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed. R. Civ. P. 8(e)(1). Lastly, Rule 8(f) instructs that "[a]ll

pleadings shall be construed as to do substantial justice."

2. Petitioner is a United States citizen of Hungarian ancestry. J.A. 24a; Pet App. 2a. Respondent is a New York reinsurance company owned and controlled by a French parent company. *Ibid.* Petitioner began working for respondent in April 1989 as a Senior Vice President and Chief Underwriting Officer. *Ibid.* In April 1997, respondent fired petitioner. J.A. 27a; Pet. App. 3a.

Petitioner filed suit under Title VII and the ADEA claiming that respondent unlawfully terminated him "on account of his age and national origin." J.A. 28a. According to his ten-page complaint, petitioner had performed his job "in a satisfactory and exemplary manner." J.A. 25a. Nevertheless, in February 1995, respondent demoted petitioner and transferred his responsibilities to another employee who was both a French national and 16 years younger, even though that employee "was far less experienced and less qualified" than petitioner. *Ibid.* Respondent's chief executive officer demoted petitioner because "he wanted to 'energize' the underwriting department," a statement that petitioner understood as "clearly implying that plaintiff was too old for the job." *Ibid.*; Pet. App. 2a. The complaint alleges that this demotion was "on account of [petitioner's] national origin (Hungarian) and his age (he was 49 at the time)." J.A. 25a. The complaint further alleges that a number of other inexperienced individuals were hired to assume petitioner's duties, all of whom were either French nationals or significantly younger than petitioner. J.A. 26a. In addition, respondent "isolated" petitioner and "excluded [him] from business decisions and meetings" following the demotion. *Ibid.*

In April 1997, "following two years of ongoing discrimination on account of his national origin and age," J.A. 26a, petitioner sent respondent's chief executive officer a memorandum requesting a severance package comparable to that offered to other executives who were terminated. *Ibid.* Respondent instead offered petitioner the choice of resigning without any benefits or being fired. J.A. 27a. When petitioner refused to resign, respondent fired him. *Ibid.* According to the complaint, respondent "had no valid basis to fire [petitioner]" and his "age and national origin were motivating factors in [respondent's] decision to terminate his employment." *Ibid.*; see also J.A. 28a-29a.

The district court granted respondent's motion to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), on the ground that "[petitioner] has not adequately alleged a prima facie case, in that he has not adequately alleged circumstances that support an inference of discrimination." Pet. App. 9a.

3. The court of appeals affirmed. Pet. App. 1a-4a. The court held that, "[t]o plead" national origin or age discrimination, a plaintiff's complaint must allege (i) membership in a protected class, (ii) qualification for the job at issue, (iii) an adverse employment action, and (iv) "circumstances that give support to an inference of discrimination." *Id.* at 3a (citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973)). The court concluded that all of petitioner's allegations "are insufficient as a matter of law to raise an inference of discrimination." Pet. App. 3a.

SUMMARY OF ARGUMENT

Petitioner's complaint properly states a claim for relief under Federal Rule of Civil Procedure 8(a)(2).

That Rule requires only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." This Court has held that the Rule is satisfied if the complaint provides the defendant fair notice of the character of the claim and the grounds upon which it rests. Petitioner's complaint gave such notice. It repeatedly asserted that respondent had discriminated against petitioner in his employment on the basis of national origin and age, and it identified the specific adverse employment actions giving rise to the claim. Rule 8(a)(2) requires no more.

