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CHANGING THE RULES: WILL LIMITING THE SCOPE OF CIVIL DISCOVERY DIMINISH ACCOUNTABILITY AND LEAVE AMERICANS WITHOUT ACCESS TO JUSTICE?

HEARING

BEFORE THE

SUBCOMMITTEE ON BANKRUPTCY
AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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"Public Comment Regarding Proposed Rule Changes, Lawyers for Civil Justice," Regulations.gov (8/30/2013). Available at:
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CHANGING THE RULES: WILL LIMITING THE SCOPE OF CIVIL DISCOVERY DIMINISH ACCOUNTABILITY AND LEAVE AMERICANS WITHOUT ACCESS TO JUSTICE?

TUESDAY, NOVEMBER 5, 2013

U.S. SENATE,
SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:10 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Christopher Coons, Chairman of the Subcommittee, presiding.

Present: Senators Coons, Whitehouse, Franken, Blumenthal, Sessions, and Flake.

OPENING STATEMENT OF HON. CHRISTOPHER COONS, A U.S. SENATOR FROM THE STATE OF DELAWARE

Chairman COONS. This hearing of the Senate Judiciary Subcommittee on Bankruptcy and the Courts will come to order. Good morning. I would like to welcome the witnesses who have joined us today. I am also very glad to be joined by my distinguished Ranking Member, Senator Flake, who also has the enormous misfortune of serving with me on the Africa Subcommittee of Foreign Relations.

The purpose of this morning's hearing is to examine a series of changes to the Federal Rules of Civil Procedure proposed by the Judicial Conference's Advisory Committee on the Civil Rules. Under current rules, all relevant material is discoverable, but a party may seek court relief from an otherwise valid discovery request if the request is out of proportion to the needs of the case.

The proposed changes would invert this standard, allowing responding parties themselves to decide what is proportional and what is not.

The changes are also designed to increase the frequency with which courts assign the costs of discovery to the requesting rather than producing party. The changes would also place somewhat stricter presumptive limits on depositions, for example, from 10 to 15 and lasting no more than 6 hours as compared to 7 under current rules; limits on interrogatories from 25 to 15; and requests for admission, currently not limited, would be limited to 25.

Although this is in service of an important goal—reducing overall unnecessary discovery costs—these proposed changes have also sparked significant controversy in the civil rights, consumer rights,

antitrust, and employment rights communities. These advocates worry that limitations on civil discovery will unduly hamper the ability of those who have been subject to discrimination or other violations to obtain the evidence they need in order to prove their cases in court.

Under the Rules Enabling Act, it is the role of the judiciary to propose and for Congress to review any changes to the rules that govern litigation in our federal courts. Despite the mechanism for rules changes under the Rules Enabling Act, however, over the past 30 years courts have typically avoided the role of Congress and instead used decisional law time and again to reinterpret the federal rules. In nearly every case that reinterpretation has narrowed the path for a citizen to have his or her case decided by a jury, according to the facts and the law.

Most recently, a series of decisions has significantly limited the availability of class actions, has raised pleading standards, has foreclosed federal and State courts entirely for those unlucky enough to find their dispute subject to an arbitration clause.

Today, however, I am glad to report that the Judicial Conference is proposing that the rules be changed through the mechanisms set out in the Rules Enabling Act, which gives the public and this Congress a valuable opportunity to be heard before those changes might take effect.

In conducting my review of the proposals, I am guided, as is also, I hope, the Judicial Conference, by four basic considerations:

First, what specifically are these reforms meant to accomplish? What problems or abuses are they hoping to remedy?

Second, how effectively would these proposed reforms succeed in addressing the problems or alleged abuses?

Third, are there collateral costs to our overall system of justice?

And, finally, if there are collateral costs, I think we must weigh the costs and benefit in light of the broader public's interest in a fair, efficient, and effective court system.

So as to the first question, what are these changes meant to accomplish, let me start with what I think is an unobjectionable statement. Civil litigation in America can be very expensive. As former in-house counsel for a manufacturing company, I knew well the challenges that corporate defendants can face in controlling costs of lawsuits where even a meritless complaint can put settlement pressure on a client.

But to the second question, are these rules likely to significantly reduce discovery costs that are unnecessary in order to resolve the case, studies cited by the Judicial Conference note discovery costs are not a problem in the vast majority of cases, but that discovery is a problem in a "worrisome number of cases." And those cases where discovery costs are a real problem, which is to say that they are "out of proportion" to the needs of the case, it tends to be in cases that are ones dominated by high stakes, that are highly complex, or highly contentious. In these cases, presumptive discovery limits are likely to be of no impact at all. In smaller cases, however, presumptive limits are likely to play a normative role restricting the ability of the plaintiffs in a small case to take badly needed depositions from a defendant who holds the information relevant to a fair lending or employment discrimination claim.

