

HEIGHTENED PLEADING STANDARDS FOR DEFENDANTS: A CASE STUDY OF COURT-COUNTING PRECEDENT

Brian Soucek & Remington B. Lamons

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*In over a thousand cases, federal district courts have considered whether the heightened pleading standards imposed on plaintiffs in *Twombly* and *Iqbal* also apply to the affirmative defenses raised in defendant's answers. Courts are split, and alongside the usual textual and policy arguments they offer, a less expected consideration is often raised: the fact that a majority of other courts have decided the same way. Court-counting precedent, as we call this kind of reasoning, requires justification, not least because—as we find here—judges get their count wrong a full third of the time.*

*This Article—based on a study of 1,141 federal opinions decided in the ten years after *Twombly*—does two things. It provides the first comprehensive answer to an important doctrinal question: what pleading standard do federal courts apply to defendants—and how has that standard varied over time and across the country? Second, the Article reveals that judges deciding this issue have engaged in court-counting a surprising 27% of the time. Given the previously unacknowledged importance of court-counting precedent in the lower federal courts, this Article asks whether and when it is warranted.*

INTRODUCTION

A decade ago, as everyone who studies or practices in the federal courts knows, the Supreme Court raised the pleading standards for plaintiffs, requiring more specificity in their complaints. What no one really knows is whether the heightened pleading standards of *Bell Atlantic Corp. v. Twombly*¹ and its successor, *Ashcroft v. Iqbal*,² also apply to the affirmative defenses raised in defendants' answers. No one knows for sure whether “what's good for the

* Professor of Law and Martin Luther King, Jr. Hall Research Scholar, University of California, Davis School of Law. Many thanks to Edward Cheng, Jack Chin, Christopher Elmendorf, Shayak Sarkar, Leticia Saucedo, Aaron Tang, Nina Varsava, Rose Cuison Villazor, attendees at the 2018 Civil Procedure Workshop at Stanford Law School and the 2018 Annual Meeting of the Law and Society Association, members of the East Bay Junior Scholars Workshop, and to my research assistants, Max Engel, Catherine Reagan, and Amanda Miller. Thanks also to Dean Kevin Johnson and the UC Davis School of Law for supporting this project through the Martin Luther King, Jr. Hall Research Fund.

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1. 550 U.S. 544 (2007).

2. 556 U.S. 662 (2009).

goose is good for the gander”³ when it comes to pleading because the Supreme Court and the courts of appeals⁴ have so far failed to say.

The federal district courts, by contrast, *have* said—in nearly a thousand cases. But no one actually knows *what* they have said, for no one has attempted a systematic study of these opinions in years.⁵

That hasn’t kept district court judges, however, from basing their decisions, in part or in full, on what they think other judges have said.⁶ In case after case, judges identify one answer or the other as the majority position, whether nationally, within the circuit, or in their district. A full third of the time, they are wrong, as this Article will show. But even when they are right, it is not entirely clear why their court-counting matters. District court opinions have no precedential value even for the judges who rendered them.⁷ Their reasoning might be persuasive: here, on both sides of the issue, similar sets of arguments based in text and policy have been repeated in case after case. But the mere fact that one district judge, or several hundred of them, decided a question a particular way is not supposed to provide a reason for the next judge to decide it the same way. For court-counting to count as something like precedent, we need an account of why and when it should matter.

This Article does two things. First, it answers a straightforward but crucially important doctrinal question for federal courts and those who use or study them: What standard do defendants have to meet when they plead an affirmative defense to the claims brought against them? Given the significance of the question in day-to-day practice, it’s perhaps surprising that we don’t currently know what answer courts are most frequently giving, whether that answer has changed over time, and whether it might vary across the country. We don’t know this, in part, because the question comes up so often; the frequency with which it’s raised itself becomes a barrier to getting a complete answer.

3. See, e.g., *Barnes & Noble, Inc. v. LSI Corp.*, 849 F. Supp. 2d 925, 929 (N.D. Cal. 2012) (“What is good for the goose’s complaint should be good for the gander’s answer.”).

4. But see *infra* notes 137–59 and accompanying text. No federal appellate court has squarely asked and answered the question presented here.

5. Cf. William M. Janssen, *The Odd State of Twiqbal Plausibility in Pleading Affirmative Defenses*, 70 WASH. & LEE L. REV. 1573 (2013). As described below, see *infra* notes 119–23 and accompanying text, Professor Janssen’s article—the largest-scale previous attempt to study *Twombly* and *Iqbal*’s effect on affirmative defenses—only considered the period from 2009 (post-*Iqbal*) to 2013. And even during that period, the number of cases studied is just a fraction of those that were actually decided.

6. THOMAS D. ROWE, JR., SUZANNA SHERRY & JAY TIDMARSH, CIVIL PROCEDURE 83 (4th ed. 2016) (“Courts on both sides of the issue have claimed that their view represents the majority position, but to our knowledge no one has ever done a nose count to see which view is more common.”).

7. See *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” (quoting 18 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2011))).

This Article provides that answer by looking at 1,141 opinions decided between May 2007 and May 2017, the ten years after *Twombly*, in order to determine what the majority of courts have actually held about pleading standards for affirmative defenses. We find that a majority of courts applied heightened pleading standards to affirmative defenses until August 2011; that has been the minority view, and increasingly so, ever since.

The broader point of this Article, however, is to identify and question the use judges make of the fact—or perception—that a majority of courts have come out one way or another. In fact, in almost 27% of the cases studied, courts identified a majority view and used that as part of their reasoning—as what we refer to here as “court-counting precedent.” Court-counting precedent is, of course, not a real form of precedent at all. That is why it is so intriguing—and possibly troubling. There are good reasons why the mere number of courts to have reached one outcome rather than another shouldn’t influence future outcomes, at least on some sorts of questions. But that requires us to say when court-counting might matter, and whether there are better alternatives, as we argue there are here.

In what follows, Part I reviews *Twombly* and *Iqbal*’s heightened pleading standards for complaints and canvasses the arguments that have been made for applying or refusing to apply those standards to affirmative defenses. Reporting the doctrinal results of our study, Part II provides the first comprehensive answer to the question of how many courts have applied or refused to apply heightened pleading standards to affirmative defenses, both over time and across the country.

Part III then focuses on one particular reason courts give for doing so: the fact that other courts have done so. The first Subpart of Part III shows how often district courts have engaged in court-counting, relying on—or interestingly, sometimes rejecting—what they perceive to be the majority position within their district, their circuit, or the nation. Complicating matters is the fact that courts, as we show, are often wrong about what the majority position actually is. Our aim is to describe how federal district courts—whose operations are understudied⁸ compared to the courts of appeals⁹ and Supreme Court¹⁰—actually employ the work of other district courts in reaching their own decisions.

8. See Hillel Y. Levin, *Iqbal, Twombly, and the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143, 153 (2010) (“I believe that there is a bias towards Supreme-Court-watching throughout legal academia. But why do we privilege the Supreme Court? Mostly, I think it is because watching the lower courts is incredibly difficult.”).

9. See, e.g., DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS (2002); Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029 (1999); Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119 (2002); Eric Hansford, Note, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145 (2011).

10. See, e.g., Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851 (2014) (examining the Supreme Court’s reliance on consensus among the courts of appeals); Eric A. Posner &

The second Subpart of Part III asks whether district courts *should* treat their court-counting as something akin to precedent. This Subpart looks to the debate over pleading standards for defendants both for its own sake—to determine whether court-counting precedent is useful in that context—and, more broadly, as a case study that helps us understand how district courts should treat the decisions of their peers. Subpart III.B suggests ways in which district courts could achieve their goal of procedural consistency without joining majorities that may not even exist. And it suggests contexts beyond affirmative defenses in which court-counting precedent likely makes more sense.

Our hope is that the findings of our study will help judges employ court-counting precedent more accurately, even as we urge them to employ it less than—as we find—they currently do.

I. DEBATES OVER HEIGHTENED PLEADING STANDARDS

A. Pleading Standards for Plaintiffs

For half a century, until 2007, complaints filed in federal court were governed by the pleading standard established in *Conley v. Gibson*.¹¹ Faced with a motion to dismiss, a complaint would survive “unless it appear[ed] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”¹² The *Conley* regime was one of notice pleading: the complaint needed to “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”¹³

Conley’s “no set of facts” language stood until it was retired in a 2007 anti-trust case, *Bell Atlantic Corp. v. Twombly*.¹⁴ *Twombly* imposed what is often described as a “heightened pleading standard”¹⁵ on complaints, establishing a plausibility standard that requires plaintiffs to plead enough facts “to raise a right to relief above the speculative level.”¹⁶ In establishing its heightened pleading standard, the Court relied on the language of Federal Rule of Civil

Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 133 n.5 (2006) (examining the Supreme Court’s reliance on the laws of foreign states).

11. 355 U.S. 41 (1957), *abrogated in part by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

12. *Id.* at 45–46.

13. *Id.* at 47.

14. 550 U.S. at 562–63 (“[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement.”).

15. *E.g.*, Ross v. Morgan Stanley Smith Barney, LLC, No. 2:12-cv-09687-ODW(JCx), 2013 WL 1344831, at *2 (C.D. Cal. Apr. 2, 2013); Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009).

16. *Twombly*, 550 U.S. at 555. In assessing the plausibility of a claim, courts assume all asserted facts are true and disregard any legal conclusions. *Id.*

Procedure 8(a)(2),¹⁷ emphasizing that while a plaintiff need not “set out *in detail* the facts upon which he bases his claim,” Rule 8 still requires a “showing” of entitlement to relief “rather than a blanket assertion.”¹⁸

Immediately after *Twombly*, it was unclear whether the plausibility standard was limited to the antitrust context.¹⁹ But the Court put that question to rest in *Ashcroft v. Iqbal*,²⁰ where it ruled that *Twombly* had interpreted the pleading standards for federal complaints generally, rather than setting precedent specific to antitrust litigation.²¹ Together, *Twombly* and *Iqbal* directed courts to use a two-step analysis when deciding a motion to dismiss: First, set aside any legal conclusions and assume the truth of all factual allegations.²² Second, courts must then decide whether the plaintiffs’ allegations, thus sorted, “nudged their claims across the line from conceivable to plausible.”²³ To achieve plausibility, the complaint must contain “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”²⁴ In other words, a complaint is insufficient if it “amount[s] to nothing more than a ‘formulaic recitation of the elements.’”²⁵ The plaintiff’s facts must “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”²⁶ The standard is not one of probability, “but it asks for more than a sheer possibility that a defendant has acted unlawfully.”²⁷

An explosion of commentary, debate, and litigation ensued in the wake of

17. FED. R. CIV. P. 8(a)(2) (“A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . .”).

18. *Twombly*, 550 U.S. at 555 n.3 (quoting *Conley*, 355 U.S. at 47).

19. See *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 n.3 (2d Cir. 2007) (“A narrow view of *Twombly* would have limited its holding to the antitrust context, or perhaps only to Section 1 claims; but we have concluded that *Twombly* affects pleading standards somewhat more broadly.” (citing authorities applying *Twombly* outside the Sherman § 1 and antitrust arenas)); James A. Keyte, *Twombly: How Courts Are Interpreting and Extending Its Principles*, ANTITRUST, Fall 2008, at 65, 69–70 (“*Twombly*’s reach already is apparent across all types of antitrust conspiracy cases and is slowly seeping into the pleading standards of other types of antitrust claims. While *Twombly*’s impact may eventually precipitate the need for another ‘clarifying’ opinion from the Court, for now *Twombly*’s reach is only in its infancy in requiring more exacting antitrust allegations on all elements of a claim.”).

20. 556 U.S. 662 (2009).

21. *Id.* at 684; see *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014) (instructing lower courts to apply plausibility standard to a breach of fiduciary duty case); *Tooley v. Napolitano*, 586 F.3d 1006, 1007 (D.C. Cir. 2009) (agreeing that *Iqbal* extended *Twombly* to all claims).

22. *Iqbal*, 556 U.S. at 678 (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”); *Twombly*, 550 U.S. at 589 (Stevens, J., dissenting) (“[A]t the motion to dismiss stage, a judge assumes ‘that all the allegations in the complaint are true (even if doubtful in fact).’” (citing *Twombly*, 550 U.S. at 555 (majority opinion))).

23. *Twombly*, 550 U.S. at 570 (majority opinion).

24. *Iqbal*, 556 U.S. at 678.

25. *Id.* at 681 (quoting *Twombly*, 550 U.S. at 555).

26. *Id.* at 678 (citing *Twombly*, 550 U.S. at 556).

27. *Id.* (citing *Twombly*, 550 U.S. at 556).

Twombly and *Iqbal*.²⁸ After only a decade, *Twombly* and *Iqbal* are two of the most cited cases of all time.²⁹ The reason is simple: In the courtroom, the motion to dismiss is often the first and most contested legal battle.³⁰ To survive the pleading stage is to “unlock the doors of discovery.”³¹ Perceptions or misperceptions about the costs of that discovery—and the pressures they impose on plaintiffs to settle even meritless cases—clearly motivated the Court in both *Twombly* and *Iqbal*.³² The academic world has responded with an extensive and empirically sophisticated debate about whether *Twombly* and *Iqbal*'s heightened pleading standards for complaints prevent possibly extortionate fishing expeditions by plaintiffs or, on the contrary, keep meritorious claims out of court, particularly in certain categories of cases.³³

28. See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441 (2010); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61 (2007); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010); Lonny S. Hoffman, *Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217 (2008); William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693 (2016); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010) [hereinafter Miller, *From Conley to Twombly to Iqbal*] (arguing that *Twombly* and *Iqbal* reduced access to justice and had other negative public policy effects); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 331–47 (2013); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011; A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twombly Apologists*, 60 UCLA L. REV. 1710 (2013); Amy St. Eve & Michael A. Zuckerman, *The Forgotten Pleading*, 7 FED. CTS. L. REV. 149, 150–51 (2014) (collecting academic articles and cases, and noting that even Congress responded to *Twombly* and *Iqbal*); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010) [hereinafter Steinman, *The Pleading Problem*]; Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333 (2016) (many sources in footnotes); William H.J. Hubbard, *The Empirical Effects of Twombly and Iqbal* (Coase-Sandor Inst. for Law & Econ., Working Paper No. 773, 2016).

29. Adam Steinman, *Ever Wonder Which SCOTUS Cases Have Been Cited the Most?*, CIV. PROC. & FED. CTS. BLOG (Sept. 21, 2016), <http://lawprofessors.typepad.com/civpro/2016/09/ever-wonder-which-scotus-cases-have-been-cited-the-most.html> (ranking *Twombly* third-most-cited with 127,521 federal court citing references, and *Iqbal* fourth-most-cited with 104,712 references).

30. See Richard M. Phillips & Gilbert C. Miller, *The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action Plaintiffs, Defendants and Lawyers*, 51 BUS. LAW. 1009, 1033 (1996) (“Liberal discovery allows plaintiffs to pile enormous costs and burdens on defendants that induce defendants to settle irrespective of the merits of the suit.”); Steinman, *The Pleading Problem*, *supra* note 28, at 1294 (“If a plaintiff seeking judicial redress is unable to provide an adequate ‘statement of the claim’ at the pleadings phase, then that claim is effectively stillborn.” (footnote omitted) (quoting FED. R. CIV. P. 8(a)(2))).

31. *Iqbal*, 556 U.S. at 678–79.

32. See *id.* at 685–86 (“Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources”); *Twombly*, 550 U.S. at 558–60 (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial].”).

33. See Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235 (2011); Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012); 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 (2012); William H.J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEG. STUD.

By contrast, relatively little has been written about heightened pleading standards as they apply to the other usual pleading in a lawsuit: the answer.³⁴ And the articles that *have* been written mostly just weigh the arguments for and against applying *Twombly* and *Iqbal* to defendants.³⁵ By now, the academic literature and case law have made clear what those arguments are. Less clear is what argument courts are favoring and why. Before turning to this question in Part II, the following Subpart summarizes the terms of the debate.

B. Pleading Standards for Defendants

The civil answer has been referred to as “the forgotten pleading,”³⁶ which is appropriate considering the relatively little attention it receives compared to the significant impact it can have on litigation.³⁷ Answers are pleadings under the Federal Rules,³⁸ and thus the general pleading rules apply.³⁹ Filed in response to pleadings, such as complaints or counterclaims,⁴⁰ answers consist of two parts: admissions or denials of the individual allegations in the complaint⁴¹ and a statement of the party’s defenses.⁴² Affirmative defenses—

474 (2017); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(B)(6) Motions*, 46 U. RICH. L. REV. 603, 605 (2012) (concluding that *Iqbal* increased Rule 12(b)(6) dismissals: (1) generally, (2) of entire cases, and (3) of constitutional civil rights cases specifically); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010).

34. See generally James V. Bilek, *Twombly, Iqbal, and Rule 8(c): Assessing the Proper Standard to Apply to Affirmative Defenses*, 15 CHAP. L. REV. 377 (2011); Peter M. Durney & Jonathan P. Michaud, *Fending off the Use of a Rule 12(f) Motion to Strike Affirmative Defenses*, 79 DEF. COUNS. J. 438 (2012); Melanie A. Goff & Richard A. Bales, *A “Plausible” Defense: Applying Twombly and Iqbal to Affirmative Defenses*, 34 AM. J. TRIAL ADVOC. 603 (2011); Justin Rand, *Tightening Twiqual: Why Plausibility Must Be Confined to the Complaint*, 9 FED. CTS. L. REV., no. 2, 2016, at 79; Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. 987 (2012); Anthony Gambol, Note, *The Twombly Standard and Affirmative Defenses: What Is Good for the Goose Is Not Always Good for the Gander*, 79 FORDHAM L. REV. 2173 (2011); Nathan A. Leber, Note, *Solving a Pleading Plague: Why Federal Courts Should Strike Insufficient Affirmative Defenses Under the Twombly-Iqbal Plausibility Standard*, 61 CLEV. ST. L. REV. 231 (2013); Stephen Mayer, Note, *An Implausible Standard for Affirmative Defenses*, 112 MICH. L. REV. 275 (2013); Matthew J.M. Pelikan, Note, *Plausible Defenses: Historical, Plain Meaning, and Public Policy Arguments for Applying Iqbal and Twombly to Affirmative Defenses*, 96 MINN. L. REV. 1828 (2012); Nathan Pysno, Note, *Should Twombly and Iqbal Apply to Affirmative Defenses?*, 64 VAND. L. REV. 1633 (2011); Leslie Paul Machado & C. Matthew Haynes, *Do Twombly and Iqbal Apply to Affirmative Defenses?*, FED. LAW., July 2012, at 56. Other articles devote one part or section to the issue. See Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1359–63 (2010); Miller, *From Conley to Twombly to Iqbal*, *supra* note 28, at 101–03.