The court of appeals' requirement that employment discrimination complaints include facts demonstrating a prima facie case is fundamentally flawed. First, the rule erroneously conflates the fair notice owed a defendant at the outset of the litigation with the standards governing the plaintiff's presentation of proof in court. The court's holding also cannot be reconciled with this Court's decisions generally rejecting the imposition of heightened pleading standards under Rule 8. More fundamentally, the requirement that a complaint allege evidence of a prima facie case disregards the entire purpose and history of Rule 8. The Federal Rules of Civil Procedure were intended to simplify and expedite the pleading stage of litigation, so that parties could more expeditiously proceed to resolving litigation on the merits. To that end, in 1952, the Advisory Committee on the Civil Rules specifically considered and rejected an amendment of Rule 8 that would require plaintiffs to allege, as the Second Circuit did here, all of the facts constituting the cause of action. The Second Circuit's regime thus resurrects the very prolix, technical, and fact-intensive pleading procedures that the modern rules deliberately eschewed.

This case, involving statutory claims against a private employer, obviously does not raise any qualified immunity issue. On a number of occasions, this Court has reserved the question whether particularized pleading rules or procedures are necessary to effectuate the qualified immunity doctrine's protection against discovery and trial. Nothing in the Court's resolution of this case should implicate the distinct pleading issues involved in qualified immunity litigation.

ARGUMENT

PETITIONER'S COMPLAINT SATISFIES FEDERAL RULE OF CIVIL PROCEDURE 8 BECAUSE IT IDENTIFIES A CLAIM FOR WHICH RELIEF COULD BE GRANTED AND PROVIDES FAIR NOTICE OF THE FACTUAL CIRCUMSTANCES GIVING RISE TO THE CLAIM

A. Petitioner's Complaint Provides Fair Notice Of His Claim For Relief

Under Federal Rule of Civil Procedure 8(a), a complaint initiating a civil action need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[1] The Rule "mean[s] what it sa[ys]." *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). A claimant need not "set out in detail the facts upon which he bases his claim." *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957). Rather, the complaint need only

[1] Rule 8(a) also requires a complaint to contain "a short and plain statement of the grounds upon which the court's jurisdiction depends," and "a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P. 8(a)(1), (3). It is undisputed that petitioner's complaint satisfies those requirements. See J.A. 22a-23a, 29a-30a.

provide the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Ibid.* Accordingly, in evaluating the sufficiency of a complaint, the court's role "is necessarily a limited one," confined to evaluating "not whether a plaintiff will ultimately prevail," *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974), but "whether the claimant is entitled to offer evidence to support the claims," *ibid.*[2]

Taking the allegations of the complaint as true (see *Berkovitz* v. *United States*, 486 U.S. 531, 540 (1988)), petitioner's complaint satisfies that standard. The complaint repeatedly identifies the claim for relief as one of employment discrimination on the basis of national origin and age and cites the specific state and federal statutory provisions under which relief is sought. J.A. 22a ("This is an employment discrimination action" for "the violation of his rights under Title VII * * *[,] the Age Discrimination in Employment Act * * *," and state law.), 23a (describing EEOC complaint), 25a (alleging that plaintiff was demoted "on account of his national origin (Hungarian) and his age (he was 49 at the time)"), 26a (complaining of "two years of ongoing discrimination on account of his national origin and age"), 27a (asserting that "age and national origin were motivating factors in [respondent's] decision to terminate his employment"), 28a (alleging violation of petitioner's "rights under Title VII and the ADEA by discharging him from employment on account of his age

---

[2] This case does not involve the common, alternative basis for a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6)—the contention that, accepting the factual allegations of the complaint as true, a legal defect in the plaintiff's case (such as a constitutional challenge to the underlying law or a dispute over the proper construction of a statute) precludes recovery.

and national origin"), 28a-30a (alleging violations of Title VII, the ADEA, and two state laws, and seeking relief authorized by those laws).[3]

The complaint, moreover, provides fair notice of the factual circumstances giving rise to petitioner's claims. The complaint identifies the specific adverse employment actions at issue, provides a general time frame for the alleged violations, and offers sufficient factual context to permit the defendant to identify the events and participants implicated by the litigation. See J.A. 24a-27a.