If I might, without objection, I would submit for the record letters from Barry Dyller and from the Delaware Trial Lawyers Association setting forth some of these concerns.

I will also submit for the record a letter from the Alliance Defending Freedom, an Arizona-based organization committed to defending religious freedom, which believes these changes would inhibit legal challenges they bring to protect citizens under the Free Exercise Clause of the First Amendment.

[The letters appear as submissions for the record.]

Chairman COONS. As to proposals to restrict the scope of discovery, the import and impact of these changes is likely to be highly litigated. Motions practice is also not cheap, and when all is said and done, these changes would be implemented by those same judges who today, according to the Judicial Conference itself, are not doing a good enough job limiting discovery in the cases before them.

Five times since 1980, the Judicial Conference has tweaked civil discovery rules in attempts to curb perceived abuses. Back in 1980, pretrial conference was added; in 1983, proportionality was first added as a general limitation on discovery; in 1993, the rules were amended to add some presumptive discovery limits; in 2000, the scope of discovery was narrowed; finally, just a few years ago, in 2006, the proportionality provision, first instituted in 1983, was revised again in an attempt to reflect the burdens of electronic discovery.

Today we are faced with yet another incremental restriction on discovery. Why would we expect these changes to work significantly where the previous ones, arguably, have failed? And if discovery cost is, at least according to one study, a problem only in a minority of cases, is it appropriate to narrow the scope of discovery in a way that applies across the board to all?

Next, even if we are to assume that these changes would have a positive impact in curbing discovery abuse, we must still consider the third question: What harms are risked if these changes are implemented? Discovery is a critical stage in litigation that allows parties to marshal evidence in support of their claims or defenses and evaluate the claims and defenses of their counterparty. Without discovery, parties ask judges and juries to decide cases based on incomplete information, which can only degrade the ability of our legal system to deliver justice under the law.

If discovery is important to the criminal justice system, it is absolutely indispensable to civil plaintiffs. Plaintiffs, not defendants, bear the burden of persuasion in proving their claims, yet often, especially in employment discrimination and consumer fraud cases, most of the relevant evidence is in the possession of the defendant. Less access to information could mean that responsible parties remain unaccountable, not because allegations are not true but because of a lack of the evidence to prove the allegations. If so, this would be a very real cost, and not just to the plaintiffs whose meritorious cases would thus be thrown out. In many areas of the law, notably antitrust and discrimination, the law recognizes the societal value of so-called private attorneys general.

Recognizing the limitation of Government resources, the law provides encouragement for civil plaintiffs to bring suit and help en-

sure compliance with these areas of the law. Where we can cut costs without doing damage to our criminal justice system, we should absolutely do so. When there is the possibility of collateral costs to our courts and the ability of Americans to enforce their substantive rights, we must tread much more carefully.

Before we amend the rules to limit the ability of litigants to marshal evidence to prove their cases, we should examine whether any of these potential harms are likely to come to pass. We must examine whether other reforms are more likely to achieve the goals of reducing unnecessary litigation costs and less likely to have the collateral consequence of reducing access to justice.

Commentators are in general agreement that judges could do more under the rules than they are currently doing to narrow issues for discovery and reduce the burdens on producing parties. Why are they not doing so? Are judges overworked? If so, perhaps the problem could best be addressed by creating some or all of the 91 new Article III judgeships recommended by the Judicial Conference, as would be accomplished by the Federal Judgeship Act of 2013 I recently introduced with the Chairman.

Would a greater investment in technical and support resources allow for more efficient management of cases and of e-discovery leading to significant savings to litigants?

Is judicial training a limiting factor? And how might we address that?

Clients also have tremendous power to limit litigation costs incurred by their legal representation. Clients can and do negotiate down hourly rates, the size of legal teams, and even the hourly billing model that has created divergent incentives between attorneys and clients. Do these paths all, either in isolation or concert, offer a more promising avenue for reform? These are just a few of many questions we will explore with our witnesses today, but first I would invite Senator Flake for his opening statement.

Senator Flake.

OPENING STATEMENT OF HON. JEFF FLAKE, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator FLAKE. Thank you, Mr. Chairman. I am here today because Senator Sessions had a prior commitment. He may be able to come a little later after that is finished. But I am glad to be here. I want to thank the witnesses for coming today.

