Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Has The Supreme Court Limited Americans' Access To Courts?"
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This morning we will examine the impact two recent Supreme Court decisions have had on Americans' access to the Nation's court system.

A few years ago, a slim majority of the Supreme Court undercut the landmark precedent of Brown v. Board of Education and its guarantee of equal justice. At that time, Justice Breyer observed that "it is not often in the law, that so few, have so quickly, changed so much." That comment reflects the power that a mere five justices on the Supreme Court can have in our democracy. Their actions need not be unanimous. They do not need consensus. In the very year a justice is confirmed, he or she can be the deciding vote to overturn precedent and settled law.

This is now our fifth hearing in 18 months held to highlight cases where literally five justices - the slimmest majority - have changed the legal landscape by overturning precedent and undermining legislation passed by Congress. Today's hearing is yet another reminder about how just one vote on the Supreme Court can impact the rights and liberties of millions of Americans.

Today, we focus on how a thin majority of the Supreme Court has changed pleading standards. This issue sounds abstract, but the ability of Americans to seek redress in their court system is fundamental. In a pair of divided decisions, the Court restricted a petitioner's ability to bring suit against those accused of wrongdoing. The Court essentially made it more difficult for victims to proceed in litigation before they get to uncover evidence in discovery. I fear that this is just the latest example of conservative judicial activism.

For more than 50 years, judges around the Nation enforced longstanding precedent designed to open courthouse doors for all Americans. In the 1957 decision of Conley v. Gibson, the Supreme Court held that a plaintiff's complaint will not be dismissed if it sets out a short and plain statement of the claim, giving "the defendant fair notice of what the claim is and the grounds upon which it rests." This precedent reflected the intent behind the Federal Rules of Civil Procedure, which Congress adopted over 70 years ago, to set pleading standards to allow litigants their day in court. Lawyers call this "notice pleading" and distinguish it from specific fact pleading. The underlying intent has been to allow people their day in court and not to require them to know everything or have all the evidence that they will use to prove their claims at the outset. Much of that evidence may be in the hands of the defendant accused of wrongdoing, after

all. Allowing the case to begin with a good faith claim permits the parties to engage in evidence gathering. Of course to prevail a party needs to establish a claim by a preponderance of the evidence so by the end of the case, the claim of wrongdoing will be fairly tested.

In two cases, Iqbal and Twombly, the Supreme Court abandoned the 50-year-old precedent established in Conley. Now, the Court requires that prior to discovery, a judge must assess the "plausibility" of the facts of an allegation. In his dissent, Justice Stevens called Twombly a "dramatic departure from settled procedural law" and "a stark break from precedent." He predicted that this decision would "rewrite the Nation's civil procedure textbooks" because it "marks a fundamental - and unjustified - change in the character of pretrial practice." Justice Souter, the author of the Twombly decision, dissented in Iqbal because he believed the five justice majority created a new rule that was "unfair" to plaintiffs because it denied them a "fair chance to be heard."

These activist decisions do more than ignore precedent - they also pose additional burdens on litigants seeking to remedy wrongdoing. As a result of this judge-made law, litigants could be denied access to the facts necessary to prove wrongdoing. As this Committee learned last year from the testimony of Lilly Ledbetter, employees are often at a disadvantage because they do not have access to the evidence to prove their employer's illegitimate conduct. I fear that her civil rights claim would not have survived a motion to dismiss under the new standard. Our justice system cannot ignore the reality that a defendant often holds the keys to critical information which a litigant needs to prove unlawful conduct.

By making the initial pleading standard much tougher for plaintiffs to reach, the conservative majority on the Supreme Court is making it more difficult to hold perpetrators of wrongdoing accountable. I fear that this new heightened pleading standard will result in wrongdoers avoiding accountability under our laws. Of course, wealthy corporate defendants and powerful government defendants would prefer never to be sued and never to be held accountable. These new judge-made rules will result in prematurely closing the courthouse doors on ordinary Americans seeking the meaningful day in court that our justice system has provided.

As we will hear from our witnesses today, the impact of the Twombly and Iqbal decisions has been immediate and expansive. According to the National Law Journal, four months after Iqbal, more than 1,600 cases before lower Federal courts have cited the ruling. This precedent has the potential to deny justice to thousands of current and future litigants who seek to root out corporate and governmental wrongdoing.

It has been said that a right without a remedy is no right at all. That is what is at stake here. I fear that Twombly and Iqbal are not isolated rulings, but rather part of a larger agenda by conservative judicial activists to undermine Americans' fundamental rights. The Seventh Amendment to the Constitution guarantees the right of every American to a jury trial. That guarantee is undermined if the rules for getting into court are so restrictive that they end up closing the courthouse doors before a fair inquiry can be made.

I thank Senator Whitehouse, the Chairman of the Subcommittee on Administrative Oversight and the Courts, for working with me to hold this hearing and for sharing the responsibility for

chairing it. I also thank the distinguished witnesses for coming. I look forward to hearing their testimony.

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