In *Conley*, *supra*, this Court had "no doubt" that a complaint containing similar allegations of discriminatory treatment "adequately set forth a claim and gave the respondents fair notice of its basis." 355 U.S. at 48; see also Complaint, Rec. Tr. 3-16, *Conley* v. *Gibson*, 355 U.S. 41 (1951) (No. 7) (alleging failure of union properly to represent the plaintiffs and asserting that race discrimination motivated the discriminatory treatment). As in *Conley*, once petitioner's complaint put the defendant on notice of the legal and factual bases of his claim for relief, "the Federal Rules * * * d[id] not require [him] to set out in detail the facts upon which he bases his claim." 355 U.S. at 47.[4]

---

[3] Rule 8(a)(2) does not require a plaintiff to "plead law" or to identify a particular legal theory in the complaint. *Krieger* v. *Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000); see also *Fitzgerald* v. *Codex Corp.*, 882 F.2d 586, 589 (1st Cir. 1989) ("[U]nder Fed. R. Civ. P. 8 it is not necessary that a legal theory be pleaded in the complaint."). The complaint need only "set[] forth sufficient factual allegations to state a claim showing that he is entitled to relief under *some* viable legal theory." *Fitzgerald*, 882 F.2d at 589 (internal quotation marks omitted).

[4] See also *Dioguardi* v. *Durning*, 139 F.2d 774, 775 (2d Cir. 1944) (where complaint, "however inartistically," fairly "disclose[s]

Indeed, given the content of the ten-page complaint, neither the court of appeals nor respondent ever seriously contended that it lacked adequate notice of the nature and character of petitioner's complaint or the events giving rise to the litigation. Nor has it been suggested that the complaint is too ambiguous, vague, or confusing to permit respondent to answer the charges and initiate a defense. To the contrary, respondent's prompt production of evidence that it believes counters the merits of petitioner's claims—*viz.*, petitioner's April 1997 memorandum to respondent's chief executive officer seeking severance benefits (J.A. 34a-36a)—belies any claim that respondent lacks "fair notice" of the claims against it.

The essence of respondent's objection, instead, is that, in light of the complaint's conclusory allegations of discriminatory motive, petitioner will not be able to prove his case on the merits. Rule 9(b), however, expressly permits plaintiffs to aver generally "[m]alice, intent, knowledge, and other condition[s] of mind of a person." Moreover, nothing in Rule 8 compels plaintiffs to establish in their complaints that they not only have a tenable claim for relief, but also have the better of the

---

his claims," the plaintiff may not "properly be deprived of his day in court"), cited with approval in *Conley*, 355 U.S. at 46 n.5, and *Haines* v. *Kerner*, 404 U.S. 519, 521 (1972); cf. Fed. R. Civ. P., App., Form 5 (complaint for goods sold and delivered is sufficient to state a claim for relief if it says: "Defendant owes plaintiff __ dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936"), *id.*, Form 9 (complaint for negligence sufficient if it identifies the date and location of an accident and alleges only that "defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway" and identifies the injuries suffered); see generally *id.*, Forms 3-14.

argument on the facts. See *Scheuer*, 416 U.S. at 236 ("[I]t may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."); see also *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986) (Rule 8(a)(2) is not a "tool[] by which factually insufficient claims or defenses could be isolated and prevented from going to trial."). Nor is a motion to dismiss for failure to state a claim, under Federal Rule of Civil Procedure 12(b)(6), an appropriate "device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint." *ACLU Found.* v. *Barr*, 952 F.2d 457, 467 (D.C. Cir. 1991).[5]

It is, of course, possible for a plaintiff to plead himself out of a cause of action by alleging facts that conclusively foreclose relief. See, *e.g.*, *Sparrow* v. *United Air Lines, Inc.*, 216 F.3d 1111, 1116 (D.C. Cir. 2000) ("In some cases, it is possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible."). That would occur if, for example, the complaint revealed that petitioner's age was 35 and thus that he did not fall within the class protected by the ADEA.