I look forward to the continuation of the process that Congress created to make changes to the Federal Rules of Civil Procedure. In the Rules Enabling Act, Congress created a process that is careful and deliberate, taking years to effect changes to the rules. This process begins with the Judicial Conference Advisory Committee on Civil Rules. The Advisory Committee evaluates proposals for amendments to the rules, and if it decides to pursue a proposal, it may seek permission from the Standing Committee to publish a draft of the proposed amendments. Once published, the draft is subject to a 6-month comment period, including several public hearings. We are currently in the public comment period of the draft proposal, and the first of the public hearings is taking place in 2 days on November 7 in Washington.

The Advisory Committee on Civil Rules is chaired by the Honorable David Campbell, U.S. District Judge from my home State of Arizona, and members of the Advisory Committee include four lawyers, including some who routinely represent plaintiffs and others who routinely represent defendants in civil litigation, which will be affected by the rules. The committee also includes eight judges, one a judge on the Supreme Court of Georgia, six U.S. district court judges, one judge from the U.S. Court of Appeals on the Tenth Circuit, the dean of the Lewis and Clark Law School, the Assistant Attorney General for the Civil Division, Stuart Delery. The membership of this committee brings vast experience and diverse points of view to the process.

What I am trying to explain here is that this is a deliberative, long, involved process. There is nothing that happens quickly here. It is deliberative.

After the public review period, the Advisory Committee will again review the proposed rules in light of the comments it receives. The amendments may then be submitted to the Standing Committee for Approval. The Standing Committee independently reviews the findings of the Advisory Committee and, if satisfied, recommends changes to the Judicial Conference, which in turn recommends the changes to the Supreme Court. It is only then that the rule proposal reaches Congress. If Congress does not act within 6 months, the rules will be automatically adopted. This entire process, as I have explained, is a cautious one with each proposed rule change subject to meticulous evaluation and discussion.

In proposing changes to the rules, the Judicial Conference justifiably seeks to reduce costs and delays in civil litigation. These costs have escalated in recent years due to the massive increase in electronically stored data, as the Chairman mentioned. The proposals put forth by the Advisory Committee are modest changes to the rules seeking to address these concerns. I respect this ongoing process. I hope that the Advisory Committee will continue its careful review, and I look forward to the witnesses' testimony. And I would ask unanimous consent that Senator Cornyn's statement be entered into the record as well.

Chairman COONS. Without objection.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

Chairman COONS. Thank you, Senator Flake.

Before we begin with witness testimony, I would like to ask all three witnesses to stand while I administer the oath, which is the custom of this Committee. Please raise your right hand and repeat after me. Do you solemnly swear that the testimony you are about to give to the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MILLER. I do.

Mr. PINCUS. I do.

Ms. IFILL. I do.

Chairman COONS. Thank you. Let the record show the witnesses have answered in the affirmative. Please be seated.

Our first witness today is Professor——

Senator WHITEHOUSE. Mr. Chairman, if we are not going to allow for opening statements from other members of the Subcommittee,

may I ask for unanimous consent that my written statement be put into the record?

Chairman COONS. Certainly, Senator Whitehouse. You had not expressed any interest to me beforehand. If you would like to make an opening statement at this time, I will invite you to.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Thank you. I want to thank the Chairman for holding this hearing. It is the 75th anniversary of the Federal Civil Rules, and there is particular reason for careful deliberation when we consider rules changes like the ones before us today.

There has been an undeniable trend in changes to the Federal Rules of Civil Procedure—both the changes that come through the Rules Enabling Act and changes that have occurred through judicial interpretation. And that undeniable trend has been to narrow and erode a fundamental American legal and political institution: the civil jury. I fear that, if enacted, the current proposed changes will continue and accelerate that trend.

Our Founding Fathers envisioned the civil jury in the same way that Sir William Blackstone had as a means of preventing what Blackstone called "the encroachments of the more powerful and wealthy citizens." Unfortunately, today's most powerful and wealthy beings are corporations, and they view jury trials with annoyance and hostility, and they have brought their considerable powers of political persuasion to bear to limit Americans' access to this historic constitutional institution. Aided by an increasing judicial focus on court efficiency, they have successfully limited the use of the civil jury, which, as Alexis de Tocqueville observed, is in the United States "a political institution" and "one form of the sovereignty of the people."