35. For articles that go beyond just weighing the arguments, see Janssen, *supra* note 5; Machado & Haynes, *supra* note 34.

36. See St. Eve & Zuckerman, *supra* note 28.

37. *Id.* at 151 (“The answer can bring with it significant procedural advantages but is too often overlooked.”).

38. See FED. R. CIV. P. 7(a).

39. See St. Eve & Zuckerman, *supra* note 28, at 152; see also FED. R. CIV. P. 10.

40. See St. Eve & Zuckerman, *supra* note 28, at 151.

41. FED. R. CIV. P. 8(b)(1)(B).

which the rules require defendants to “state in short and plain terms”⁴³—are ones seeking to avoid liability based on some fact outside the complaint.⁴⁴ In an affirmative defense, defendants claim that even if the allegations against them are true, they should nevertheless not be held liable for the alleged harm.⁴⁵ The statute of limitations, for example, is one of the enumerated affirmative defenses listed in Rule 8(c);⁴⁶ those who raise it are claiming that the complaint should be dismissed, regardless of the truth of the plaintiff’s claims, because the plaintiff took longer than statutorily allotted to file a complaint.

The question confronting courts since *Twombly* and *Iqbal* is how much defendants need to say when pleading their affirmative defenses. Options range from simply naming the defense, to providing fair notice to the plaintiff (which may or may not require something more than just naming the defense), to supplying enough facts to show the plausibility of the asserted defense.

Let us return to the example of a statute of limitations defense. Under a fair notice regime, a sufficient pleading may look like this: “Plaintiff’s complaint was not brought within the applicable statute of limitations.”⁴⁷ Under a plausibility standard, however, this language would likely be stricken as legally conclusory boilerplate.⁴⁸ To survive under the heightened standard, the affirmative defense would need to assert specific facts which, taken to be true, make that claim plausible. For example, a defendant asserting a statute of limitations defense may plead the following: “The alleged breach of contract occurred on January 1, 2016, more than two years before plaintiff filed her complaint on January 5, 2018.”⁴⁹

Affirmative defenses must be pled in the answer to be preserved.⁵⁰ This requirement is intended to further the purpose of affirmative defenses: “to give the opposing party notice of [each] affirmative defense and a chance to

42. FED. R. CIV. P. 8(b)(1)(A) & 8(c)(1).

43. FED. R. CIV. P. 8(b)(1)(A).

44. *St. Eve & Zuckerman*, *supra* note 28, at 158.

45. *See id.* at 157–60.

46. FED. R. CIV. P. 8(c).

47. *See, e.g., Steiner v. Everett*, No. 16-cv-1286-MJR-DGW, 2017 WL 1836607, at *5 (S.D. Ill. May 8, 2017).

48. *See id.*

49. *See, e.g., Nat’l Grange of the Order of Patrons of Husbandry v. Cal. State Grange*, Civ. No. 2:14-676 WBS DAD, 2014 WL 3837434, at *3 (E.D. Cal. July 30, 2014) (“Accordingly, because defendant’s defense[] of . . . statute of limitations . . . ha[s] sufficient bases in fact and law, the court will deny plaintiff’s motion to strike . . .”).

50. FED. R. CIV. P. 8(c)(1) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense . . .”); *St. Eve & Zuckerman*, *supra* note 28, at 161 n.75 (noting that “an affirmative defense is a defense that ‘the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver’” (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008))). However, note that defendants can later get the court’s leave to amend their affirmative defenses. *See* FED. R. CIV. P. 15(a)(2).

rebut it.”⁵¹ Plaintiffs can attack affirmative defenses by a motion for summary judgment under Rule 56, by a motion for judgment on the pleadings under Rule 12(c), or by a motion to strike an insufficient defense under Rule 12(f).⁵² Rule 12(f) is the most commonly used and arguably most appropriate vehicle for a plaintiff to challenge a defendant’s defenses.⁵³ And Rule 12(f) motions to strike allegedly insufficient affirmative defenses surged as the pleading standard remained unresolved in the wake of *Twombly* and *Iqbal*.⁵⁴

Resolving this standard is crucial, as it can affect the cost and even the outcome of litigation. Defendants can bring dispositive motions under Rule 12(c) or Rule 56 based on their affirmative defenses if they are properly preserved.⁵⁵ The presence of affirmative defenses affects the scope of discovery,⁵⁶ can extend the boundary of what’s relevant for purposes of evidentiary law,⁵⁷ and can complicate or prevent class certification.⁵⁸ Despite their importance, however, affirmative defenses are subjected to pleading standards that vary from court to court, as judges since *Twombly* and *Iqbal* have taken two divergent paths.

Soon after *Twombly* raised the pleading standards for complaints, plaintiffs began claiming that what is good for the goose is good for the gander.⁵⁹ They began arguing, in other words, that the heightened pleading standards *Twombly* and *Iqbal* applied to their claim should also apply to the affirmative defenses raised in defendants’ answers.⁶⁰ Defendants, of course, argued the opposite to protect their claims from the scrutiny of the heightened standard.⁶¹ Neither

51. St. Eve & Zuckerman, *supra* note 28, at 160 (quoting *Zelenika v. Commonwealth Edison Co.*, No. 09 C 2946, 2012 WL 3005375, at *11 (N.D. Ill. July 23, 2012)).

52. *Id.* at 166–68.

53. *Id.* at 166–67.

54. *Id.* at 168.

55. *Id.* at 166, 169–70; see FED. R. CIV. P. 12(c).

56. FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”).

57. St. Eve & Zuckerman, *supra* note 28, at 171; see also FED. R. EVID. 401, 403.

58. St. Eve & Zuckerman, *supra* note 28, at 170–71 n.126 (“[T]he possibility of hundreds if not thousands of individual hearings related to ownership, distinctiveness and the applicability of *affirmative defenses*, including managing probable discovery to be conducted prior to those hearings, precludes a finding that a class action is a superior method of adjudicating the trademark-related claims” (quoting *Vulcan Golf, LLC v. Google, Inc.*, 254 F.R.D. 521, 537 (N.D. Ill. 2008), and adding emphasis)).

59. See, e.g., *Barnes & Noble, Inc. v. LSI Corp.*, 849 F. Supp. 2d 925, 929 (N.D. Cal. 2012) (“What is good for the goose’s complaint should be good for the gander’s answer.”); *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 233 (E.D.N.C. 2010).

60. See, e.g., *Charleswell v. Chase Manhattan Bank, N.A.*, No. 01-119, 2009 WL 4981730, at *4 (D.V.I. Dec. 8, 2009) (rejecting Plaintiff’s argument that *Twombly* and *Iqbal* should apply to affirmative defenses).

61. See, e.g., *Bakery & Confectionery Union & Indus. Int’l Pension Fund v. Just Born II, Inc.*, No. DKC 16-0793, 2017 WL 511911, at *8 (D. Md. Feb. 8, 2017) (“Defendant argues, in response . . . that the ‘better interpretation of the Federal Rules of Civil Procedure is that the *Iqbal-Twombly* standard does not apply.”); see also *McLemore v. Regions Bank*, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010) (“On its face, *Twombly* applies only to complaints and to Rule 8(a)(2), because

Twombly nor *Iqbal* directly addressed whether the plausibility standard extends to all types of pleadings under Rule 8, specifically affirmative defenses under Rule 8(b)–(c).⁶² District courts have often claimed that no appellate court has ruled on the matter;⁶³ despite the occasional appellate hint,⁶⁴ district courts have largely been left to resolve this question on their own.⁶⁵ And the arguments that these courts consider usually fall into one of a few categories.⁶⁶

1. Equity

Both sides often appeal to the court's sense of equity. Plaintiffs, with their claim that "[w]hat is good for the goose's complaint should be good for the gander's answer,"⁶⁷ argue that it would be unfair to hold their pleadings to a higher standard than those of defendants.⁶⁸ Defendants, meanwhile, respond by pointing out that they generally have only twenty-one days to formulate their defenses, as compared to plaintiffs, who have the entire statute of limitations period to prepare a complaint.⁶⁹ Therefore, defendants reason, fairness

the Court was interpreting" Rule 8(a)(2)'s requirement that any pleading which states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."), *aff'd*, 682 F.3d 414 (6th Cir. 2012).

62. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Both cases only discuss the pleading standards for complaints under Federal Rule of Civil Procedure 8(a).

63. *Infogroup, Inc. v. DatabaseLLC*, 95 F. Supp. 3d 1170, 1192 (D. Neb. 2015) ("Neither the Supreme Court nor any circuit court has considered the question, and district courts are sharply divided."); *Cottle v. Falcon Holdings Mgmt., LLC*, No. 2:11-CV-95-PRC, 2012 WL 266968, at *1 (N.D. Ind. Jan. 30, 2012) (noting that no circuit court has resolved the debate); *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1171 (N.D. Cal. 2010) ("[N]either the Ninth Circuit nor any other Circuit Courts of Appeals has ruled on this issue . . .").

64. See *infra* notes 137–59 and accompanying text.

65. *Rand*, *supra* note 34, at 87 ("Before the ink dried on Justice Kennedy's opinion, lower courts had to decide whether the new plausibility pleading standard applied beyond Rule 8(a)(2) to a defendant's affirmative defenses.").

66. For a good summary of this debate, see *Rosen v. Masterpiece Mktg. Grp., LLC*, 222 F. Supp. 3d 793, 798–802 (C.D. Cal. 2016), which outlines the standard and reasoning for applying on both sides of the argument. See also *Pysno*, *supra* note 34.

67. *Barnes & Noble, Inc. v. LSI Corp.*, 849 F. Supp. 2d 925, 929 (N.D. Cal. 2012).

68. See *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 233 (E.D.N.C. 2010) ("[T]he courts recognize that what is good for the goose is good for the gander, and reason that 'it makes neither sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit a defendant under another pleading standard simply to suggest that some defense may possibly apply in the case.'" (quoting *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010))); *Bradshaw v. Hilco Receivables, LLC*, 725 F. Supp. 2d 532, 536 (D. Md. 2010) ("[P]laintiffs are entitled to receive proper notice of defenses in advance of the discovery process and trial.").

69. See *FED. R. CIV. P. 12(a)(1)(A)(i)*; *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 901 (E.D. Pa. 2011) (noting that defendants have a shorter amount of time to gather facts to support affirmative defenses and risk losing the opportunity to bring those defenses in trial if they fail to plead them in their response).

dictates that courts should hold them to a lower pleading standard⁷⁰ so they aren't forced to waive their right to an affirmative defense at trial by failing to plead it adequately.⁷¹

Plaintiffs rebut this argument by noting that the twenty-one-day deadline is not inflexible, and that even after an answer is submitted, leave to amend can be granted “when justice so requires.”⁷² Also, despite defendants' worries that they will need to go through “a similar pre-suit investigation in a much shorter window of time,”⁷³ the relevant facts are, in many cases, already within the defendant's possession.⁷⁴

2. Text

Defendants' first and most successful argument generally comes from the text of the Federal Rules of Civil Procedure.⁷⁵ Defendants contend that a subtle difference between the rules governing complaints and answers indicates that defendants have a lower threshold for their pleadings.⁷⁶ Rule 8(a) requires that plaintiffs provide “a short and plain statement of the claim *showing* that the pleader is entitled to relief.”⁷⁷ By contrast, Rule 8(b) instructs defendants to “state in short and plain terms its defenses,”⁷⁸ and Rule 8(c) dictates that “a party must affirmatively state any avoidance or affirmative defense.”⁷⁹ Neither mentions Rule 8(a)'s “showing.”

Defendants further argue that the Supreme Court's focus in *Twombly* and *Iqbal* on Rule 8(a) alone demonstrates its intent to treat it differently.⁸⁰ The Court did not mention Rules 8(b) and (c) when it established the plausibility

70. See *Tyco Fire Prods.*, 777 F. Supp. 2d at 901.

71. See *Nguyen v. Biondo*, 508 F. App'x 932, 936 (11th Cir. 2013) (holding that a defendant waived an affirmative defense by raising it for the first time on a motion for summary judgment); *St. Eve & Zuckerman*, *supra* note 28, at 160–61.

72. FED. R. CIV. P. 15(a)(2); see also *Rosen v. Masterpiece Mktg. Grp., LLC*, 222 F. Supp. 3d 793, 800–01 (C.D. Cal. 2016); *Infogroup, Inc. v. DatabaseLLC*, 95 F. Supp. 3d 1170, 1194 (D. Neb. 2015); *St. Eve & Zuckerman*, *supra* note 28, at 152.

73. *Craten v. Foster Poultry Farms Inc.*, No. CV-15-02587-PHX-DLR, 2016 WL 3457899, at *3 (D. Ariz. June 24, 2016).

74. *Rosen*, 222 F. Supp. 3d at 800.

75. See *Bayer CropScience AG v. Dow AgroSciences LLC*, No. 10-1045 RMB/JS, 2011 WL 6934557, at *1–2 (D. Del. Dec. 30, 2011) (noting the textual differences between Rule 8(a) and Rule 8(c) first in the list of nine reasons to refuse to apply the *Twombly* and *Iqbal* standard to affirmative defenses).

76. See *id.*

77. FED. R. CIV. P. 8(a)(2) (emphasis added).

78. *Id.* 8(b)(1)(A).

79. *Id.* 8(c)(1).

80. See, e.g., *McLemore v. Regions Bank*, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010) (stating that, “[o]n its face, *Twombly* applies only to complaints and to Rule 8(a)(2), because the Court was interpreting” Rule 8(a)(2)'s requirement that any pleading which states a claim for relief must contain “a short and plain statement of the claim showing that the pleader is entitled to relief”), *aff'd*, 682 F.3d 414 (6th Cir. 2012).

standard for complaints.⁸¹ Thus, defendants argue, the Court implicitly affirmed a reading of the Rules that imposes two different standards: one for complaints and a different one for defenses.⁸²

While defendants focus on the differences in the text (“state” versus “show”), plaintiffs point out the similarities between Rule 8’s instructions for claims and defenses.⁸³ Namely, both rules say that statements should be “short and plain.”⁸⁴ This shared language, plaintiffs argue, shows that Rule 8 intended to create a unified pleading standard for complaints and defenses.⁸⁵ Therefore, the argument concludes, *Twombly* and *Iqbal* redefined “fair notice” as it applies to Rule 8 generally—complaints and answers alike.⁸⁶ As plaintiffs would have it, “the reasoning of *Twombly* and *Iqbal* extends to the pleading of affirmative defenses.”⁸⁷

3. Judicial Efficiency

All parties want to “avoid the expenditure of time and money that must arise from litigating spurious issues by disposing of those issues prior to trial.”⁸⁸ But plaintiffs and defendants differ on what will achieve this judicial efficiency. Plaintiffs say that moving to strike affirmative defenses under Rule 12(f) will rid the court of spurious issues, thus preventing the need to litigate them.⁸⁹ They contend that applying *Twombly* and *Iqbal*’s heightened standard

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

82. See *Bayer CropScience AG v. Dow AgroSciences LLC*, No. 10-1045 RMB/JS, 2011 WL 6934557, at *1–2 (D. Del. Dec. 30, 2011).

83. See *Mayer*, *supra* note 34, at 282.

84. *Id.*

85. *Id.*

86. *Id.*; see *O’Sullivan v. AMN Servs., Inc.*, No. C-12-02125 JCS, 2012 WL 2912061, at *7 (N.D. Cal. July 16, 2012).

87. See *Rosen v. Masterpiece Mktg. Grp., LLC*, 222 F. Supp. 3d 793, 800 (C.D. Cal. 2016) (quoting *Dodson v. Strategic Rests. Acquisition Co. II*, 289 F.R.D. 595, 598–603 (E.D. Cal. 2013)).

88. *Id.* at 797 (quoting *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010)); Kent Sinclair & Patrick Hanes, *Summary Judgement: A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633, 1643 n.36 (1995) (“A just and speedy outcome of a particular action—whether a dismissal or an entry of judgment—is of primary value to the party that benefits from the ruling. Judicial efficiency, on the other hand, is a value from which all parties or potential parties in a jurisdiction benefit.”). It should be noted, however, that this does not include a situation where a party with greater resources is strategically delaying to harass the opposition. This arguably violates the guidance instructing attorneys to litigate “without undue cost or delay.” See FED. R. CIV. P. 1 advisory committee’s note to 1993 amendment.