---

[5] Numerous courts of appeals have recognized the limited demands that Rule 8 imposes on plaintiffs. See, *e.g.*, *Weston* v. *Pennsylvania*, 251 F.3d 420, 430 (3d Cir. 2001) (even though plaintiff's allegations were not "compelling," his complaint "suffice[d] to state a Title VII claim"); *Sparrow* v. *United Air Lines, Inc.*, 216 F.3d 1111, 1117 (D.C. Cir. 2000) (complaint was sufficient under Rule 8(a)(2) even though it was "doubtful" whether plaintiff will be able to establish that defendant's explanation was pretextual); *Bennett* v. *Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (complaint does not fail to state a "claim upon which relief can be granted" simply "because it does not set forth a complete and convincing picture of the alleged wrongdoing").

The allegations in petitioner's complaint that a discriminatory demotion and "two years of ongoing discrimination on account of his national origin and age" (J.A. 26a) precipitated his discharge, however, cannot fairly be construed as foreclosing all possibility of relief.

B. Proof Establishing The Elements Of A Prima Facie Case Is Not Required

The court of appeals dismissed the complaint because petitioner failed to plead the elements of a prima facie case under Title VII and the ADEA. In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), this Court identified four elements that allow a plaintiff to establish a prima facie case of disparate treatment under Title VII through the use of circumstantial evidence. Specifically, a prima facie case under *McDonnell Douglas* entails a showing that (i) the plaintiff is a member of a protected class (such as a racial minority); (ii) he is qualified for the position in question; (iii) he suffered an adverse employment action, and (iv) after the adverse action, the employer continued to seek applicants sharing the complainant's general qualifications. See *id.* at 802; see also *Reeves* v. *Sanderson Plumbing Prods.*, 530 U.S. 133, 142 (2000) (assuming, without deciding, that the *McDonnell Douglas* framework applies to ADEA claims). The court of appeals fundamentally erred in transporting the concept of a prima facie case to the pleading stage of litigation, for three reasons.

First, the court's test confuses pleading standards and evidentiary burdens of proof. The *McDonnell Douglas* framework does not purport to prescribe the proper content of a complaint. Rather, it "set[s] forth the basic allocation of burdens and order of presentation of *proof*" applicable in an employment dis-

crimination case. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 252 (1981) (emphasis added). As such, the prima facie case provides "a sensible, orderly way to evaluate the *evidence* in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (emphasis added).

The test for the sufficiency of a complaint at the pleading stage is not one of evidentiary production or persuasion, but simply of notification. A complaint suffices under Rule 8(a) if it affords the defendant "fair notice" of what the plaintiff's "claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. The proper question to ask at the pleading stage thus is not whether the plaintiff has satisfied some threshold level of persuasiveness, but whether the plaintiff has identified a claim for relief under which he "is entitled" to go forward and "offer evidence to support the claim[]." *Scheuer*, 416 U.S. at 236; see also *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (question at motion to dismiss stage is whether the allegations in the complaint, "however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence").

Second, the court of appeals' rule is difficult to reconcile with this Court's consistent rejection of heightened pleading standards for complaints. In *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, *supra*, this Court reversed a court of appeals' requirement that plaintiffs plead "with factual detail and particularity" cases against municipalities under 42 U.S.C. 1983. 507 U.S. at 167. The Court explained that "it is impossible to square" such a "heightened pleading standard" with "the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168. See also *Conley*, 355 U.S. at 47 (rejecting requirement that a

complaint "set forth specific facts to support its general allegations of discrimination"); cf. *Celotex Corp.*, 477 U.S. at 327 ("with the advent of 'notice pleading,' the motion to dismiss seldom fulfills th[e] function" of dispensing with "factually insufficient claims"). The enhanced pleading requirement imposed on employment discrimination plaintiffs by the court of appeals here suffers the same infirmity.