These recent amendments governing pleading, motions to dismiss, class action lawsuits, summary judgment, and case management procedures have narrowed the gateways to jury trial, and now the Judicial Conference seeks to make changes to the discovery process that could burden individual plaintiffs while benefiting large corporations.

Most significantly, the proposed changes could fundamentally shift the burden of discovery requiring plaintiffs to demonstrate that discovery beyond presumptive limits is necessary rather than requiring defendants to prove that the information sought is not relevant. In cases involving employment discrimination, product liability, and consumer rights, the proposed changes could prevent plaintiffs from ultimately obtaining the information that they need to advance their cases to the trial phase and win their case.

The Founders intended the civil jury to serve as an institutional check on the wealthy and powerful. It did so by giving ordinary American people direct control over one element of Government. We should be very careful not to lightly cast such an institution aside in the name of judicial efficiency.

I thank the Chairman for his courtesy in allowing me to make that opening statement.

Chairman COONS. Thank you, Senator Whitehouse.

Our first witness today is Professor Arthur Miller. Professor Miller is a university professor of law at New York University Law School and the School of Continuing and Professional Studies. Professor Miller is I think unquestionably the Nation's foremost expert on civil procedure, which he has taught, researched, and written about for more than 40 years. He is the co-author of one of America's most cited, and used by the Chair, legal treatises "Practice and Procedure" with Charles Wright. He has also served as a member and reporter to the Judicial Conference's Advisory Committee of Civil Rules, whose proposed rules changes we are here today to examine. The remainder of his resume is too voluminous to begin to address this morning.

We welcome your testimony, Professor Miller. Thank you for being with us. Please proceed.

STATEMENT OF ARTHUR R. MILLER, PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. MILLER. Thank you, Mr. Chairman, Senator Flake. I thank the Chair for giving me an additional 10 years of life by saying I have been teaching it for 40 years. The truth is it is over 50 years. But who is counting?

In my written statement, I have tried to give you some context and perspective for the proposed amendments, and both you, Mr. Chairman, and Mr. Whitehouse have mentioned many of the facts. In the last 25 years, the pretrial landscape in federal courts has literally been littered with stop signs. These stop signs prevent Americans from getting meaningful days in court. They undermine congressional and constitutional policies embedded in our most sacred statutes, and they have resulted in the deformation of the Federal Rules of Civil Procedure.

You have mentioned summary judgment enhancement. I add the screening of expert witnesses, class action obstacles of extraordinary significance, not simply the well-known *Wal-Mart* case. The pleading decisions in 2007 and 2009 have completely abandoned simplified pleading, substituted plausibility pleading, meaning that there is now a real potential for complete termination of an action based on one paper, the complaint, and judicial speculation as to what the merits may be. Not surprisingly, like Pavlov's dogs, defense firms automatically make the motion to dismiss.

We have the potential narrowing of personal jurisdiction indicated by four Justices of the Supreme Court, and I strongly suspect Justice Alito will join them in the next case, meaning that Americans may have to litigate in inconvenient fora. And since 1983, when I was reporter, there have been sequential restrictions to the scope of discovery, which the Chair has already alluded to.

All of this means that there is now earlier and earlier and earlier termination of civil actions long before discovery, long before the trial.

Senator Whitehouse spoke of the jury trial, and that has been our gold standard. Our gold standard is gone. Cases are not tried. We are now left with the dross of motions to dismiss and summary judgments.

Now, the defense bar would have us believe all of these changes are necessary because of costs, loss of American competitiveness,

and electronic discovery. I assure the Committee the foundations of American capitalism are not crumbling. The system as it now exists is strong enough to deal with these problems. There is simply no empiric basis for these charges. There are anecdotes and there are impressionistic, superficial cost surveys. The Federal Judicial Center itself says it is not a problem.

I think there is an important back story here. American capitalism in the last 75 years has expanded exponentially. That has produced complex litigation and perhaps an increase in absolute dollars.

However, keep in mind that the same exponential expansion of dimension has brought exponential expansion of profits. Corporate America has benefited from these tremendous growths in our economy. They serve national marketplaces. They create national risks to our people. And when challenged, they should stand and defend against the charges against their conduct.

To me, an even more important risk is the risk to our national statutes. Our 75 years has seen the greatest sensitivity and development of social justice in this country, and we should be proud of it. We now have civil rights legislation, which we did not have then. We have environmental, consumer, product protection, which we did not have then. We have defenses against employment discrimination, disability discrimination, and my personal favorite, age discrimination.