89. See *Rosen*, 222 F. Supp. 3d at 800 (“If a defendant cannot articulate the reasons that affirmative defenses apply to a dispute, it is costly, wasteful, and unnecessary to force plaintiffs to conduct discovery into those defenses.” (quoting *Dodson*, 289 F.R.D. at 598–603)).

will declutter boilerplate defenses from the docket, increasing judicial efficiency.⁹⁰

Defendants claim that applying the heightened standard will lead to a proliferation of motions to strike.⁹¹ Motions to strike do not usually expedite litigation because leave to amend is routinely granted.⁹² Thus, the reasoning concludes, unlike motions to dismiss, motions to strike “waste everyone’s time.”⁹³

4. *Discovery*

A related efficiency argument revolves around discovery. As previously mentioned, affirmative defenses are intertwined with discovery requirements.⁹⁴ Plaintiffs point out, rightly, that the *Twombly* and *Iqbal* Courts established the heightened plausibility standard to avoid unnecessary discovery burdens on defendants.⁹⁵ This intent, they argue, logically extends to defendants’ affirmative defenses.⁹⁶ “*Iqbal*’s admonition that fair notice pleading under Rule 8 is not intended to give parties free license to engage in unfounded fishing expeditions on matters for which they bear the burden of proof at trial”⁹⁷ should apply to affirmative defenses no less than claims made by plaintiffs.⁹⁸

Defendants beg to differ, distinguishing the extent to which complaints “unlock[] the doors of discovery” as compared to defenses.⁹⁹ Defendants argue that plaintiffs can easily learn more about their affirmative defenses through interrogatories, that it is unlikely that either side will pursue discovery on frivolous defenses, and thus that there is no efficiency need to apply the heightened standard to affirmative defenses.¹⁰⁰ Further, there is an inherent

90. *See id.*; *see also* *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 233 (E.D.N.C. 2010) (noting that applying the *Twombly* and *Iqbal* standard promotes judicial economy by decluttering the docket of boilerplate defenses which create extra work and extend discovery).

91. *See* *Craten v. Foster Poultry Farms Inc.*, No. CV-15-02587-PHX-DLR, 2016 WL 3457899, at *3 (D. Ariz. June 24, 2016); *Rosen*, 222 F. Supp. 3d at 799 (“[H]eighted pleading standards create unnecessary judicial burdens in that they ‘require the court to address multiple motions to amend the answer as discovery reveals additional defenses.’” (quoting *Dodson*, 289 F.R.D. at 598–603)).

92. *Bayer CropScience AG v. Dow AgroSciences LLC*, No. 10-1045 RMB/JS, 2011 WL 6934557, at *2 (D. Del. Dec. 30, 2011).

93. *Infogroup, Inc. v. DatabaseLLC*, 95 F. Supp. 3d 1170, 1194 (D. Neb. 2015) (quoting *Lane v. Page*, 272 F.R.D. 581, 596 (D.N.M. 2011)).

94. *See* FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense . . .”).

95. *See Rosen*, 222 F. Supp. 3d at 800 (citing *Dodson*, 289 F.R.D. at 598–603).

96. *See id.*

97. *Perez v. Gordon & Wong Law Grp., P.C.*, No. 11-CV-03323-LHK, 2012 WL 1029425, at *8 (N.D. Cal. Mar. 26, 2012).

98. *Id.*

99. *See Bayer CropScience AG v. Dow AgroSciences LLC*, No. 10-1045 RMB/JS, 2011 WL 6934557, at *1 (D. Del. Dec. 30, 2011).

100. *See Aguilar v. City Lights of China Rest., Inc.*, No. DKC 11-2416, 2011 WL 5118325, at *4 (D. Md. Oct. 24, 2011).

difference in the stakes of haling someone into court as opposed to expanding the scope of discovery within an already existing proceeding.¹⁰¹

5. Historical Practice and Pre-*Twombly* Case Law

We have already seen that “[m]otions to strike an affirmative defense are generally disfavored and, historically, were only granted in limited circumstances.”¹⁰² Courts have long said that motions to strike are “time wasters”¹⁰³ that “serve little useful purpose in modern federal practice, and are often wielded mainly to cause delay and inflict needless burdens on opposing parties.”¹⁰⁴ Defendants claim that this principle should make courts wary of applying the heightened standard to affirmative defenses when considering motions to strike.¹⁰⁵

Plaintiffs, on the other hand, point to pre-*Twombly* appellate court precedent that imposes the same pleading standard—*Conley’s*—on complaints and defenses both.¹⁰⁶ Plaintiffs argue that *Twombly* and *Iqbal* only “changed the legal foundation underlying” these decisions.¹⁰⁷ In other words, the precedent still stands for the proposition that pleading standards should be unified;¹⁰⁸

101. See *In re Quaker Oats Labeling Litig.*, No. C 10-0502 RS, 2013 WL 12155299, at *1 (N.D. Cal. May 20, 2013) (“Permitting a plaintiff to proceed on a conclusory or factually deficient complaint potentially exposes the defendant to expensive and intrusive discovery, and to pressure to settle the matter for its ‘nuisance value.’ In most cases, even the most conclusory affirmative defenses do not impose similar burdens.”).

102. *Bayer CropScience*, 2011 WL 6934557, at *1; see also *BIC Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007) (stating that striking pleadings “is an extreme and disfavored measure”); *Heller Fin., Inc. v. Midweh Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989); *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 901 (E.D. Pa. 2011) (“On a more practical level, requiring greater notice conflicts with the longstanding truism that motions to strike are disfavored.” (citing *Fiorentino v. Cabot Oil & Gas Corp.*, 750 F. Supp. 2d 506, 509–10 (M.D. Pa. 2010))).

103. *Moore v. R. Craig Hemphill & Assocs.*, No. 3:13-CV-900-J-39-PDB, 2014 WL 2527162, at *1 (M.D. Fla. May 6, 2014).

104. *Inn S.F. Enter., Inc. v. Ninth St. Lodging, LLC*, No. 3:16-cv-00599-JD, 2016 WL 8469189, at *1 (N.D. Cal. Dec. 19, 2016).

105. See *Bayer CropScience*, 2011 WL 6934557, at *1–2.

106. See *Rosen v. Masterpiece Mktg. Grp., LLC*, 222 F. Supp. 3d 793, 799–800 (C.D. Cal. 2016); *Ross v. Morgan Stanley Smith Barney, LLC*, No. 2:12-cv-09687-ODW(JCx), 2013 WL 1344831, at *2 (C.D. Cal. Apr. 2, 2013) (noting how courts “have found that *Twombly* and *Iqbal* merely ‘changed the legal foundation underlying’ *Wyshak* and that the reasoning in *Twombly* and *Iqbal* should apply to affirmative defenses to the same extent *Conley* did before *Twombly* and *Iqbal* were decided”). See generally *Wyshak v. City Nat’l Bank*, 607 F.2d 824, 827 (9th Cir. 1979).

107. See *Rosen*, 222 F. Supp. 3d at 799–800 (discussing the view that “the reasoning in *Twombly* and *Iqbal* applies with equal force in the context of affirmative defenses, and further not[ing] that, at the time the Court of Appeals for the Ninth Circuit decided *Wyshak*, it applied the same ‘fair notice’ standard to both complaints and affirmative defenses”).

108. See *United States v. Quadrini*, No. 2:07-CV-13227, 2007 WL 4303213, at *4 (E.D. Mich. Dec. 6, 2007) (“This clarification by the Supreme Court that a plaintiff must plead sufficient facts to demonstrate a plausible claim . . . cannot be a pleading standard that applies only to plaintiffs. It must also apply to defendants in pleading affirmative defenses . . .”); *Pelikan*, *supra* note 34, at 1854–55 (arguing for a unified pleading standard, and drawing the similarities between complaints and affirmative defenses as pleadings).

Twombly and *Iqbal* simply changed that standard from fair notice to plausibility.¹⁰⁹

Defendants object to this reasoning. The holding they draw from pre-*Twombly* precedent is that the pleading standard for affirmative defenses is fair notice.¹¹⁰ Neither *Twombly* nor *Iqbal* mention any standard for defenses at all.¹¹¹ Therefore, defendants conclude that district courts should follow pre-*Twombly* precedent to the letter, applying the fair notice standard.¹¹² In a similar vein, defendants have also noted that applying the heightened standard “would run counter to the Supreme Court’s warning in *Twombly* that legislative action, not ‘judicial interpretation,’ is necessary to ‘broaden the scope’ of specific federal pleading standards.”¹¹³ Judges, especially district court judges, should not expand the scope by interpretation, the argument concludes.

6. Court-Counting Precedent

One final argument gets made by both sides as they argue whether to apply the *Twombly* and *Iqbal* standard to affirmative defenses. Plaintiffs and defendants *both* claim that theirs is the majority view about pleading standards among district courts.¹¹⁴ As Part III will describe in detail, courts often observe, and sometimes rely on, their (sometimes incorrect) perceptions of how the majority of courts have ruled.¹¹⁵

109. See *Rahman v. San Diego Accounts Serv.*, No. 16cv2061-JLS (KSC), 2017 WL 1387206, at *2 (S.D. Cal. Apr. 18, 2017) (“Specifically, the only case *Wyshak* cited to support its ‘fair notice’ standard is *Conley*, and *Conley* has since been abrogated insofar as it permitted pleading at a standard lower than *Twombly*’s plausibility standard. Accordingly, ‘fair notice’ necessarily now encompasses the ‘plausibility’ standard; whatever standard ‘fair notice’ previously encompassed no longer exists.” (citations omitted)); *Rosen*, 222 F. Supp. 3d at 799–800.

110. See, e.g., *Rahman*, 2017 WL 1387206, at *2.

111. See *supra* note 62.

112. See *Infogroup, Inc. v. DatabaseLLC*, 95 F. Supp. 3d 1170, 1193 (D. Neb. 2015) (“As far as this Court is concerned, it is the Eighth Circuit’s prerogative to overrule its own decisions.”).

113. *Kohler v. Big 5 Corp.*, No. 2:12-cv-00500-JHN-SPx, 2012 WL 1511748, at *2 (C.D. Cal. Apr. 30, 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007)).

114. Compare *Strauss v. Centennial Precious Metals, Inc.*, 291 F.R.D. 338, 342 (D. Neb. 2013) (“[Plaintiff] concedes that the Eighth Circuit Court of Appeals has not addressed the issue, but *argues* that the majority of federal district courts have decided that the *Iqbal/Twombly* pleading standard does apply to the pleading of affirmative defenses.” (emphasis added)), with *Enough for Everyone, Inc. v. Provo Craft & Novelty, Inc.*, No. SA CV 11-1161 DOC (MLGx), 2012 WL 177576, at *1 (C.D. Cal. Jan. 20, 2012) (“Plaintiff contends that the ‘vast majority of courts have extended this heightened *Twombly* . . . standard to affirmative defenses.” (quoting Pl.’s Mot. To Strike Affirmative Defenses)).

115. See, e.g., *Hartford Underwriters Ins. v. Kraus USA, Inc.*, 313 F.R.D. 572, 574 (N.D. Cal. 2016) (noting that “the majority of district courts have concluded that the pleading standards set forth in [*Twombly* and *Iqbal*] apply to affirmative defenses,” and giving no other reason for deciding to apply the standards); *Dorsey v. Ghosh*, No. 13-cv-05747, 2015 WL 3524911, at *4 n.3 (N.D. Ill. June 3, 2015); *Jenkins v. Grant Thornton LLP*, No. 13-60957-CIV-ALTONAGA/O’Sullivan, 2014 WL 12634797, at *1 (S.D. Fla. July 22, 2014) (applying the heightened standard, giving only one in-district case for her reasoning); *Incuse Designs, Inc. v. Mophie, Inc.*, No. 13-cv-00602 RS, 2013 WL 12173931, at *1 (N.D. Cal. July 1, 2013); *Hudson v. First Transit, Inc.*, No. C 10-03158 WHA, 2011 WL 445683, at *1 (N.D. Cal. Feb. 3, 2011); *United States v.*

It might seem strange that both sides would claim to be part of the majority and sometimes win on the basis of that claim.¹¹⁶ After all, determining which position has been taken more often is an empirical question. But the sheer number of cases on the subject likely hampers courts from doing the empirics correctly. The following Part does that work for them. It reveals what a majority of courts have decided, across the country and over time, about whether to apply *Twombly* and *Iqbal*'s heightened pleading standards to affirmative defenses.

II. WHAT ARE COURTS DECIDING?

A. National Study Results

The authors of a leading civil procedure casebook tell students that, while “the level of detail that an affirmative defense must contain has divided courts in the wake of *Twombly* and *Iqbal*,” “to our knowledge no one has ever done a nose count to see which view is more common. It is probably safest to say that the courts are closely divided.”¹¹⁷

Having systematically counted noses, we can now say that courts are no longer closely divided on this question. In the 925 times courts answered it in the first ten years after *Twombly*, they *refused* to apply heightened pleading standards to affirmative defenses 62% of the time.¹¹⁸ Although a majority of cases initially did apply *Twombly* and *Iqbal* to defendants, the majority position flipped in August 2011; the proportion of cases which refuse to apply heightened pleading standards to defendants has been steadily increasing ever since. Figure 1 maps the numbers.

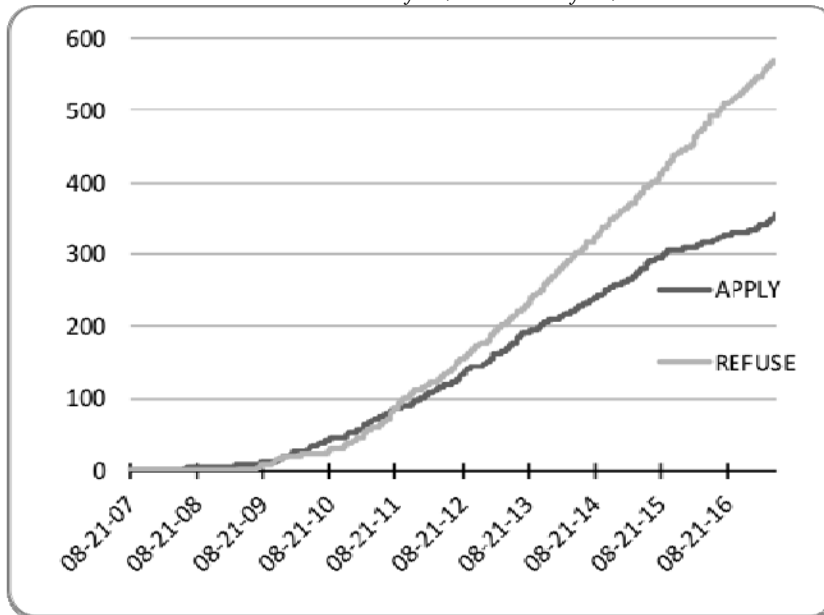
Brink, No. C-10-243, 2011 WL 835828, at *3 (S.D. Tex. Mar. 4, 2011); Barnes v. AT&T Pension Benefit Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1171–72 (N.D. Cal. 2010) (noting that “the vast majority of courts presented with the issue” applied the *Twombly* and *Iqbal* standard to affirmative defenses and that “[o]nly a few district courts have reached the contrary conclusion”). The data shows that judges are often swayed by the recognition of other courts’ rulings. See *infra* Section III.A.2, Table 1. This is discussed in depth *infra* Section III.A.2.

116. Compare *Brink*, 2011 WL 835828, at *3 (applying the heightened standard only after noting that “the majority of district courts” have done so (citing *Bradshaw v. Hilco Receivables, LLC*, 725 F. Supp. 2d 532, 536 (D. Md. 2010))), with *Decarlo v. McKinnon*, No. 13-14324-CIV-MARTINEZ-LYNCH, 2013 WL 12077796, at *2 (S.D. Fla. Nov. 19, 2013) (noting that a “growing majority of district courts . . . have held that the *Twombly/Iqbal* plausibility pleading standard does not apply to affirmative defenses” (quoting *EEOC v. Joe Ryan Enters., Inc.*, 281 F.R.D. 660, 662 (M.D. Ala. 2012))). It should be noted that *Decarlo* arrived at its view by misquoting *Joe Ryan Enterprises, Inc.*, which in fact states that “the growing *minority* of district courts . . . have held that the *Twombly/Iqbal* plausibility pleading standard does not apply to affirmative defenses.” 281 F.R.D. at 662. (emphasis added).

117. ROWE, JR., SHERRY & TIDMARSH, *supra* note 6, at 83.

118. See *infra* notes 124–27 and accompanying text.

Figure 1. *Number of Cases Applying and Refusing to Apply Heightened Pleading Standards to Affirmative Defenses from May 18, 2007 to May 18, 2017*



Our study both extends and amends the one previous large-scale study of pleading standards for affirmative defenses: Professor William Janssen’s survey of cases from August 2009 to September 2013.¹¹⁹ Aside from considering the nearly six hundred cases that have addressed the issue since Janssen’s study ended, ours also turned up more than twice as many cases as Janssen’s *during* the period he studied.¹²⁰ Other previous academic claims about who is in the majority and minority on this question have been either incorrect,¹²¹ sharply limited in their scope,¹²² or reliant on claims made by courts rather than their own independent research.¹²³

119. See Janssen, *supra* note 5.

120. Professor Janssen’s article does not include any discussion of the methods he used to find and select the cases he studies. He identified 232 relevant cases during the period in question, *id.* at 1606; our database includes 527 during the same period. And although we find that Professor Janssen’s study significantly overestimated the proportion of opinions that rejected heightened pleading standards in September 2013 (he claims 65%, *see id.*; we find that at that time it was 56%), his estimate is closer to the proportion we found at the endpoint of our study, where 62% of the relevant opinions refuse to apply *Twombly* and *Iqbal* to affirmative defenses. For an explanation of our approach in finding, reviewing, and recording the data for this Article, see *infra* notes 124–27 and accompanying text.

121. See, e.g., St. Eve & Zuckerman, *supra* note 28, at 163 (“The emerging majority view appears to be that the *Twombly/Iqbal* standard does indeed apply to affirmative defenses.”). Notably, Judge St. Eve sits on a court, the Northern District of Illinois, that is among the most likely in the country to apply the *Twombly/Iqbal* standard to defenses. See *infra* Figure 2.

122. See, e.g., Machado & Haynes, *supra* note 34, at 57 (“Most of the district courts in the Fourth Circuit have held that the pleading requirements of *Twombly* and *Iqbal* apply to affirmative defenses.”).