In a similar vein, courts of appeals generally have held, in a variety of litigation contexts, that a complaint need not articulate facts supporting each and every element of the claim for relief. See, *e.g.*, *Roe* v. *Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001) ("[T]he liberal 'notice pleading' standards embodied in Federal Rule of Civil Procedure 8(a)(2) do not require that a plaintiff specifically plead every element of a cause of action.") (suit against abortion providers under Freedom of Access to Clinic Entrances Act); *Krieger* v. *Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000) ("complaints need 'not plead law or match facts to every element of a legal theory'") (Privacy Act suit). With respect to employment discrimination claims in particular, most courts of appeals to address the issue likewise have held that a complaint need not allege facts sufficient to establish a prima facie case of discrimination. *Sparrow*, 216 F.3d at 1115; *Powell* v. *Ridge*, 189 F.3d 387, 394 (3d Cir.), cert. denied, 528 U.S. 1046 (1999); *Ortez* v. *Washington County*, 88 F.3d 804, 808 (9th Cir. 1996); *Ring* v. *First Interstate Mortgage, Inc.*, 984 F.2d 924, 926-927 (8th Cir. 1993); accord *Bennett*, 153 F.3d at 518 ("'I was turned down for a job because of my race' is all a complaint has to say."); but see *Jackson* v. *City of Columbus*, 194 F.3d 737, 751 (6th Cir. 1999).

The court of appeals' emphasis on the *McDonnell Douglas* factors is particularly problematic because those factors do not constitute the elements of a discrimination claim in any strict sense, nor are they the exclusive means by which a plaintiff may establish a prima facie claim of discrimination. As this Court has cautioned, the *McDonnell Douglas* framework "is not necessarily applicable in every respect in differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13. In fact, the *McDonnell Douglas* prima facie case does not apply to disparate impact claims,[6] and a plaintiff with direct, rather than circumstantial evidence of disparate treatment, may establish his prima facie case with a different showing. Further, this Court has as yet to hold that the *McDonnell Douglas* framework applies to the ADEA at all. *Reeves*, 530 U.S. at 142.

Instead, the inquiry into the existence of a prima facie case in all cases reduces to whether the plaintiff has produced "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (emphasis and brackets omitted). That standard is appropriate for evaluating a record at the summary judgment or trial stage, when discovery has developed and clarified the parties' claims. But it would be precipitate to undertake such an inquiry before discovery commences. The parties' arguments and the court's analysis would have

---

[6] To establish a prima facie case of disparate impact, the plaintiff must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two. See *Byrnie* v. *Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 111 (2d Cir. 2001).

to anticipate what facts and evidence the discovery process might unearth. As a result, motions to dismiss based on the plaintiff's alleged inability to demonstrate a prima facie case could frequently prove to be little more than dress rehearsals for the true battle to come at the summary judgment stage, further postponing the "just, speedy, and inexpensive determination" (Fed. R. Civ. P. 1) of cases on their merits.

Third and most significantly, the court's rule undermines the core purpose of Rule 8, which is to simplify and demystify the art of pleading. One of the "basic philosophies of the federal rules" is "simplicity of procedure." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1182, at 12 (2d ed. 1990). Earlier federal pleading regimes imposed a variety of technical requirements on complaints and placed great weight on the factual content of the plaintiff's allegations. See *Gilbane Bldg. Co.* v. *Federal Reserve Bank of Richmond*, 80 F.3d 895, 900 (4th Cir. 1996) (discussing the former "code pleading's formalistic, purely factual approach" and the "murky code-pleading requirement that a claimant plead ultimate facts and avoid pleading evidence and conclusions of law").[7]

Under the modern federal rules, however, pleadings "are not an end in themselves." 5 *Federal Practice and Procedure* § 1182, at 13. "[T]echnical forms of pleading are not required." *Id.* § 1202, at 68; see also Fed. R.