Our numbers,¹²⁴ by contrast, result from a Westlaw search for all cases decided in the ten years after *Twombly* was handed down—May 21, 2007—which mention affirmative defenses in the same paragraph as *Twombly*, *Iqbal*, or heightened pleading.¹²⁵ From the 2,863 cases in that set, we and our research assistants were able to eliminate hundreds of false hits, ultimately identifying and individually reviewing a total of 1,141 opinions that address the question of whether affirmative defenses have to satisfy the pleading standards established in *Twombly* and *Iqbal*. In 216 of these, courts were able to side-step the question, often because the defendant’s answer would satisfy, or fail to satisfy, either standard. That left 925 opinions in which courts answered the question, in cases stretching from one decided by a magistrate judge in the Southern District of Florida on August 21, 2007¹²⁶—a mere three months after *Twombly*—to three cases decided in mid-May 2017,¹²⁷ all from the Northern District of Illinois. All four of these decisions, incidentally, chose to apply heightened pleading standards to affirmative defenses.

Although applying heightened pleading is now the minority position nationwide, it is not surprising that these cases would have come out this way, given district-by-district variations and trends. Of the districts that have considered more than a handful of cases on the subject, the Northern District of Illinois (where 91% apply the heightened standard) is second only to the Northern District of California (92% apply) in requiring heightened pleading by defendants. Meanwhile, the Southern District of Florida (53% apply) is also among the thirteen judicial districts that have applied *Twombly* and *Iqbal* to

Machado and Haynes’s claim about courts in the Fourth Circuit was true in July 2012 when they published their article; now, courts in the Fourth Circuit are almost evenly split. See *infra* Figure 3.

123. See, e.g., Rand, *supra* note 34, at 80–81 (“[W]hile the majority of federal district courts initially applied *Twombly* plausibility to affirmative defenses, the tide is slowly shifting in favor of applying the *Conley* standard.” (footnote omitted)). In support of this empirical claim, Rand’s 2016 article cites a 2012 district court opinion, *Tiscareno v. Frasier*, No. 2:07-CV-336, 2012 WL 1377886, at *14 n.4 (D. Utah Apr. 19, 2012), which found the majority at that time to be “unclear”; and a 2013 student note, Mayer, *supra* note 34, at 285 n.65, which cited both *Tiscareno* and *Hansen v. R.I.’s Only 24 Hour Truck & Auto Plaza, Inc.*, 287 F.R.D. 119, 122 (D. Mass. 2012), the first case in the country to note correctly that the national majority had flipped from symmetrical to asymmetrical pleading standards.

124. All of the cases culled were cataloged and sorted in Microsoft Excel spreadsheets, recording, *inter alia*, the case name; date of the case; the judge who wrote the opinion; and whether the case applied heightened pleading standards to defendants, refused to apply them, or neither applied nor refused to apply them due to inapplicability. These spreadsheets are on file with the authors.

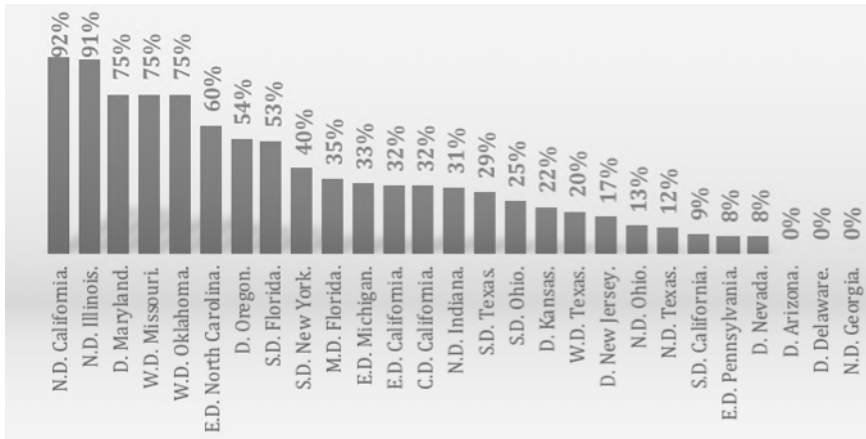
125. Because our study was based on opinions available on Westlaw, there is a possibility that case-selection bias might have affected which court orders are included. See Edward K. Cheng, *Detection and Correction of Case-Publication Bias*, 47 J. LEGAL STUD. 151 (2018). In this, our study’s “court-counting” shares one of the limitations that faces judges who presumably rely on commercial databases to engage in counting of their own. See *infra* notes 200–12 and accompanying text.

126. *Home Mgmt. Sols., Inc. v. Prescient, Inc.*, No. 07-20608-CIV, 2007 WL 2412834, at *3 (S.D. Fla. Aug. 21, 2007).

127. *Solo Cup Operating Corp. v. Lollicup USA, Inc.*, No. 16 C 8041, 2017 WL 2152424, at *2 (N.D. Ill. May 17, 2017), *amended and superseded on reconsideration*, No. 16 C 8041, 2017 WL 3581182 (N.D. Ill. Aug. 18, 2017); *Janssen v. BRI Holding, LLC*, No. 16-cv-10098, 2017 WL 2080424, at *4 (N.D. Ill. May 15, 2017); *Badshah v. Am. Airlines, Inc.*, No. 17 C 01254, 2017 WL 2021089, at *1 (N.D. Ill. May 12, 2017).

affirmative defenses a majority of the time, and with ninety-three cases on the subject, it leads the country in the number of times its judges have confronted the question. Figure 2 shows the federal judicial districts' widely varying responses; included is every district with ten or more cases on the subject.

Figure 2. *Percent of Cases in Which District Courts APPLY Heightened Pleading Standards to Affirmative Defenses*
(Districts with ten or more cases on the subject)



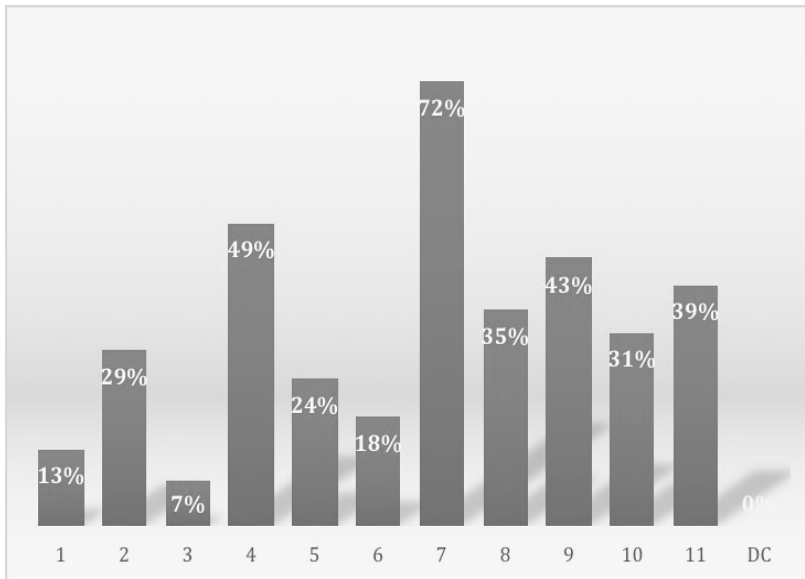
This district-by-district variation means that defendants are effectively subjected to different pleading standards depending on whether they have been taken to court in, say, the Northern District of California instead of the Districts of Delaware, Arizona, or even the Southern District of California. In addition to the intracircuit variation, there is also significant variation among the circuits. District courts in the Seventh Circuit (72% apply, with eighty-three cases)¹²⁸ are by far the most likely to apply heightened pleading standards to affirmative defenses; of the circuits with significant numbers of cases,¹²⁹ courts in the Third Circuit (only 7% apply, with fifty-five cases)¹³⁰ are least likely to treat the gander like the goose. Figure 3 shows these numbers.

128. See *supra* notes 124–27 and accompanying text.

129. Courts in the First Circuit have decided only eight cases, while those in the D.C. Circuit have decided just two.

130. See *supra* notes 124–27 and accompanying text.

Figure 3. Percent of Cases in Which Courts in Each Circuit Apply Heightened Pleading Standards to Affirmative Defenses



To a certain extent, the circuit numbers may be less useful than the district-wide statistics, as some are dominated or skewed by cases from a single district. The Seventh Circuit falls into the former category: forty-four of its eighty-three decisions come from the Northern District of Illinois,¹³¹ which, as noted above, applies heightened pleading standards 91% of the time.¹³² Remove that district and the rest of the Seventh Circuit splits nearly 50-50 on the question.¹³³ The Ninth Circuit falls into the skewed category: without the Northern District of California, which applied heightened standards in 92% of the seventy-five cases it decided,¹³⁴ the Ninth Circuit would fall from 43% applying to just 23%.¹³⁵ And the number of remaining cases would still be high: 181 decisions come from the circuit's other districts.¹³⁶

The district courts of the Seventh and Ninth Circuits are notable also for the way that they have looked to decisions by their courts of appeals. Importantly, no federal appellate court has squarely asked and answered the question of whether *Twombly* and *Iqbal* apply to affirmative defenses. The Sec-

131. *See id.*

132. *See supra* Figure 2.

133. *See supra* notes 124–27 and accompanying text.

134. *See supra* Figure 2.

135. *See supra* notes 124–27 and accompanying text.

136. *See supra* notes 124–27 and accompanying text.

ond¹³⁷ and Sixth Circuits¹³⁸ have both asked the question and avoided answering it. Other circuit court opinions have been said to provide an answer even though they failed to make the question explicit.

This is the case with the Seventh Circuit's opinion in *Heller Financial, Inc. v. Midwhey Powder Co.*,¹³⁹ a case from 1989. Long before *Twombly*, the *Heller Financial* court had held that “[a]ffirmative defenses are pleadings and, therefore, are subject to all pleading requirements of the Federal Rules of Civil Procedure. Thus, defenses must set forth a ‘short and plain statement’ of the defense.”¹⁴⁰ More recent district court cases in the Seventh Circuit have cited *Heller* as part of a syllogism of sorts: (1) *Twombly* and *Iqbal* raised pleading requirements; (2) *Heller* says that affirmative defenses “are subject to all pleading requirements”; therefore, (3) affirmative defenses now face heightened pleading requirements.¹⁴¹

The Fifth Circuit's 1999 decision in *Woodfield v. Bowman*¹⁴² has proven more contested. On the one hand, it confirmed that affirmative defenses only have to give plaintiffs “fair notice”—in fact, “in some cases, merely pleading the name of the affirmative defense . . . may be sufficient.”¹⁴³ But on the other hand, *Woodfield* also held, long before *Twombly* and *Iqbal*, that “[a]n affirmative defense is subject to the same pleading requirements as is the complaint.”¹⁴⁴ District courts in the Fifth Circuit have pointed to one part of *Woodfield*¹⁴⁵ or the other¹⁴⁶ in reaching their divergent decisions.

A stronger argument comes from the Sixth Circuit's post-*Iqbal* decision in *Montgomery v. Wyeth*,¹⁴⁷ which held that the federal rules “do not require a

137. *Jones v. Bryant Park Mkt. Events, LLC*, 658 F. App'x 621, 624 (2d Cir. 2016) (“[W]e need not reach this question, because even if we were to apply the *Iqbal-Twombly* standard to affirmative defenses, it would not help [the plaintiff].”).

138. *Depositors Ins. Co. v. Estate of Ryan*, 637 F. App'x 864, 869 (6th Cir. 2016) (“[B]ecause the district court did not actually apply [the heightened] standard to appellants’ affirmative defenses, it is unnecessary for us to resolve this issue.”); *Herrera v. Churchill McGee, LLC*, 680 F.3d 539, 547 n.6 (6th Cir. 2012) (“Because we find no unfair prejudice, we need not address[.] . . . [and we] express no view regarding the impact of *Bell Atlantic Corp. v. Twombly*, and *Ashcroft v. Iqbal*, on affirmative defenses.” (citations omitted)).

139. 883 F.2d 1286 (7th Cir. 1989).

140. *Id.* at 1294 (citations omitted) (quoting Fed. R. Civ. P. 8(a)).

141. *See id.*; *see also, e.g.*, *Groupon Inc. v. MobGob LLC*, No. 10 C 7456, 2011 WL 2111986, at *2 (N.D. Ill. May 25, 2011); *Kimbrew v. Advocate Health & Hosps. Corp.*, No. 10 C 4531, 2010 WL 5135908, at *1 (N.D. Ill. Dec. 8, 2010).

142. 193 F.3d 354 (5th Cir. 1999).

143. *Id.* at 362.

144. *Id.*

145. *See, e.g.*, *Joe Hand Promotions, Inc. v. HRA Zone, L.L.C.*, No. A-13-CA-359 LY, 2013 WL 5707810, at *2 (W.D. Tex. Oct. 18, 2013) (citing *Rogers v. McDorman*, 521 F.3d 381, 385–86 (5th Cir. 2008), as evidence that *Woodfield*'s fair notice standard for affirmative defenses survived *Twombly*).

146. *See, e.g.*, *T-Mobile USA, Inc. v. Wireless Exclusive USA, LLC*, No. 3:08-CV-0340-G, 2008 WL 2600016, at *2 (N.D. Tex. July 1, 2008) (equating pleading standards for complaints and answers, citing *Woodfield*).

147. 580 F.3d 455 (6th Cir. 2009).

heightened pleading standard for a statute of repose defense.”¹⁴⁸ Although *Montgomery* does not mention *Twombly* or *Iqbal*, district courts in the Sixth Circuit have since found that it reaffirmed the circuit’s longstanding fair notice standard for affirmative defenses.¹⁴⁹ The notably low rate at which courts in the Sixth Circuit apply heightened pleading standards—eleven out of sixty-two cases¹⁵⁰—is surely a result.

A more divisive example is the Ninth Circuit’s 2015 opinion in *Kohler v. Flava Enterprises, Inc.*¹⁵¹ There the court held that “the ‘fair notice’ required by the pleading standards only requires describing the defense in ‘general terms.’”¹⁵² But in doing so, it did not mention *Twombly* or *Iqbal*, and it cited the 1998 edition of Wright and Miller’s *Federal Practice and Procedure*, which, unlike the current version, obviously could not have acknowledged the more recent debates over pleading standards.¹⁵³

Before *Kohler*, district courts in the Ninth Circuit were almost evenly divided: seventy-eight opinions applied heightened pleading standards to affirmative defenses, and eighty did not.¹⁵⁴ Since then, courts have applied them only half as often as they have refused (thirty-three to sixty-five).¹⁵⁵ But even these numbers mask what has really happened. Outside the Northern District of California, courts have largely interpreted *Kohler* to preclude heightened pleading standards for defendants; they have refused to apply them in sixty-four out of seventy-nine cases.¹⁵⁶ But the Northern District has gone its own

148. *Id.* at 468. This statement might be dictum, however, as the court goes on to say that Tennessee’s Statute of Repose may not be waivable; defendant’s failure to plead it sufficiently (or at all) would not then matter. *See id.* at 468 n.7.

149. *See, e.g.*, *Revocable Living Tr. of Stewart I. Mandel v. Lake Erie Utils. Co.*, No. 3:14 CV 2245, 2015 WL 2097738, at *4 (N.D. Ohio May 5, 2015); *Chiancone v. City of Akron*, No. 5:11CV337, 2011 WL 4436587, at *3 (N.D. Ohio Sept. 23, 2011).

150. *See supra* notes 124–27 and accompanying text.

151. 779 F.3d 1016 (9th Cir. 2015).

152. *Id.* at 1019 (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1274 (3d ed. 1998)).

153. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1274 (3d ed. 2004 & Supp. 2018).

154. *See supra* notes 124–27 and accompanying text.

155. *See supra* notes 124–27 and accompanying text.

156. *See supra* notes 124–27 and accompanying text; *see also, e.g.*, *Rosen v. Masterpiece Mktg. Grp., LLC*, 222 F. Supp. 3d 793, 798–802 (C.D. Cal. 2016) (including a notable, lengthy discussion of both sides of the debate that settles on a refusal to apply heightened standards to defendants); *Sherwin-Williams Co. v. Courtesy Oldsmobile-Cadillac, Inc.*, No. 1:15-cv-01137 MJS HC, 2016 WL 615335, at *3 (E.D. Cal. Feb. 16, 2016) (reversing course from an earlier decision after finding that, “[s]ince *Kohler*, every judge in this district that has evaluated the split in light of the *Kohler* decision has found that the fair notice standard should apply”); *Castellano v. Access Premier Realty7, Inc.*, No. 1:15-cv-00407-MCE-MJS, 2015 WL 7423821, at *2 (E.D. Cal. Nov. 23, 2015) (“The Ninth Circuit . . . has resolved the split in the district courts.”); *Aubin Indus., Inc. v. Caster Concepts, Inc.*, No. 2:14-cv-02082-MCE-CKD, 2015 WL 3914000, at *5–6 (E.D. Cal. June 25, 2015) (“[T]his Court reads *Kohler* as standing for the proposition that *Wyshak*, and not *Twombly/Iqbal*, provides the proper yardstick for assessing the sufficiency of affirmative defenses.” (citing *Wyshak v. City Nat’l Bank*, 607 F.2d 824, 827 (9th Cir. 1979) (“The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.”))).

way: since *Kohler* it has applied heightened pleading standards in eighteen out of nineteen cases.¹⁵⁷ As one district judge put it, *Kohler*'s "use of the specific phrase 'fair notice' prompted some district courts to reconsider the pleading standard for affirmative defenses," but, in her view, "the Ninth Circuit did not specifically hold in [*Kohler*] that the *Twombly/Iqbal* standard does not apply to the pleading of affirmative defenses."¹⁵⁸ Consequently, she concluded that "in the absence of clear controlling authority, the Court will follow numerous decisions in this district applying the *Twombly/Iqbal* standard to affirmative defenses."¹⁵⁹ Court-counting precedent—deference to the strong trend in outcomes at the district level—here trumped the actual, if arguably ambiguous, precedent of a higher court. We will soon return, in Part III, to the question of how common court-counting precedent has been in this area of law.

Before we do, however, it is worth asking what else, aside from cases like *Kohler*, might have caused the majority position to flip over time. In particular, it is interesting to note cases in which individual judges switch sides from their own previous rulings.

B. *Reasons for Change in the National Majority*

Some judges simply change their views on the merits. Judge Drain of the Eastern District of Michigan offers an example. In June of 2014, Judge Drain was persuaded by the reasoning of courts that have refused to apply the heightened standards.¹⁶⁰ Less than six months later, Judge Drain ruled the opposite way, applying the heightened standard and citing the need to reduce boilerplate defenses.¹⁶¹ Going the other direction, Judge Ellison of the Southern District of Texas switched from applying to refusing to apply heightened pleading standards based solely on the persuasiveness of legal arguments—ones which he didn't explicitly consider in his earlier opinion.¹⁶² District court judges are entirely free to do this, of course, as prior decisions do not act as

157. See *supra* notes 124–27 and accompanying text.

158. *Murphy v. Trader Joe's*, No. 16-cv-02222-SI, 2017 WL 235193, at *2 (N.D. Cal. Jan. 19, 2017) (quoting *Perez v. Wells Fargo & Co.*, No. 14-cv-0989-PJH, 2015 WL 5567746, at *3 (N.D. Cal. Sept. 21, 2015)). Another argument, made earlier in *Perez v. Gordon & Wang Law Group, P.C.*, No. 11-CV-03323-LHK, 2012 WL 1029425, at *8 n.4 (N.D. Cal. Mar. 26, 2012), is that the Ninth Circuit's references to the fair notice standard fail to answer the question of "how to construe what constitutes 'fair notice' to plaintiff post-*Iqbal*."

159. *Trader Joe's*, 2017 WL 235193, at *2.

160. *Malibu Media v. Doe*, No. 13-11432, 2014 WL 2616902, at *2 (E.D. Mich. June 12, 2014).

161. *Rehab Sols., Inc. v. St. James Nursing & Physical Rehab. Ctr., Inc.*, No. 14-cv-13651, 2014 WL 6750590, at *1 (E.D. Mich. Dec. 1, 2014).

162. *Compare Magicon, LLC v. Weatherford Int'l, Inc.*, Nos. 4:08-cv-03639, 4:08-cv-03636, 2009 WL 7868746, at *1–2 (S.D. Tex. Aug. 10, 2009) (applying the heightened standard), with *Florida v. DLT 3 Girls, Inc.*, No. 4:11-cv-3624, 2012 WL 1565533, at *2 (S.D. Tex. May 2, 2012) (refusing to apply the heightened standard).

binding legal precedent at the district court level.¹⁶³ Even the principles of stare decisis do not necessarily apply across or even within district courts.¹⁶⁴

Sometimes judges' opinions continue to be highly influential even after the judges themselves change their minds. In 2010, Judge Fox of the Eastern District of North Carolina decided in *Racick v. Dominion Law Associates* to apply the heightened standard to affirmative defenses.¹⁶⁵ Judge Fox's careful reasoning made *Racick* one of the most cited district court cases on this issue, and his opinion was even included in a leading civil procedure textbook.¹⁶⁶ Judge Fox declined an invitation to change positions in 2013.¹⁶⁷ But in 2015 Judge Fox found "more recent district court decisions on the matter to be persuasive and adopt[ed] their reasoning" for *not* applying the *Twombly* and *Iqbal* standard to affirmative defenses.¹⁶⁸ *Racick* continues to be influential despite its author's repudiation of its result. Eleven opinions have cited *Racick* since Judge Fox changed his mind in 2015;¹⁶⁹ meanwhile, only two opinions have cited his

163. See *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 134.02[1][d] (3d ed. 2011))); *RLJCS Enters., Inc. v. Prof'l Benefit Tr. Multiple Emp'r Welfare Benefit Plan & Tr.*, 487 F.3d 494, 499 (7th Cir. 2007) (Easterbrook, C.J.) ("[D]ecisions of district judges have no authoritative effect."); *Mueller v. Reich*, 54 F.3d 438, 441 (7th Cir. 1995) (Posner, C.J.) ("[D]istrict court decisions are not authoritative as precedents, even at the district court level."), *vacated*, *Wisconsin v. Mueller*, 519 U.S. 1144 (1997). *But see* *J & J Sports Prods., Inc. v. Vega*, No. 5:15-CV-5199, 2016 WL 627356, at *2 (W.D. Ark. Feb. 16, 2016) ("However, *this* Court has previously ruled otherwise, and is not in the business of departing from its own precedent absent a very compelling reason to do so . . .").

164. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 801–02 (2012) ("Although there is considerable ambiguity regarding horizontal stare decisis in district courts, the modern trend is moving away from extending any deference." (footnote omitted)).

165. 270 F.R.D. 228, 234 (E.D.N.C. 2010) ("This court, however, agrees with the district courts within the Fourth Circuit that have considered the question and concludes that . . . the same pleading requirements apply equally to complaints and affirmative defenses.").

166. See THOMAS D. ROWE, JR., SUZANNA SHERRY & JAY TIDMARSH, *CIVIL PROCEDURE* 83–85 (3d ed. 2012). Westlaw indicates thirty cases, many of them out of circuit, and thirty secondary sources, citing specifically to the headnote where the *Racick* court applies the heightened standard. See Citing References for *Racick v. Dominion Law Associates*, WESTLAW, <https://1.next.westlaw.com> (enter the citation "270 F.R.D. 228" in the search bar to access *Racick v. Dominion Law Associates*; follow "Cases that cite this headnote" hyperlink under Headnote 5) (thirty cases citing *Racick* on Mar. 17, 2019).

167. See *Johnson v. Clark*, No. 5:12-CV-743-F, 2013 WL 3455737, at *2 (E.D.N.C. July 9, 2013) ("Defendants suggest that this court should reverse course from its decision in *Racick* and instead allow conclusory defenses to stand. This the court declines to do.").

168. *Microspace Commc'ns Corp. v. Guest-Tek Interactive Entm't, Ltd.*, No. 5:14-CV-535-F, 2015 WL 4910134, at *4 (E.D.N.C. Aug. 17, 2015).

169. See Citing References for *Racick v. Dominion Law Associates*, WESTLAW, <https://1.next.westlaw.com> (enter the citation "270 F.R.D. 228" in the search bar to access *Racick v. Dominion Law Associates*; scroll over the "Citing References" tab; follow the "Cases" link in the sidebar; expand the "Date" tab on the sidebar; set the date to "all dates after August 17, 2015"; select the "Apply" link) (eleven cases citing *Racick* on Mar. 17, 2019). Two of these cases were for the proposition that a heightened standard should be applied to affirmative defenses. See *Balon v. Enhanced Recovery Co.*, 316 F.R.D. 96, 101–02 n.3 (M.D. Pa. 2016); *Info. Planning & Mgmt. Serv. Inc. v. Dollar Gen. Corp.*, No. 2:15cv206, 2016 WL 69902, at *4 (E.D. Va. Jan. 5, 2016).

2015 decision.¹⁷⁰ A similar story can be told about Magistrate Judge Rushfelt in the District of Kansas.¹⁷¹

Judges Fox and Rushfelt changed their minds based on arguments offered by other judges in their districts. Elsewhere, however, judges have relied on a perceived majority, whether at the district, circuit, or national level, as one of the reasons for their switch. In the Northern District of California, Judge White applied the heightened standard in 2013,¹⁷² after refusing to do so in 2010¹⁷³ and 2011.¹⁷⁴ Though he had previously refused, Judge White noted when he switched that “the majority of courts within this District have applied *Twombly* and *Iqbal* to affirmative defenses.”¹⁷⁵ He went on to describe those courts’ reasoning and to agree with it.¹⁷⁶ Thus, while Judge White’s perceived district majority likely had an influence on the outcome of the case, it was not the only factor. Judge Melgren’s decisions in the District of Kansas have followed a similar pattern.¹⁷⁷

Another group of judges appear to have changed their position solely to join a perceived majority, whether national or more local. An example of this at the district level comes from the rulings of Judge Seeborg of the Northern District of California. He first entered the debate in August of 2011, finding

170. See Citing References for *Microspace Commc'ns Corp. v. Guest-Tek Interactive Entm't, Ltd.*, WESTLAW, <https://1.next.westlaw.com> (enter “2015 WL 4910134” in the search bar to access *Microspace Commc'ns Corp. v. Guest-Tek Interactive Entertainment, LTD*; scroll over the “Citing References” tab; follow the “Cases” link in the sidebar) (two cases citing *Microspace Commc'ns Corp.* on Mar. 17, 2019).

171. See *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009) (“It makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses.”). Thirty-six courts and forty-nine secondary sources cited to the Westlaw headnote in *Hayne* applying the heightened standard. See Citing References for *Hayne v. Green Ford Sales, Inc.*, WESTLAW, <https://1.next.westlaw.com> (enter the citation “263 F.R.D. 647” in the search bar to access *Hayne v. Green Ford Sales, Inc.*; follow the “Cases citing this headnote” hyperlink beneath Headnote 7; follow either the “Cases” or “Secondary Sources” link on the sidebar) (thirty-six cases and forty-nine secondary sources citing *Hayne* on Mar. 17, 2019). Judge Rushfelt changed his position, however, in *Ponder v. Prophete*, No. 16-2376-CM-GLR, 2016 WL 6539128, at *1–2 (D. Kan. Nov. 3, 2016). Twelve cases have cited *Hayne* since Judge Rushfelt flipped. See Citing References for *Hayne v. Green Ford Sales, Inc.*, WESTLAW, <https://1.next.westlaw.com> (enter the citation “263 F.R.D. 647” in the search bar to access *Hayne v. Green Ford Sales, Inc.*; scroll over the “Citing References” tab; select the “Cases” link; expand the “Date” tab in the sidebar; set the date to “all dates after November 3, 2016; select the “Apply” link) (twelve cases citing *Hayne* on Mar. 17, 2019).

172. See *Polo v. Shwiff*, No. C 12-04461 JSW, 2013 WL 1797671, at *4–5 (N.D. Cal. Apr. 29, 2013).

173. *Vieste, LLC v. Hill Redwood Dev.*, No. C 09-04024 JSW, 2010 WL 11484768, at *3 (N.D. Cal. July 13, 2010) (“[T]his Court does not find that a defense which alleges nothing more than a legal assertion must be stricken as insufficient.”).

174. *Smith v. Levine Leichtman Capital Partners, Inc.*, No. C 10-00010 JSW, 2011 WL 13152867, at *2 (N.D. Cal. Mar. 9, 2011) (refusing to apply the heightened standard).

175. *Polo*, 2013 WL 1797671, at *4.

176. *Id.* at *5.

177. Compare *Bennett v. Sprint Nextl Corp.*, No. 09-2122-EFM, 2011 WL 4553055, at *1–2 (D. Kan. Sept. 29, 2011) (refusing to apply heightened standard), with *Constr. Indus. Laborers Pension Fund v. Explosive Contractors, Inc.*, No. 12-2624-EFM, 2013 WL 3984371, at *1–2 (D. Kan. Aug. 1, 2013) (“[M]ost [district] courts hold[] that the more rigorous *Twombly/Iqbal* standard does apply to affirmative defenses. . . . This Court agrees with . . . those jurisdictions that have interpreted the *Twombly/Iqbal* standard as applicable to affirmative defenses.”).

the reasoning for refusing to apply heightened pleading standards more compelling than the alternative.¹⁷⁸ Two years later, in *Incase Designs, Inc. v. Mophie, Inc.*,¹⁷⁹ Judge Seeborg again noted that “[a] good argument can be made that the heightened pleading standard should not apply to affirmative defenses.”¹⁸⁰ But then, without even considering the substantive arguments on the other side, he concluded: “Nevertheless, as a majority of courts in this district have applied the heightened pleading standard to affirmative defenses in considering a motion to strike, that standard will be applied.”¹⁸¹

The opinions of Judge Alsup of the Northern District of California offer an example of court-counting at the national level. In a 2009 opinion, Judge Alsup applied the *Conley* standard, asserting that “[t]he key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.”¹⁸² Just over a year later, in February 2011, Judge Alsup reversed his position, applying the heightened plausibility standard to affirmative defenses.¹⁸³ In the opinion, Judge Alsup gave no legal reasoning for or against applying the heightened standard to affirmative defenses.¹⁸⁴ Instead, he asserted that *Twombly*'s heightened pleading standard applied because “the vast majority of courts presented with the issue have” applied it.¹⁸⁵ Judge Alsup's only stated reason for changing course was that the national majority of district courts had done so.¹⁸⁶

As Part III will show, Judge Alsup is far from alone in employing court-counting as something akin to precedent: a reason for a decision that derives not from other courts' arguments, but from the brute fact that they decided the question that way too.

178. *Shire LLC v. Impax Labs., Inc.*, No. C 10-5467 RS, 2011 WL 13152734, at *4 (N.D. Cal. Aug. 29, 2011) (refusing to apply the heightened standard, noting that striking a defense and requiring the defendant “to restate it would waste resources better spent on advancing [the] case on the merits”).

179. *Incase Designs, Inc. v. Mophie, Inc.*, No. 13-cv-00602 RS, 2013 WL 12173931, at *1 (N.D. Cal. July 1, 2013).

180. *Id.*

181. *Id.* Another example of this is Judge Altonaga from the Southern District of Florida. *Compare* *CI Int'l Fuels, LTDA. v. Helm Bank, S.A.*, No. 10-20347-CIV, 2010 WL 3056598, at *1–2 (S.D. Fla. Aug. 4, 2010) (refusing to apply the heightened standard), *with* *Jenkins v. Grant Thornton LLP*, No. 13-60957-CIV-ALTONAGA/O'Sullivan, 2014 WL 12634797, at *1 (S.D. Fla. July 22, 2014) (applying the heightened standard, giving only one in-district case for her reasoning).

182. *CTF Dev., Inc. v. Penta Hosp., LLC*, No. C 09-02429 WHA, 2009 WL 3517617, at *7 (N.D. Cal. Oct. 26, 2009) (quoting *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979)). Though he does reference *Iqbal* in the case, Judge Alsup retains the fair notice standard rather than applying the heightened plausibility standard. *Id.* at *8.

183. *See* *Hudson v. First Transit, Inc.*, No. C 10-03158 WHA, 2011 WL 445683, at *1 (N.D. Cal. Feb. 3, 2011).

184. *Id.*

185. *Id.* (quoting *Barnes v. AT&T Pension Benefit Plan—Nonbargained Program*, 718 F. Supp. 2d 1167, 1171 (N.D. Cal. 2010)).

186. *Id.*

III. COURT-COUNTING PRECEDENT

The data of Part II reveal current majority views about pleading standards for affirmative defenses. The next question is why they should matter. They obviously matter to defendants, who surely want to know what hurdle their pleadings are likely to face in a given district or circuit. But should it matter to other courts? As they decide whether to apply *Twombly* and *Iqbal's* heightened pleading standard to answers, should courts be swayed by what a majority of other courts have done? If so, *which* courts, and why?

At the end of Part II, we looked at judges who changed their minds about the pleading threshold for defendants, sometimes because of perceived majorities. District court judges are free to do so, since their decisions are, in the Supreme Court's words, "not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."¹⁸⁷ But if one district court opinion has no precedential weight, several hundred weightless opinions presumably don't either. And yet that is not how judicial trends or majorities are treated in practice, as the following Subpart III.A describes.

What we refer to here as "court-counting precedent" isn't, of course, an officially recognized form of precedent. But it is often employed in a manner akin to precedent, insofar as courts rely on the *fact* that other courts have ruled a certain way—as opposed to the other courts' *arguments* for so ruling—as a reason for ruling the same way. Subpart III.B examines whether and when it makes sense to do so.

A. Description

Out of the 1,141 relevant cases that we examined, judges identified one position or the other as the majority view in 306 of them.¹⁸⁸ In other words, *judges engaged in court-counting precedent in almost 27% of the cases we studied.*

The majorities that courts perceived were sometimes national ones, sometimes specific to a circuit or a district. In fact, judges identified national majorities 153 times; circuit-wide majorities eighty-five times; and majorities within a federal judicial district 112 times. In ten different cases, judges did something more unusual: instead of a circuit or district majority, judges identified a trend within a particular state. Judges in California,¹⁸⁹ Florida,¹⁹⁰ Kentucky,¹⁹¹

187. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (quoting 18 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 134.02[1][d] (3d ed. 2011)).

188. *See supra* notes 124–27 and accompanying text (describing our research methods and records).

189. *See Vargas v. Cty. of Yolo*, No. 2:15-CV-02537-TLN-CKD, 2016 WL 3916329, at *3 (E.D. Cal. July 20, 2016); *Hamilton v. Quinonez*, No. 1:14-cv-1216-LJO-MJS (PC), 2015 WL 1238245, at *2 (E.D. Cal. Mar. 17, 2015) ("There is some disagreement among the district courts in California as to the level of factual support necessary for an affirmative defense to put a plaintiff 'on notice' or to save an affirmative

and Virginia¹⁹² have taken this approach, bewildering as it is. Why, after all, should a federal judge care about trends in some districts within their circuits but not others? When analyzing an issue of federal procedure, why should a judge in, say, the Eastern District of California find the views of judges in California's Southern District more relevant than those of judges in the neighboring District of Nevada?