---

[7] See also 5 *Federal Practice and Procedure* § 1202, at 68-69 (under code pleading, "[t]he complaint not only gave notice of the nature of plaintiff's case but also was required to state the facts constituting the cause of action"; "[f]ailure to incorporate an essential allegation might lead to a speedy end of the litigation by way of demurrer or a motion to dismiss"); R. Millar, *Civil Procedure of the Trial Court in Historical Perspective* 175 (1952) (discussing disadvantages of the code pleading system).

Civ. P. 8(e)(1). Rather, Rule 8 is "designed to discourage battles over mere form of statement and to sweep away the needless controversies which the [predecessor] codes permitted," so that parties can proceed directly and more efficiently to resolving cases on their merits. *Id.* § 1201, at 67 n.11 (Advisory Comm. 1955 Report); see also *Conley*, 355 U.S. at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome."). The modern rules thus dramatically eased the pressure on plaintiffs to include particularized and regimented factual allegations in their complaints.

> "Under the Rules . . . a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings." Thus, the function of a pleading in federal practice is to inform a party of the nature of the claims and defenses being asserted against him and the relief demanded by his adversary.

5 *Federal Practice and Procedure* § 1182, at 13 (quoting *De Loach* v. *Crowley's, Inc.*, 128 F.2d 378 (5th Cir. 1942)) (footnotes omitted).[8]

In fact, the Advisory Committee on the Civil Rules expressly rejected the approach employed by the Second Circuit here. In 1952, the Advisory Committee refused to adopt a proposed amendment to Rule 8(a)(2) that would have added a requirement that the state-

---

[8] See also 5 *Federal Practice and Procedure* § 1202, at 69 ("The only function left to be performed by the pleadings alone is that of notice. Thus, pleadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon.").

ment of the claim "contain the facts constituting a cause of action." See "Claim or Cause of Action: A Discussion of the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure," 13 F.R.D. 253 (1952).[9] That proposal was made in the wake of decisions—including, ironically, a particularly controversial decision by the Second Circuit—holding that, under Rule 8(a)(2), "there is no pleading requirement of stating facts sufficient to constitute a cause of action." *Dioguardi* v. *Durning*, 139 F.2d 774, 775 (2d Cir. 1944); see also "Claim or Cause of Action," 13 F.R.D. at 254 n.1, 261.

In rejecting the proposed amendment, the Committee explained that the current practice of permitting general descriptions of the claim "adequately sets forth the characteristics of good pleading" and "does away with the confusion resulting from the use of 'facts' and 'cause of action.'" 5 *Federal Practice and Procedure*, § 1201, at 67 n.11. As one opponent of the proposed amendment cautioned:

> Once again we will find ourselves engaged in the time-consuming and frustrating process typified by the interminable attacks upon litigants' claims upon the ground that, *under common-law concepts, a cause of action has not been* stated. Again the technical forces will be marshalled for the never ending exploitation of all the common-law devices to drag out the pleading stage of litigation and delay the litigants' day in court.

---

[9] See also 5 *Federal Practice and Procedure* § 1216, at 164; 2 J. Moore, *Moore's Federal Practice and Procedure* § 8App.01[3] (2001); Millar, *supra*, at 190-193 (discussing debate over whether Rule 8 requires the pleading of a cause of action).

"Claim or Cause of Action," 13 F.R.D. at 274-275; see also R. Millar, *Civil Procedure of the Trial Court in Historical Perspective* 193 (1952) (explaining that requiring facts consituting a cause of action is inconsistent with notice pleading).

The court of appeals' requirement that a complaint allege all of the facts constituting a prima facie case—and in particular identify all the "circumstances that give support to an inference of discrimination" (Pet. App. 3a)—likewise would resurrect the very confusion, complication, and prolixity that Rule 8 was designed to eliminate. The decision would encourage plaintiffs to file complaints "lard[ed] * * * with facts and legal theories," *Bennett* v. *Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998), in order to anticipate and protect against dismissal of any potential grounds for relief that discovery and the litigation process might uncover.