Occasionally, judges have identified majorities at multiple levels. In *Lockheed Martin Corp. v. United States*,¹⁹³ for example, the district court's thoughtful opinion first tallies decisions within the District of Maryland (finding five judges who had applied heightened pleading standards to defendants, none who refused, and four who had expressed uncertainty).¹⁹⁴ It then goes on to claim that "district judges both within the Fourth Circuit and nationally have split on the question [of] whether the plausibility standard applies to affirmative defenses, with a majority adopting the view that it does."¹⁹⁵ In September 2013, when *Lockheed* was decided, this claim was true in regard to the Fourth Circuit but false nationwide, where plausibility pleading was required only 45% of the time.¹⁹⁶ Fascinatingly, the *Lockheed* court ends up parting ways with these perceived majorities—both accurate and not—in favor of the policy considerations that, in its view, support asymmetrical pleading standards.¹⁹⁷

Lockheed, then, suggests two important points about court-counting precedent. First, courts' court-counting can be wrong.¹⁹⁸ And second, the fact that courts identify a majority view doesn't necessarily mean that they will follow it; court-counting precedent, like "real" precedent, isn't always dispositive.¹⁹⁹

defense from insufficiency. The general trend, however, seems to be toward applying the heightened *Iqbal/Twombly* standard to affirmative defenses." (citations omitted)), *adopted by* No. 1:14-cv-1216-LJO-MIS (PC), 2015 WL 1606969 (E.D. Cal. Apr. 9, 2015).

190. See, e.g., *Castillo v. Roche Labs. Inc.*, No. 10-20876-CIV, 2010 WL 3027726, at *2 (S.D. Fla. Aug. 2, 2010) ("[A] majority of district courts in Florida have applied this heightened pleading standard to affirmative defenses."). Other courts in Florida have cited and quoted this language from *Castillo* as well. See, e.g., *Montero v. Bradshaw*, No. 12-80406-CIV-RYSKAMP/HOPKINS, 2013 WL 12080226, at *2 (S.D. Fla. Jan. 8, 2013); *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2012 WL 12877717, at *15 (S.D. Fla. July 19, 2012).

191. See *United States v. Assocs. in Eye Care, P.S.C.*, No. 13-cv-27-GFVT, 2014 WL 12606508, at *1 (E.D. Ky. Nov. 14, 2014) ("The courts in the Eastern and Western Districts of Kentucky so far have chosen to use the more lenient fair notice standard for pleading affirmative defenses.").

192. See *Warren v. Tri Tech Labs., Inc.*, No. 6:12-cv-00046, 2013 WL 2111669, at *7 n.7 (W.D. Va. May 15, 2013) ("[T]he district judges in the Western and Eastern Districts of Virginia who have considered the argument have not applied the *Twombly* and *Iqbal* pleading requirements to affirmative defenses raised in an answer.").

193. 973 F. Supp. 2d 591 (D. Md. 2013).

194. *Id.* at 593.

195. *Id.*

196. See *supra* notes 124–27 and accompanying text (describing our research).

197. *Lockheed Martin Corp.*, 973 F. Supp. 2d at 594–95.

198. See *infra* Section III.A.1.

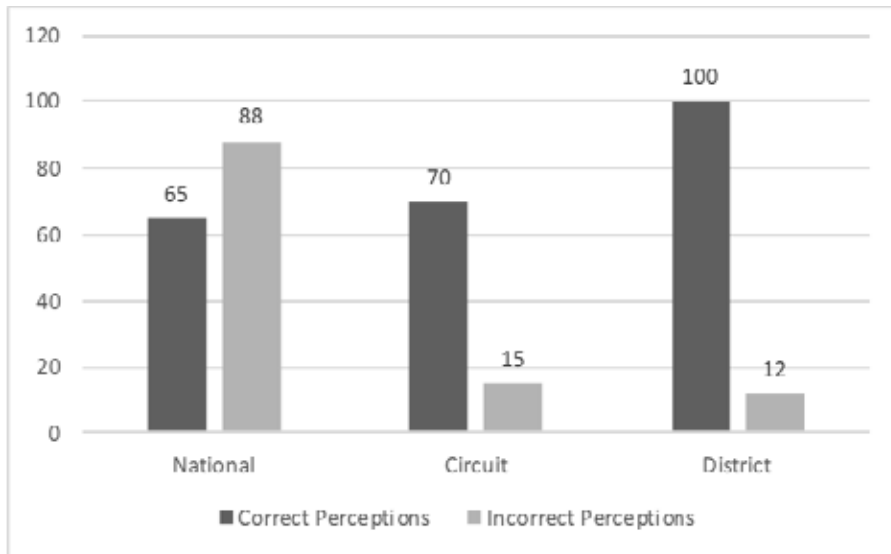
199. See *infra* Section III.A.2.

So the questions are: How often do courts count incorrectly? And, correct or not, how are these counts used?

1. *The Accuracy of Court-Counting*

In the set of cases we studied, courts that perceived a majority view got it wrong a full third of the time. And as we might expect, courts were more likely to get things wrong the larger the scope of their claim. Thus, of the 153 cases in which courts perceived a national majority, they were wrong in eighty-eight of them: a 57.5% error rate.²⁰⁰ By contrast, those who perceived a majority at the circuit level were wrong only 17.6% of the time. At the district level, the error rate dropped to 10.7%.²⁰¹

Figure 4. *Correctly and Incorrectly Perceived Majority Positions at the National, Circuit, and District Levels*



The numbers detailed in Figure 4 suggest a few reasons for courts' errors. One is obvious: doing the research to determine what a majority of courts have said on a given question takes effort, and the larger the scope of the study, the more effort it takes. A district court faced with a Rule 12(f) motion to strike an affirmative defense—or a lawyer filing one—can hardly be ex-

200. See *infra* Figure 4; *supra* notes 124–27 and accompanying text (describing our research).

201. See *infra* Figure 4; *supra* notes 124–27 and accompanying text (describing our research).

pected to survey anything close to the 1,141 cases that we studied to produce the national results in Part II.²⁰²

Researching cases within a circuit or, especially, a district is somewhat easier. Aside from the Ninth and Eleventh Circuits, whose courts have answered the pleading standards question 256 and 200 times, respectively, other circuits only have between two (D.C. Circuit) and eighty-three (Seventh Circuit) cases on the subject²⁰³—not insignificant but not impossible to canvas. At the district level, no district outside of California, Florida, or Illinois has more than twenty-five cases to review.²⁰⁴ Surely this accounts for the fact that only four mistaken perceptions about district majorities have been made outside of those three states.²⁰⁵

In actuality, though, courts do not always do their own research.²⁰⁶ Take the *Lockheed* opinion, discussed above. Judge Williams did his own research when it came to the District of Maryland, citing opinions from nine of its judges. In regard to the claimed Fourth Circuit and national majorities, however, Judge Williams (writing in 2013) cited 2010 and 2011 cases from Maryland along with a 2011 New Mexico case, a 2012 Utah case, and two scholarly articles.²⁰⁷ One of the articles provided then-correct information about the Fourth Circuit majority.²⁰⁸ But of the cases cited as evidence of a national majority, two were decided before the national majority flipped,²⁰⁹ one was decided just after but itself relied solely on cases decided beforehand, and the last one, *Tiscareno v. Frasier*, from the District of Utah,²¹⁰ offered a more nuanced position than *Lockheed* acknowledged.

The *Lockheed* opinion demonstrates the danger of citations to past cases

202. And even if someone surveyed all the cases available on commercial databases, there is still a danger of publication bias skewing what orders are included—a danger which might affect our own numbers as well. See Cheng, *supra* note 125.

203. See *supra* notes 124–27 and accompanying text (describing our research in reaching this and other conclusions related to our study).

204. See *supra* notes 124–27 and accompanying text.

205. See *supra* notes 124–27 and accompanying text.

206. Although the discussion here focuses on court-counting sources that judges actually cite, they may also rely on the court-counting offered in litigants' briefs. In a recent empirical study of the extent to which briefs mistaken about the law contribute to opinions that are similarly mistaken, Diego Zambrano found a statistically significant correlation. See Diego A. Zambrano, *Judicial Mistakes in Discovery*, 112 NW. U. L. REV. ONLINE 217, 238 (2018).

207. *Lockheed Martin Corp. v. United States*, 973 F. Supp. 2d 591, 593 (D. Md. 2013) (citing *Tiscareno v. Frasier*, No. 2:07–CV–336, 2012 WL 1377886, at *14 n.4 (D. Utah Apr. 19, 2012); *Aguilar v. City Lights of China Rest., Inc.*, No. DKC 11–2416, 2011 WL 5118325, at *2–3 (D. Md. Oct. 24, 2011); *Lane v. Page*, 272 F.R.D. 581, 589–90 n.5, 590 n.6 (D.N.M. 2011); *Piontek v. Serv. Ctrs. Corp.*, No. PJM 10-1202, 2010 WL 4449419, at *3 (D. Md. Nov. 5, 2010); *Machado & Haynes*, *supra* note 34, at 57; *St. Eve & Zuckerman*, *supra* note 28, at 166).

208. See *supra* note 122 (discussing *Machado & Haynes*'s article).

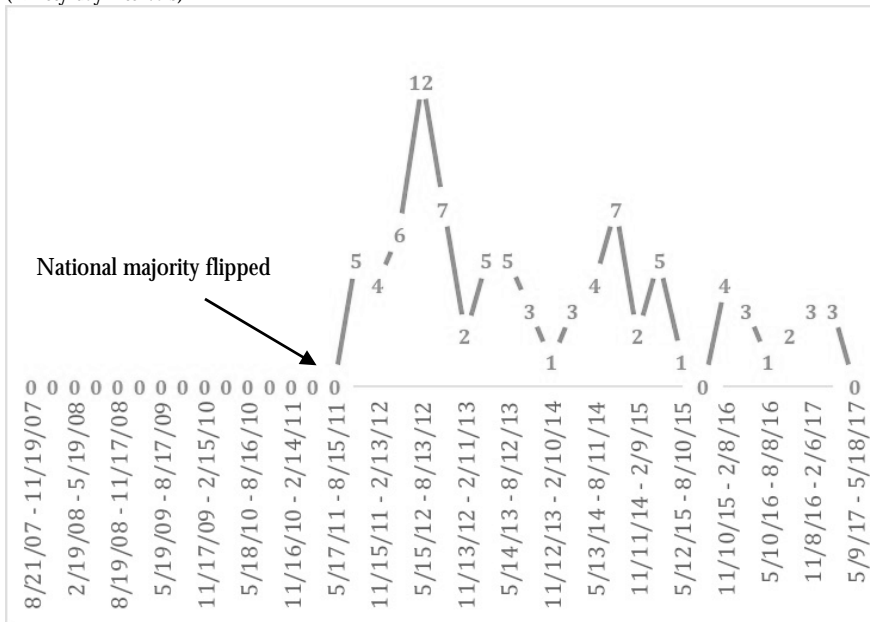
209. The national majority flipped in August of 2011. See *supra* Figure 1.

210. No. 2:07–CV–336, 2012 WL 1377886, at *14 n.4 (D. Utah Apr. 19, 2012) (“[A] growing number of district courts are declining to extend the *Twombly/Iqbal* pleading standard to affirmative defenses, and it is unclear whether that approach is still a majority position.”).

and articles as evidence of a perceived majority: majority positions can—and here, did—change over time. But it takes courts a while to notice this. In fact, no court acknowledged that the majority view on heightened pleading standards for answers had flipped until October 2012—more than a year after the national majority switched in August 2011.²¹¹ In that case, Judge Gorton of the District of Massachusetts asserted without citation that “[a]lthough a majority of early cases applied the heightened standard, this is now the minority approach.”²¹²

When judges rely on earlier attempts at court-counting, they not only replicate prior courts’ (or academic articles’) potential errors but also lengthen the time lag before counts catch up with present realities. Figure 5, which graphs errors in perceived national majorities over time, depicts this time lag in action.

Figure 5. *Incorrectly Perceived National Majorities*
(Ninety-day intervals)



Difficulties in counting and reliance on faulty or outdated studies are not the only causes of misperceived majorities, however. It may well be that some courts claim a majority less as a description than as an aspiration.

Consider the Northern District of California, which is responsible for an astonishing nine of the fifteen cases in which courts misperceived the majority

211. See *Hansen v. R.I.’s Only 24 Hour Truck & Auto Plaza, Inc.*, 287 F.R.D. 119, 122 (D. Mass. 2012).

212. *Id.*

position within their circuit.²¹³ In the first of these misperceptions, *Ramirez v. Ghilotti Bros.*, from 2013,²¹⁴ Judge Breyer wrote that, “[w]hile the Ninth Circuit has not directly addressed the issue, most district courts in this circuit agree that the heightened pleading standard of *Twombly* and *Iqbal* . . . is now the correct standard to apply to affirmative defenses.”²¹⁵ In support of his circuit-wide claim, he cited only two cases, both from *within* the Northern District of California, and neither of which makes a claim about a circuit majority.²¹⁶ One of the two cited cases, in fact, includes a footnote referencing opinions from the Central and Southern Districts of California that *reject* heightened pleading standards for affirmative defenses.²¹⁷ In fact, at the time *Ramirez* was decided, courts in the Ninth Circuit had refused to apply heightened standards for answers almost 60% of the time.²¹⁸ Applying *Twombly* and *Iqbal* to defendants had *never* been the majority position in the Ninth Circuit. And yet Judge Breyer—citing only his own district, where courts had applied heightened standards in thirty-five out of forty cases²¹⁹—wishfully projected the district’s majority onto the circuit as a whole.²²⁰

This pattern recurs in Northern District cases, among a variety of different judges who often cite and quote each other.²²¹ This incorrect perception could just be a mistake, an unfounded and perhaps unthinking extrapolation from district to circuit. Yet it is hard to avoid the suspicion that judges on the Northern District of California might be employing talk of circuit majorities strategically—attempting to make their position appear as inevitable outside their district as it is within it.²²²

The point is that erroneous court-counting might not always be *just* a mistake; that depends on what courts are using their count to achieve.

213. See *supra* notes 124–27 and accompanying text.

214. 941 F. Supp. 2d 1197 (N.D. Cal. 2013).

215. *Id.* at 1204.

216. See *Powertech Tech., Inc. v. Tessera, Inc.*, No. C 10-945 CW, 2012 WL 1746848, at *4 (N.D. Cal. May 16, 2012) (asserting a national and district-wide, but not circuit-wide, majority for heightened pleading standards); *Perez v. Gordon & Wong Law Grp., P.C.*, No. 11-CV-03323-LHK, 2012 WL 1029425, at *8 (N.D. Cal. Mar. 26, 2012) (same).

217. See *Perez*, 2012 WL 1029425, at *8 n.5.

218. See *supra* notes 124–27 and accompanying text.

219. See *supra* notes 124–27 and accompanying text.

220. *Ramirez*, 941 F. Supp. 2d at 1204.

221. See, e.g., *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No. 16-cv-01393-JST, 2017 WL 635291, at *1 (N.D. Cal. Feb. 16, 2017) (Tigar, J.); *Hernandez v. Cty. of Monterey*, 306 F.R.D. 279, 283 (N.D. Cal. 2015) (Grewal, M.J.); *Kelly Moore Paint Co. v. Nat’l Union Fire Ins. of Pittsburgh*, No. 14-cv-01797-MEJ, 2014 WL 5335829, at *3 (N.D. Cal. Oct. 17, 2014) (James, M.J.); *Keil v. Equifax Info. Servs.*, No. C 13-03989 SI, 2013 WL 6001860, at *2 (N.D. Cal. Nov. 12, 2013) (Illston, J.).

222. Cf. *Prime Media Grp. LLC v. Acer Am. Corp.*, No. 5:12-cv-05020 EJD, 2013 WL 621529, at *2 n.2 (N.D. Cal. Feb. 19, 2013) (“Although the Ninth Circuit has not yet settled this issue once and for all, *it seems a foregone conclusion at this point* that the Rule 8 pleading standard . . . should also apply to affirmative defenses.” (emphasis added)).

2. *The Use of Court-Counting*

Not all court-counting is interesting. Sometimes talk of majority and minority positions on a given question amounts to nothing more than an observation that opinions on that question differ.

Oftentimes, however, courts identify majority and minority positions for a reason. As we have just seen, it may be a rhetorical reason—an attempt to cast the court’s decision as inevitable, whether rightly or wrongly. On the flip side, a court that identifies a majority position only to *buck* the trend may do so for a different rhetorical purpose.²²³ Doing so may show the depth of the court’s commitment to the substantive arguments on the other side of the question. Or perhaps a court wants to emphasize that the majority view is wrong in order to attract the attention of a higher court.

Table 1. *Number of Times Courts Follow or Buck the Perceived National Majority*

	DOES APPLY <i>Twombly/Iqbal</i>	DOES NOT APPLY <i>Twombly/Iqbal</i>
Perceived national majority: <i>Twombly/Iqbal</i> APPLIES	87	29
Perceived national majority: <i>Twombly/Iqbal</i> DOES NOT APPLY	1	20

In fact, as Table 1 shows, a significant number of courts (twenty-nine) have perceived a national majority in favor of heightened pleading standards but have then gone on to side with the perceived minority view, refusing to apply *Twombly* and *Iqbal* to defendants.²²⁴ Perhaps this indicates the depth of many courts’ commitment to the asymmetrical position. Only one court has *applied* heightened standards when it thought that the majority of courts nationwide *refuse* to do so. And even this case provides a weak example. In *UPS Worldwide Forwarding, Inc. v. Simplex Leasing, Inc.*,²²⁵ the court found only a slight majority rejecting heightened pleading; it even agreed with that majority. Out of an abundance of caution, however, it ordered the defendant to amend its

223. See, e.g., *Hernandez-Hernandez v. Hendrix Produce, Inc.*, No. 6:13-cv-53, 2014 WL 726426, at *1 (S.D. Ga. Feb. 24, 2014) (“A minority, including this Court, disagree, and refuse to subject those defenses to *Twombly*’s call for particularity.”). Note that this court was incorrect about the national majority. See *supra* Figure 1.

224. See, e.g., *EEOC v. LHC Grp. Inc.*, No. 1:11CV355-LG-JMR, 2012 WL 3242168, at *2 (S.D. Miss. Aug. 7, 2012) (“The Court agrees with the minority view on this issue, primarily because it appears that different pleading standards are imposed by [Federal] Rules [of Civil Procedure] 8(a), (b) and (c).”). Note that this court was incorrect about the national majority. See *supra* Figure 1.

225. No. 3:12-cv-75, 2013 WL 12085472, at *2–3 (D.N.D. Feb. 7, 2013).

answer, “thus tacitly adopting the heightened pleading standard.”²²⁶

In the vast majority of cases (78% of the time), courts that identify a national majority end up joining it.²²⁷ This is where the notion of court-counting precedent becomes relevant. For it’s here that judges may be relying on their court-count as a reason for their decision.

We have not attempted in our study to quantify the number of times in which court-counting precedent appeared to be a motivating or even determinative factor in a court’s decision. But in some cases, court-counting clearly plays that role. This is true, for example, in cases like *Steiner v. Everett*,²²⁸ where the *only* reason given for applying the *Twombly-Iqbal* standard is the fact that “other courts in this district and other districts in this Circuit have applied that standard.”²²⁹ Or *Hamilton v. Quinonez*,²³⁰ an opinion that notes the disagreement within California²³¹ and, more importantly, the trend within the Eastern District of California toward applying heightened standards; the court, without further reasoning, concludes: “Given that multiple decisions in the Eastern District have agreed, the Court will likewise apply that standard here.”²³²

Steiner and *Quinonez* are not alone.²³³ And sometimes, plaintiffs’ lawyers urge this kind of reasoning on courts,²³⁴ though courts do not always accept the invitation.²³⁵

226. *Id.* at *3 (“While the court finds the argument that the heightened pleading requirements are inapplicable to affirmative defenses more persuasive, it also understands that the split among the districts creates uncertainty. Given this uncertainty, the Court is inclined to take the more cautious approach. . . . [S]hould the heightened pleading standard be adopted as the law of the Eighth Circuit, the pleadings in this case will be in full conformance [once amended].”). This result may be surprising; we might think that uncertainty about pleading standards would suggest that the defendant’s answer should be accepted as is. In going the opposite route, the court in *Simplex Leasing* seemed moved by the fact that, there, defendant appeared to have all the facts needed to amend its answer to satisfy even a heightened pleading standard, thereby removing any possibility of reversal later on.

227. *See supra* Table 1.

228. No. 16-cv-1286-MJR-DGW, 2017 WL 1836607 (S.D. Ill. May 8, 2017).

229. *Id.* at *4. Interestingly, one of the two cases cited for this claim predates *Twombly*! *Id.* (citing *W. Am. Ins. v. Mund*, No. 06-CV-0293-DRH, 2007 WL 1266543 (S.D. Ill. Apr. 30, 2007)).

230. No. 1:14-cv-1216-LJO-MJS (PC), 2015 WL 1238245 (E.D. Cal. Mar. 17, 2015), *adopted by* No. 1:14-cv-1216-LJO-MJS (PC), 2015 WL 1606969 (E.D. Cal. Apr. 9, 2015).

231. For more on the tendency to look to statewide (rather than district or circuit) majorities, see *supra* notes 189–92 and accompanying text.

232. *Quinonez*, 2015 WL 1238245, at *2 (citation omitted).

233. *See, e.g.*, *Ferrellgas, L.P. v. Best Choice Prods.*, No. 1:16CV259, 2016 WL 4539220, at *2 (M.D.N.C. Aug. 30, 2016) (blindly following district majority despite contrary circuit majority); *Orshal v. Bodycote Thermal Processing, Inc.*, No. 1:15CV674, 2016 WL 4007610, at *2 (M.D.N.C. July 26, 2016); *Boehm v. Legends of the Field, LLC*, No. 15-cv-683-jdp, 2016 WL 2732202, at *1 (W.D. Wis. May 10, 2016); *Vazquez v. Triad Media Sols., Inc.*, No. 15-CV-07220 (WHW) (CLW), 2016 WL 155044, at *2 (D.N.J. Jan. 13, 2016); *Hartford Underwriters Ins. v. Kraus USA, Inc.*, 313 F.R.D. 572, 574 (N.D. Cal. 2016); *S. Fifth Towers, LLC v. Aspen Ins. UK*, No. 3:15-CV-00151-CRS, 2015 WL 7571906, at *2 (W.D. Ky. Nov. 24, 2015); *Dorsey v. Ghosh*, No. 13-cv-05747, 2015 WL 3524911, at *4 n.3 (N.D. Ill. Jun. 3, 2015); *Warren v. Tri Tech Labs., Inc.*, No. 6:12-cv-00046, 2013 WL 2111669, at *7 n.7 (W.D. Va. May 15, 2013).

234. *Revocable Living Tr. of Stewart I. Mandel v. Lake Erie Utilities Co.*, No. 3:14 CV 2245, 2015 WL 2097738, at *3 (N.D. Ohio May 5, 2015) (“Plaintiff claims we should apply the heightened standard

An even stronger use of court-counting precedent appears in opinions which tout textual or policy reasons for deciding one way, only to follow a majority in going the other way. In *Incase Designs, Inc. v. Marware, Inc.*,²³⁶ for example, a judge in the Northern District of California compellingly described why “[i]nsufficiently pleaded affirmative defenses present significantly different issues than do conclusory allegations in a complaint.”²³⁷ But he then went on: “Nevertheless, as a majority of courts in this district have applied the heightened pleading standards to affirmative defenses in considering a motion to strike, that standard will be applied.”²³⁸

Most cases are not nearly so easily categorized. For example, it is difficult to classify an opinion that separately lists the arguments for and against applying heightened pleading standards, claims (correctly) that the district majority is against, and then joins that majority, noting only that it “finds the reasoning supporting this conclusion persuasive.”²³⁹ There is no way to know why one set of reasons weighed more heavily than the other, or whether other courts’ weighing of the reasons provided a reason of its own. Another opinion is similarly murky but also notable in its concision: “Suffice to say that this court agrees with the decisions of other courts in this district, holding that *Twombly* and *Iqbal* apply.”²⁴⁰

To be sure, some courts engage in court-counting but explicitly reject the notion of court-counting precedent. One of the Northern District of California opinions discussed in the previous Section—after taking accurate note of the district majority and inaccurate note of the nationwide trend—clarified that, “[a]lthough this Court is not bound by the decisions of other district courts, it finds” another judge’s reasoning, “adopted also by others in this district, to be persuasive.”²⁴¹ Another court, this time in Nebraska, noted that courts nationwide disagreed, not only on the merits, but even on their percep-

because a majority of district courts have answered in the affirmative.”). The court in *Revocable Living Trust of Stewart I. Mandel* declined the plaintiff’s invitation. *Id.* at *4.

235. See, e.g., *Breville USA, Inc. v. Hurom L.S. Co.*, No. CV 13-8324 DMG (AJWx), 2014 WL 12600145, at *8 (C.D. Cal. Apr. 28, 2014) (“While [Plaintiff] contends that the *Twombly/Iqbal* standard is applied by the ‘vast majority’ of courts, its premise appears to be mistaken. More importantly, this Court is not bound by the decisions of other district courts and rather looks to them for persuasive authority.” (citations omitted)).

236. No. C 13-00604 RS, 2013 WL 12214133 (N.D. Cal. May 28, 2013).

237. *Id.* at *3 (“[T]o determine the precise nature of the defendant’s affirmative defenses, a plaintiff will rarely need do more than propound simple interrogatories.”).

238. *Id.*

239. *Schwarz v. Meinberg*, No. CV 13-00356-BRO (PLAx), 2016 WL 4011716, at *3-4 (C.D. Cal. July 15, 2016) (“The Court finds the reasoning supporting this conclusion persuasive and will evaluate Defendants’ affirmative defenses using the fair notice standard.”).

240. *Erickson Prods., Inc. v. Kast*, No. 5:13-cv-05472 HRL, 2014 WL 1652478, at *2 (N.D. Cal. Apr. 23, 2014).

241. *Perez v. Gordon & Wong Law Grp., P.C.*, No. 11-CV-03323-LHK, 2012 WL 1029425, at *8 (N.D. Cal. Mar. 26, 2012).

tion of the majority rule.²⁴² Not to worry, though, it concluded, because “this Court need not resort to nose-counting to decide a question of law.”²⁴³

Whether needed or not, resorting to nose-counting is endemic among federal district courts, at least on the question of law we have studied here. And while courts differ in the way they describe their use of court-counting precedent—with some, as we have just seen, rejecting its precedential value entirely—the fact that court-counting occurs in almost 27% of the cases we read suggests that courts may find it more important than they admit. Our final Subpart asks whether they are right to do so.

B. Evaluation

Court-counting precedent is not “real” precedent, as we have said. District courts are bound to follow the holdings of superior courts,²⁴⁴ and appellate courts have a lesser duty to follow their own previous decisions.²⁴⁵ But the fact that two, or two hundred, district courts have decided a question one way rather than another has no official bearing on how future district courts are to decide the same question.²⁴⁶

That said, to disregard the fact that a majority of one’s peers have decided a question a certain way smacks of hubris. To adapt a cliché: “Five hundred and sixty-nine federal judges can’t be wrong!”²⁴⁷

This is perhaps why it is so common as to be almost unremarkable to note, for example, that a majority of circuits have reached a particular outcome.²⁴⁸ Similarly, fifty-state surveys are routinely done to figure out the majority and minority positions on questions of state law, especially on common law questions and those involving uniform codes.²⁴⁹ The various restatements of law all engage in counts like these, reporting both majority views and more

242. *Infogroup, Inc. v. DatabaseLLC*, 95 F. Supp. 3d 1170, 1192 n.24 (D. Neb. 2015).

243. *Id.*

244. See BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 28 (2016); see also Hillel Y. Levin, *Justice Gorsuch’s Views on Precedent in the Context of Statutory Interpretation*, 70 ALA. L. REV. 687, 689–90 (2019) (discussing the concept of judicial precedent and the standard policy arguments for following it).

245. See GARNER ET AL., *supra* note 244, at 38.

246. See *id.* at 515 (“The stare decisis effect of federal district-court decisions on other trial courts is nil.”); see also *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011).

247. This is the number of judges, or rather cases, that rejected heightened pleading standards for defendants in the ten years after *Twombly*. See *supra* notes 124–27 and accompanying text (discussing research methods employed in finding these cases); cf. ELVIS PRESLEY, 50,000,000 ELVIS FANS CAN’T BE WRONG: ELVIS’ GOLD RECORDS, VOL. 2 (RCA Victor 1959).

248. See GARNER ET AL., *supra* note 244, at 512 (“In opinions addressing a matter of first impression in a circuit, the court will ordinarily set forth the relevant law in the other circuits.”).

249. See *id.* at 703 (“Although the decisions of state and federal courts in other jurisdictions aren’t binding, state courts have long shown a willingness to follow these decisions in the interest of uniformity or comity.”); *id.* at 705 (“Courts are often careful to adopt other state courts’ interpretation of a uniform act.”); *id.* at 708 (“A state court may even be persuaded to overrule its horizontal precedent when faced with a clear weight of contrary authority on an issue in which uniformity is particularly important.”).

recent trends.²⁵⁰ And some legal standards—cruel and unusual punishment²⁵¹ perhaps most notably—are substantively constituted in part by trends and consensus, which is to say majority views among various jurisdictions.²⁵² More controversially, the U.S. Supreme Court occasionally even identifies majorities among foreign courts as a reason supporting its decision.²⁵³

Fortunately, there is a significant literature not only in law, but in economics, psychology, and philosophy as well, about why and when it's wise to follow the wisdom of crowds.²⁵⁴ But getting an answer “right” isn't courts' only aim as they decide whether to apply heightened pleading standards. Other values, such as clarity, consistency, uniformity, or the perceived legitimacy of the federal courts, may be as or even more important. “Better settled than right,” after all, is one of the chief rationales for precedent.²⁵⁵ If the pleading question is one where uniformity or predictability matters, then perhaps court-counting really does deserve to play a role akin to precedent. We take each of these sets of considerations in turn.

1. *The Wisdom of Crowds*

In his book, *The Wisdom of Crowds*, James Surowiecki recounts a 1968 psychology experiment in which first one person, then five, then fifteen were sent to a city sidewalk and told to stare at the empty sky.²⁵⁶ As the number of people hired to stare at the sky increased, the number of passersby who also stopped to stare increased even more dramatically: 4% stopped alongside a single skygazer, while fifteen gawkers caused 40% of those walking by to stop and 86% of them to look up.²⁵⁷ Surowiecki's point is that these passersby

250. AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 5 (rev. ed. 2015) (“The Restatement process contains four principal elements. The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went the other way, or refined their prior adherence to the majority rule, that is obviously important as well.”).

251. See U.S. CONST. amend. VIII.

252. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002); *Enmund v. Florida*, 458 U.S. 782, 788–93 (1982); *Coker v. Georgia*, 433 U.S. 584, 593–96 (1977). *But see* Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 18–24 (2009) (arguing that consensus is better seen as a limit on, not a source of, national law).

253. See RICHARD A. POSNER, *HOW JUDGES THINK* 349–68 (2008) (criticizing the practice); Posner & Sunstein, *supra* note 10, at 133 n.5 (listing cases in which the Supreme Court has referred to foreign precedents).

254. See *infra* Section III.B.1.

255. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.”), *overruled in part by Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

256. JAMES SUROWIECKI, *THE WISDOM OF CROWDS* 43 (First Anchor Books ed. 2005).

257. Stanley Milgram et al., *Note on the Drawing Power of Crowds of Different Size*, 13 J. PERSONALITY & SOC. PSYCHOL. 79, 80–81 (1969).

weren't mindless conformists; they were "looking up at the sky because they assume[d]—*quite reasonably*—that lots of people wouldn't be gazing upward if there weren't something to see."²⁵⁸

Perhaps the same could be said of the court-counting judges that we have identified here. They might want to know whether a majority of judges have gone one way or another—and if so, how many of them—because that information is telling. In other words, knowing what others have decided has epistemic value. As Professor Aaron-Andrew Bruhl has written in the context of circuit court splits, "[t]he fact that a large majority of judges have converged on a particular answer to some legal question provides some reason to believe that their answer is indeed correct."²⁵⁹

Professor Bruhl²⁶⁰ and others²⁶¹ have noted that this intuition receives support from the well-known "Condorcet Jury Theorem," according to which the majority view of a group, whose members are each better than random at making decisions, becomes more and more certain to be correct as the number of group members increases. Among one thousand voters, each of whom has a 51% likelihood of getting an answer right, the majority view is 69% likely to be correct.²⁶² And that likelihood itself increases as the size of the majority increases.²⁶³ Assuming there is a correct answer to the question of pleading standards for affirmative defenses,²⁶⁴ the 62% majority against applying heightened pleading²⁶⁵ is more likely to be correct than the decision of most any individual judge.

Or it would be, at least, if the judges were making their decisions independently.²⁶⁶ Independence is a crucial constraint on Condorcet's theorem.²⁶⁷ And it is one that court-counting precedent threatens to violate.

258. SUROWIECKI, *supra* note 256, at 43 (emphasis added).

259. Bruhl, *supra* note 10, at 862–63; see also Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159, 180 (2016) ("Knowing that many other people who are presumptively reasonable are persuaded by a given reason and have cast votes accordingly should strengthen our confidence in the validity of the reason over and above the intrinsic quality of the reason itself.").

260. Bruhl, *supra* note 10, at 863–64.

261. For examples in law, see Posner & Sunstein, *supra* note 10, at 136; Posner & Vermeule, *supra* note 259, at 177 n.54, 180–82; in political philosophy, see DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 223–36 (2008).

262. ESTLUND, *supra* note 261, at 223. Note that this is approximately the number of cases in our study.

263. See Bruhl, *supra* note 10, at 864.

264. Here, "correct" might refer to the answer that maximizes judicial efficiency, reaches the most just outcomes, or is most likely to be upheld by the Supreme Court. Those who think there is simply no such thing as a "correct" answer to questions of this sort can skip to Section III.B.2's discussion of the nonepistemic values that may (or may not) justify court-counting precedent.

265. See *supra* notes 124–27 and accompanying text.

266. See Bruhl, *supra* note 10, at 864 n.40 ("It is not the case that the Jury Theorem is wholly inapplicable when the decisionmakers are not independent (in the relevant, technical sense), but the lack of independence reduces the effective size of the jury, diminishing the force of any consensus.").

267. See *id.* at 864–65; Posner & Sunstein, *supra* note 10, at 144–45.

As Professors Posner and Sunstein have noted: “The reason that independence is an important condition is that voters who . . . simply mimic other voters, do not, by agreeing on whether the outcome is good or bad, provide additional information about the sense or value of the outcome.”²⁶⁸ When judgments aren’t independent but are based instead on the fact that previous judgments have gone a certain way—the very definition of court-counting precedent, as we have used the term—a so-called “information cascade” can arise.²⁶⁹ Cascades occur when decisions are made sequentially by voters (here judges) who look to the actions of other voters instead of relying on their own knowledge. “Instead of aggregating all the information individuals have, . . . the cascade becomes a sequence of uninformed choices, so that collectively the group ends up making a bad decision.”²⁷⁰ The collective decision—the emergent majority—ends up being a bad one if early decisionmakers made wrong decisions, ones later mimicked by later decisionmakers overly reliant on the wisdom of crowds.

Cascades aren’t inevitable simply because courts engage in court-counting. The problem only arises insofar as courts rely on court-counting in the strong precedential sense described in Part II. When judges fail to give a reason for their decision, or even switch their position solely because they think a majority of judges have come out the same way—this is the situation that gives rise to a cascade. Judges who merely report on a perceived majority or who make their court-counting just one consideration among other, independently-weighted substantive considerations do not pose the same threat.²⁷¹

The irony here is that, according to the Condorcet Jury Theorem, judges would do well to engage in court-counting, thereby benefitting from the wisdom of the crowd. But this is true only insofar as the courts being counted haven’t based their own judgments on court-counting precedent.²⁷² Courts that follow court-counting precedent add to a majority’s numbers, but they do not thereby increase its epistemic value.