Like code-pleading, the court of appeals' rule also would erect a "daunting hurdle" for plaintiffs by requiring them to amass evidence of a prima facie case before discovery. *Powell*, 189 F.3d at 396. Facts pertaining to an employee's past performance or an employer's actions subsequent to the adverse employment action, for example, often will be in the hands of the employer. In particular, evidence relevant to the fourth *McDonnell Douglas* factor—that, after the adverse employment action, the employer continued to seek applicants sharing the plaintiff's general qualifications—will uniquely be in the defendant's possession. Statistical information relevant to establishing a prima facie case of disparate impact also will often be largely within the employer's ken. See *ibid.* (noting difficulties that would arise if plaintiffs were required "at the pleading stage, before answers have been filed and before discovery, to identify" the specific part of de-

fendant's "complex funding formula" that created the adverse effect); *Gilligan* v. *Jamco Dev. Corp.*, 108 F.3d 246, 250 (9th Cir. 1997) ("without any responsive pleadings or record evidence," plaintiffs did not have facts they needed to allege all the elements of a prima facie case).[10] Employment discrimination plaintiffs, no less than other plaintiffs proceeding in federal court, "are entitled to discovery before being put to their proof." *Bennett*, 153 F.3d at 519.[11]

The court of appeals' rule, although legally untenable, appears motivated by the understandable desire to terminate insubstantial litigation at the earliest possible stage. This Court has already held, however, that generally "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."

---

[10] To be sure, the shifting burdens of proof and production under the *McDonnell Douglas* framework, in part, reflect judgments about which party, after discovery has concluded, may reasonably be charged with producing the relevant information at the summary judgment or trial stages of litigation. However, that framework has never purported to identify which party controls evidence bearing on the critical facts at the very outset of the case. Indeed, how the *McDonnell Douglas* framework operates and what facts are available to a plaintiff to establish a prima facie case could change significantly if discovery reveals that the case involves a mixed-motive employment action (see *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989)), or an after-acquired evidence case (see *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995)).

[11] See also *Estelle* v. *Gamble*, 429 U.S. 97, 112-113 n.7 (1976) (Stevens, J., dissenting) ("[T]he decision on the merits of the complaint should normally be postponed until the facts have been ascertained."); cf. Fed. R. Civ. P. 56(f) (permitting court to grant continuance where a party shows that discovery is necessary before responding to a summary judgment motion).

Leatherman, 507 U.S. at 168-169. In addition, the Federal Rules allow district courts to order the clarification of pleadings to facilitate the filing of responsive pleadings and motions. See Fed. R. Civ. P. 7(a) (authorizing a court-ordered reply to an answer), 12(e) (motion for a more definite statement).[12]

C. This Case Does Not Implicate The Special Considerations Governing Pleadings In Qualified Immunity Cases

This is a case between private parties arising under federal statutory law, where the conventional rules of federal civil litigation clearly apply.[13] The case thus does not present the question whether some enhanced pleading standard or special procedures are appropriate

---

[12] Even if a complaint suffers from some factual deficiency, the proper remedy is usually to allow leave to amend or to grant a motion for a more definite statement under Federal Rule of Civil Procedure 12(e), rather than to dismiss the case with prejudice. See *Conley*, 355 U.S. at 48 & n.9 (noting that Rule 12(e), among others, establishes the procedures for "narrowly" defining "the disputed facts and issues"); *Roe* v. *Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 684 (11th Cir. 2001) (dismissal with leave to amend); *Bennett*, 153 F.3d at 518 (the district court should "keep the case moving—if the claim is unclear, by requiring a more definite statement under Rule 12(e)"); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1351 (2d Cir.) ("We would be acting contrary to the spirit of the Federal Rules if we did not recognize the ease with which the complaint may be amended under these Rules to supply any additional allegations required to make the complaint more informative."), cert. denied, 417 U.S. 932 (1974).

[13] See *Price Waterhouse*, 490 U.S. at 253 ("Conventional rules of civil litigation generally apply in Title VII cases."); *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 150 (1984) (per curiam) (finding "no persuasive justification for [the] view that the Federal Rules of Civil Procedure were to have a different meaning in, or were not to apply to, Title VII litigation").

for implied causes of action brought under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual government officials who assert a defense of qualified immunity. Nor does it present questions concerning what level of detail must be alleged before a senior government official may be questioned about his or her actions in such a case.

This Court has recognized that qualified immunity cases raise special concerns because the "entitlement is an *immunity from suit* rather than a mere defense to liability." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985); see also *Saucier* v. *Katz*, 121 S. Ct. 2151, 2156 (2001). There is substantial tension between Rule 8's command of simplified pleading, which generally defers merits determinations to the discovery and summary judgment phases of litigation, and the qualified immunity doctrine's protection against the burdens of discovery and trial, which necessitates that "insubstantial lawsuits * * * be quickly terminated," *Crawford-El* v. *Britton*, 523 U.S. 574, 590 (1998). See also *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819-820 n.35 (1982) ("Insubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure, and firm application of the Federal Rules of Civil Procedure is fully warranted in such cases.") (internal quotation marks omitted).[14]

---

[14] This Court has recognized the substantial social costs that attend damage actions against individual government officials:

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.

In *Leatherman*, this Court expressly reserved the question "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." 507 U.S. at 167. Furthermore, in *Crawford-El*, in the course of invalidating the application of a heightened evidentiary (as opposed to heightened pleading) standard in cases alleging unconstitutional motive, the Court instructed that trial courts "must exercise [their] discretion in a way that protects the substance of the qualified immunity defense * * * so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." 523 U.S. at 597-598. The Court suggested that, whether by ordering a reply to an answer under Federal Rule of Civil Procedure 7(a), or granting a motion for more definite statement under Federal Rule of Civil Procedure 12(e), trial courts in *Bivens* actions "may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive * * * in order to survive a prediscovery motion for dismissal or summary judgment." *Crawford-El*, 523 U.S. at 598.[15]

Harlow, 457 U.S. at 814 (internal quotation marks omitted). In particular, "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues * * * can be peculiarly disruptive of effective government" and, if the suit is against a high-level government official, "could implicate separation-of-powers concerns." *Id.* at 817 & n.28. See also *Smith* v. *Nixon*, 807 F.2d 197, 200 (D.C. Cir. 1986) (Scalia, J., Circuit Justice).

[15] See also *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring) (heightened pleading standard is appropriate because the "substantive defense of immunity controls" over the "usual pleading requirements"); *Judge* v. *City of Lowell*, 160 F.3d 67, 72-75 (1st Cir. 1998) (imposing particularized pleading requirement in qualified immunity cases); *Schultea* v. *Wood*, 47 F.3d 1427,

Accordingly, while the Court should reverse the court of appeals' holding that plaintiffs in employment discrimination cases arising under federal statutory law must plead the elements of a prima facie case, the Court should reserve the question of what supplementary standards or procedures properly apply at the pleading stage in qualified immunity cases.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

RALPH F. BOYD, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

NICHOLAS M. INZEO
Acting Deputy General Counsel

PHILLIP B. SKLOVER
Associate General Counsel

JOHN F. SUHRE
Attorney
Equal Employment Opportunity Commission

NOVEMBER 2001

1433-1434 (5th Cir. 1995) (en banc) (requiring replies, under Federal Rule of Civil Procedure 7, to a defendant's invocation of qualified immunity). A similar rule likely would apply to invocations of qualified immunity by state officials in actions under 42 U.S.C. 1983. See *Butz* v. *Economou*, 438 U.S. 478, 500 (1978).