Importantly, all of this assumes that the majority being perceived and followed is being perceived correctly. The epistemic benefits of crowds—even

268. Posner & Sunstein, *supra* note 10, at 160.

269. See SUROWIECKI, *supra* note 256, at 53–58; Posner & Sunstein, *supra* note 10, at 160–64.

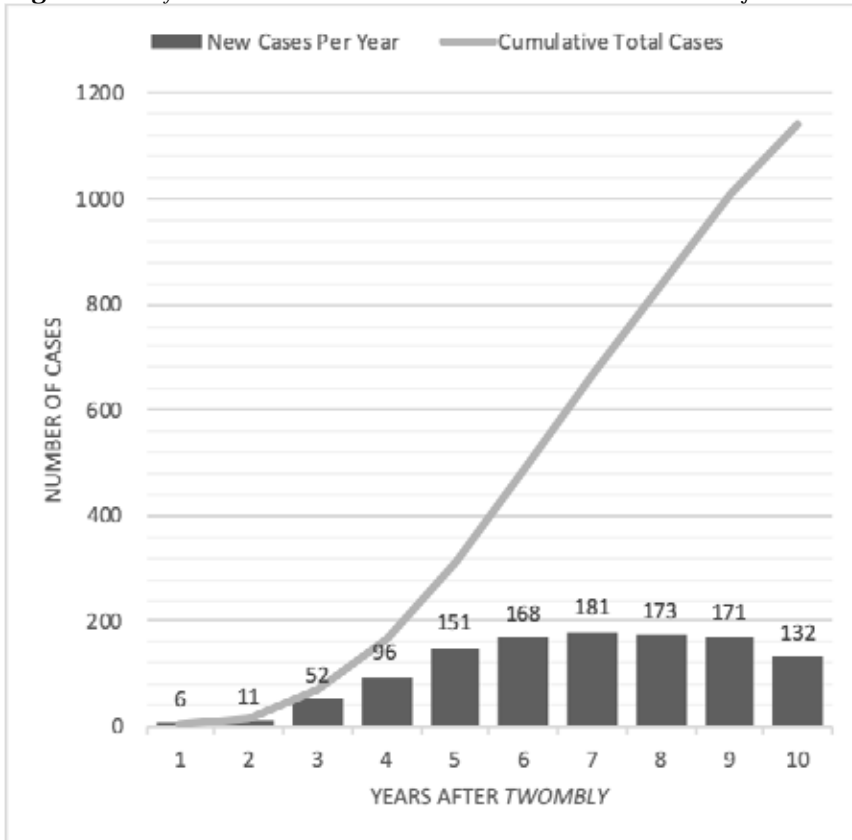
270. SUROWIECKI, *supra* note 256, at 55.

271. *Cf.* Posner & Sunstein, *supra* note 10, at 163 (“[W]here the evidence suggests that a law was adopted out of imitation and not as a result (at least partially) of independent judgment, an American court should discount the law of another state. But in the usual case, states imitate laws and policies of other states only after going through a process of deliberation, one that takes account of local conditions and differences between the earlier adopters and the state in question. In this case, the ‘vote’ is only partially dependent, and thus reveals some information about the general desirability of the laws and policies at issue.”).

272. *Id.* (“[T]he fact that all states have the same law is no more informative than if only one or two states had the same law if it turns out that later states imitated earlier states—as they should, under our analysis! In this sense, use of the Condorcet Jury Theorem to justify reference to the law of other states turns out to be self-defeating; it undermines its own precondition.”).

crowds of capable, independent judges who satisfy Condorcet's conditions—clearly don't obtain when someone misperceives what the majority is. And yet, as we saw above, judges who expressed a view about the national majority on pleading standards got it wrong a staggering 57.5% of the time.²⁷³ And this is hardly surprising, given the size of the crowd. Figure 6 shows the number of cases that discussed the pleading standard issue in each of the ten years after *Twombly*, plus the cumulative total number of cases that a court-counter would have to consider in order to judge the national majority accurately.

Figure 6. *Yearly and Cumulative Total Cases in the Ten Years After Twombly*



The probability that a crowd will be wise increases with the size of the crowd. But increasing the size of the crowd—at least one, like this, that embeds its decisions within opinions that have to be dug up through a legal search engine—makes it far more difficult to ascertain what the majority within that crowd believes. Similarly, the best way to prevent a cascade—which

273. See *supra* note 200 and accompanying text; Figure 4.

could ruin the crowd's wisdom—is for judges to report the answer that they think best, even if they end up deciding to go the other way in deference to the majority.²⁷⁴ But this would require even more fine-grained analysis, as court-counters would have to look not just to the outcome—applying heightened pleading standards or not—but to any contrary indications given by the judges about what they would do in the absence of a majority.²⁷⁵

In sum, the views of other district court judges may not have formal precedential value, but there may still be good epistemic reasons for taking their views into account. Yet this assumes that those views were themselves independent and can be accurately gauged. When it comes to court-counting precedent, at least on the national scale, those are two big assumptions.

2. *Better Settled Than Right*

The wisdom of crowds, such as it is, may help judges reach the right result; its value is epistemic. But reaching the “right” result about pleading standards might not be judges’ most important goal. When interpreting a procedural rule like this, achieving uniformity and predictability may be more important than textual or policy considerations.²⁷⁶

Litigants deserve to know in advance what courts will expect of their pleadings, and arguing the issue afresh in each case wastes resources, slows the proceedings, and distracts from the merits of the case. At the same time, the virtue of a uniform and transsubstantive system of rules that apply across the county is subverted when different courts impose different standards on something as fundamental as an answer. Geographic variations in pleading standards may lead to forum shopping, and variations within a district may raise fairness concerns, as parties are subjected to different standards depending on which judge gets assigned the case.²⁷⁷ Finally, uniform interpretation of the law is said to enhance the perceived legitimacy of the courts; as one schol-

274. See, e.g., *Incase Designs, Inc. v. Mophie, Inc.*, No. 13-cv-00602 RS, 2013 WL 12173931, at *1 (N.D. Cal. July 1, 2013); cf. Posner & Sunstein, *supra* note 10, at 164 (“[P]ublic-spirited states ought to make their decision and announce the reasons for their decision.”); Posner & Vermeule, *supra* note 259, at 185 (urging that a judge, when voting sequentially, “both announce his private judgment . . . and cast his vote,” for “[w]hile he may vote with the herd, the disclosure of his signal ensures that relevant private information will reach subsequent judges, who may be influenced by it”).

275. A still more complicated proposal comes from Professors Will Baude and Ryan Doerfler, who argue a judge should give weight not to the views of *all* other judges, but only to those who share his or her basic methodological or interpretive approaches. See William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319, 322–40 (2018).

276. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38 (1994) (“Uniformity is a means of ensuring the predictability of legal obligations. . . . [P]redictability is necessary for such rules to be socially productive.”).

277. See *id.* at 39 (“[N]ational uniformity of federal law ensures that similarly situated litigants are treated equally; this is considered a hallmark of fairness in a regime committed to the rule of law.”). But see Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1048–50 (2013) (arguing against the equality rationale for precedent).

ar has put it, “[i]nternal consistency strengthens external credibility.”²⁷⁸

Any of these concerns, if well-founded, might give judges good reason to engage in court-counting. Jumping on the majoritarian bandwagon is one way that judges can coalesce around a single standard. Giving court-counting a quasi-precedential force helps courts achieve greater consistency within their district, throughout their circuit, or across the country. In fact, even *inaccurate* court-counting precedent—when judges claim to be joining a majority position that doesn’t actually exist—may still serve the goal of perceived legitimacy, where the appearance of consistency is arguably all that matters.

The question, though, is whether consistency matters equally at all levels and on all topics, or whether uniformity may sometimes be overvalued.²⁷⁹ The courts of appeals, for example, have often treated the opinions of their fellow circuits with more deference than district courts are thought to do (court-counting precedent aside),²⁸⁰ in part because, as they sometimes note, they are “loath to create a circuit split.”²⁸¹ They have special reasons for doing so, however—ones not fully applicable to the district courts: their opinions are more visible, and thus contribute more to perceived legitimacy; their decisions have precedential power and wider geographical applicability, so they have the potential to introduce a much greater level of non-uniformity into federal law; and, importantly, they tend to provoke Supreme Court review.²⁸²

Just as uniformity might be valued differently at the district, circuit, and national levels, so too might it matter more or less depending on the legal issue involved. We mentioned earlier how common it is to count majorities on common law issues²⁸³ and interpretive questions arising under uniform codes.²⁸⁴ The Uniform Law Commission drafts and promotes uniform acts to bring “clarity and stability” to “areas of state law where uniformity is desirable and practical.”²⁸⁵ And these acts themselves often explicitly dictate that, “[i]n applying and construing this uniform act, consideration must be given to the

278. Caminker, *supra* note 276, at 40. *But see* Levin, *supra* note 277, at 1044–46 (arguing against “public faith in the judiciary” as a rationale for following precedent).

279. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008).

280. *See, e.g.*, *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 827–28 (6th Cir. 2009) (“[W]hile we recognize that we are not bound by the law of other Circuits, this court has . . . routinely looked to the majority position of other Circuits in resolving undecided issues of law. We also take note of the importance of maintaining harmony among the Circuits on issues of law.” (citation omitted)).

281. *Muniz v. Sabol*, 517 F.3d 29, 31 (1st Cir. 2008). *See generally* Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 76–79 (2009) (describing how circuit courts have “reason to be attentive to the decisions of their sister circuits, above and beyond the cogency of their reasoning”).

282. *See Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979) (“As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket.”); SUP. CT. R. 10(a) (listing a split among the circuits as the first of its reasons for granting certiorari).

283. *See* Flanders, *supra* note 281, at 81–82 n.85 (providing examples from tort law).

284. *See supra* notes 249–50.

285. *Overview: About Us*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/aboutulc/overview> (last visited Mar. 17, 2019).

need to promote uniformity of the law with respect to its subject matter.”²⁸⁶ Obviously, courts following this instruction will want to join the majority whenever possible.

Things are likely different when it comes to a procedural matter such as pleading standards. A recent treatise on precedent notes that “stare decisis is at its zenith when the overturning of a precedent would upset important settled expectations—especially those relating to property and contract rights—[but] it is at its nadir in cases involving procedural . . . rules.”²⁸⁷ The consistency that precedent-following helps foster is less important, the claim goes, in areas of law that people are not relying on to shape their primary conduct.²⁸⁸

Divergence among the circuits on a procedural matter seems especially unproblematic given the extent to which the circuits vary not just in their own circuit rules of appellate procedure, but even in their substantive law. Knowing these variations is part of everyday practice. And in light of the results of the last section, judges’ attempts to use court-counting as a means of enforcing circuit or national uniformity may backfire. Given how often judges are wrong in their perceptions of circuit and, especially, national majorities,²⁸⁹ the bandwagon that courts are chasing may not even exist. Mistaken court-counting is no sure route to uniformity, even if uniformity is what’s desired.

Where it may be most desired—and where court-counting is at its most accurate²⁹⁰—is at the district level. Within districts, procedural variations are the most troubling, as they make pleading standards subject to the luck of the draw—the randomized process by which cases generally get doled out to individual judges.²⁹¹ Perhaps, then, it may make sense for judges to defer to strong majorities within their judicial district. This is what judges in the Northern District of California have clearly done, sometimes even when their own views on the merits seemed to point the other way.²⁹² Their willingness to follow court-counting precedent has made that district the most uniform in the country on the question of pleading standards. Its judges have applied heightened pleading for defendants in sixty-nine out of seventy-five cases—

286. See, e.g., UNIF. PARENTAGE ACT § 1001 (UNIF. LAW COMM’N 2017). This act is only the most recent of many uniform acts that contain similar language. GARNER, *supra* note 245, at 705.

287. GARNER ET AL., *supra* note 244, at 370 (citation omitted).

288. See Levin, *supra* note 277, at 1074–75 (“The decisions of sister . . . courts have independent normative force when, and to the extent that, they have generated legitimate reliance interests on the part of the public.”).

289. See *supra* Figure 4.

290. See *supra* Figure 4.

291. According to 28 U.S.C. § 137(a) (2012), the chief judge of each district is responsible for the observance of rules about how to divide up cases. The Assignment Plan of the Northern District of California, for example, aims (with limited exceptions) at the “[p]roportionate, random and blind assignment of cases.” See Assignment Plan, N.D. Cal. General Order No. 44 § D(2)(a) (2018), <http://www.cand.uscourts.gov/filelibrary/132/GO%2044.pdf> (last visited Mar. 24, 2019).

292. See, e.g., *supra* notes 182–86, 237–38 and accompanying text.

and, significantly, they have mentioned the district's majority view in forty-one of those cases.²⁹³

Still, even at the district level—where uniformity is most important, court-counting is most likely to be accurate, and court-counting precedent is most likely to be effective in achieving uniformity—it still isn't clear that court-counting precedent is the best route to follow.

Courts seeking uniformity within a district could instead invoke their authority under Federal Rule of Civil Procedure 83 to make local “rules governing its practice.”²⁹⁴ Adding a local rule requires public notice and an opportunity for comment, then the approval of a majority of a district's judges.²⁹⁵ This way of proceeding might thus be quicker than establishing, identifying, and coalescing around a district-wide majority view on an issue like pleading standards. And it has other benefits as well. Because of Rule 83's notice and comment requirement, academics and members of the local bar would have an opportunity to weigh in on the question; courts wouldn't have to rely on the arguments—and the court-counting—that lawyers provide in a given case or that judges muster up themselves. A promulgated local rule would be far more public than an emergent majority, which, as we have seen, sometimes goes unidentified or even gets misidentified. And local rules have a stability that shifting majorities lack.

In fact, local rules already vary widely across districts, even neighboring ones, on matters of procedure such as summary judgment that are at least as important as pleading standards for defendants.²⁹⁶ And, further disrupting uniformity, Congress itself has pushed districts to develop “civil justice expense and delay reduction plan[s]” that are tailored to each district's “particular needs and circumstances.”²⁹⁷ For better or worse, then, the uniformity of procedure within the federal court system is likely overstated.²⁹⁸ Attorneys, who have to be admitted to practice in individual federal judicial districts, can surely be counted on to learn the sometimes divergent rules those districts employ.

293. See *supra* notes 124–27, 134 and accompanying text.

294. FED. R. CIV. P. 83(a)(1).

295. *Id.*

296. Compare N.D. CAL. CIV. R. 56-2(a) (instructing that “no separate statement of undisputed facts or joint statement of undisputed facts shall be submitted” with a motion for summary judgment), with E.D. CAL. R. 260(a) (“Each motion for summary judgment or summary adjudication shall be accompanied by a ‘Statement of Undisputed Facts’ that shall enumerate discretely each of the specific material facts relied upon in support of the motion and cite the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied upon to establish that fact.”).

297. See Judicial Improvements Act of 1990, Pub. L. 101-650, § 472, 104 Stat. 5089, 5090–91 (codified at 28 U.S.C. § 472 (2012)).

298. See generally David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537 (1985).

At the national and circuit levels, court-counting precedent on a question like the one studied here is likely to be misleading or, at best, unnecessary. And even at the district level, where court-counting precedent may be most effective, an even more effective way of setting pleading standards for defendants stands at the ready, established clearly by the very Federal Rules that district judges have worked so hard to interpret in the 1,141 cases that we have studied.

CONCLUSION

In the decade after the Supreme Court raised the pleading standard for plaintiffs, the lower courts have decided 62% of the time that those heightened pleading standards should *not* also be applied to defendants. What's good for the goose has not been good for the gander in a growing majority of federal courts since August 2011. Talk of a national majority, however, masks huge differences in the ways various circuits and particular districts interpret the Federal Rules of Civil Procedure. Defendants in places like San Francisco or Chicago should know that the national majority view just doesn't apply there. Judges in the Northern Districts of California and Illinois apply the standards of *Twombly* and *Iqbal* to defendants over 90% of the time.

In addition to revealing these and other data about the state of pleading in federal district courts, this Article has also revealed something about the workings of those courts themselves. Specifically, this Article has shown how formal doctrine about the precedential powerlessness of district court opinions fails to capture the actual power those opinions exert—collectively, at least. By studying 1,141 opinions on a single legal issue, we have found that judges mention what they perceive to be the majority view on that issue almost 27% of the time. The majorities they note are sometimes national or sometimes limited to a given circuit or district. Sometimes, judges even note a majority at the state level—surprisingly, given that the issue is one of federal civil procedure.

What's more, courts do not just note the majority view; they often rely on it as part of their reasoning. Sometimes they even let the view of the majority trump their own preferred view. Like officially recognized precedent, court-counting "precedent" thus provides courts a reason for deciding issues in a way other than it would have done on the merits alone.

Is this a good idea? Often not. Mostly, this is because courts are bad at counting. (Courts struggle both to determine the absolute number of prior opinions and to identify which were independently decided on the merits rather than on the basis of further court-counting precedent.) Courts identify the majority view incorrectly one-third of the time; when they try to identify a national majority, their error rate climbs to 57.5%. Courts might use court-counting precedent to benefit from the wisdom of the judicial crowd. They

might see virtue in uniformity, whether the virtue be predictability, fairness, or public confidence in the courts. But some of these benefits and virtues are overstated, as we have argued. Some are best achieved at the local level, rather than circuit or national levels. And some could be achieved more efficiently by forgoing court-counting precedent and choosing instead to pursue more transparent routes to uniformity, such as local rulemaking.

If, however, courts decide that court-counting is the way to go, we hope they will at least benefit from what we have learned by doing this count of our own.