We do have a governmental regulatory system, but it is far from perfect. Bernie Madoff proved that. Enron proved that. Diet drugs, Vioxx, and the marketing of the garbage CDOs and other financial instruments that nearly brought our economy to a halt prove that what we need is what we always have had: a satellite system of private litigation to enforce our public policies.

I believe in our system. I do not want it deformed. Congress should pay attention to this back story because what we have seen are paper cuts perhaps, but death by 1,000 procedural paper cuts is still death to the system as we have known it.

Thank you.

[The prepared statement of Mr. Miller appears as a submission for the record.]

Chairman COONS. Thank you, Professor Miller.

Our next witness is Andrew Pincus. Mr. Pincus is a partner at Mayer Brown, where he focuses on State and federal appellate litigation, including before the Supreme Court, as well as on developing legal arguments in trial courts. Notably, he successfully argued *AT&T Mobility v. Concepcion* in which the Supreme Court held the Federal Arbitration Act preempted State law but denied enforceability of arbitration agreements containing class action waivers. In addition to his work at Mayer Brown, Mr. Pincus has served as general counsel of Anderson Worldwide, general counsel of the United States Department of Commerce, and Assistant to the Solicitor General of the United States, among many other areas of services.

Mr. Pincus, please proceed.

STATEMENT OF ANDREW PINCUS, PARTNER, MAYER BROWN LLP, WASHINGTON, DC

Mr. PINCUS. Thank you, Mr. Chairman. Chairman Coons, Ranking Member Flake, and members of the Subcommittee, I am honored to appear before the Subcommittee today to discuss these proposed rules amendments. And I think the starting point is that our legal system has significant problems. Litigation takes too long and it is too expensive, and that is not good for plaintiffs, and it is not good for defendants.

In the words of a report co-authored by the American College of Trial Lawyers, which is a group that includes both plaintiff and defense attorneys, and I am quoting: "Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them."

The tremendous growth in the sheer quantity of electronically stored information combined with discovery rules formulated for the typewriter and paper era have produced a huge increase in discovery-related legal costs. A very recent study by the RAND Institute for Civil Justice, a widely recognized nonpartisan group, found a median cost of $1.8 million per case just for producing electronically stored information. The cost ranged from $17,000 in the smallest case to $27 million in the largest case.

In addition, parties incur significant costs just to preserve electronically stored information, beginning when a claim is reasonably anticipated and during the entire course of the litigation. Otherwise, they face onerous sanctions in the event information later found to be subject to discovery is lost, even if that deletion is unintentional.

For example, Microsoft informed the Rules Committee in 2011 that it was storing 115 terabytes of information, or more than 5 times the text of all the books in the Library of Congress. Creating the systems to store this data and maintaining them imposes significant costs.

Experienced litigators on both sides, in the American College of Trial Lawyers and again in the Sedona group on discovery issues, have said there is a serious problem with electronic discovery, and both groups say the issues should be addressed by changes in the rules.

The fact is litigation dispositions are increasingly driven by costs in a significant category of cases and not by the underlying merits of the claim, and that undermines the entire basis of our legal system.

Now, I agree fully with Professor Miller about the importance of the principles that are embodied in federal statutes and the importance of providing a means to redress violations of them. And that is why I think it is really important to note that the rules proposals released for comment represent moderate change. The committee did not decide to do nothing. But it also did not adopt a number of proposals that were advanced by some in the defense bar. It steered a middle course.

The principal proposed amendment relating to the scope of permissible discovery simply moves a standard already in the rule, requiring that discovery be proportional to the needs of the case in order to give that standard added emphasis. It is hard to quarrel with the argument that discovery should be proportional, especially because the draft rule expressly includes factors other than the amount at stake in the litigation, such as the importance of the issues involved in the litigation, the need for discovery, and an overall cost-benefit determination. And judges will make the decision of what is proportional and what is not. We trust them to make many determinations, and there is no reason why they cannot make this one properly.

Again, this change is supported by the College of Trial Lawyers, the Sedona group, and it has an important benefit. It forces judges to engage in the discovery process when they decide these issues, and a big complaint from all lawyers on all sides is judges are not engaging enough early enough in the case. They do not manage, and the lawyers, left to their own devices, unfortunately, go off on a frolic. This will solve that problem.

The amendments also would modify the provisions of the current rules establishing presumptive limits on some forms of discovery. The proposed limits are based on information regarding the norms in most federal court litigation and, therefore, are not expected to affect much of the litigation that happens in the federal courts. But the Advisory Committee's eminently reasonable conclusion, again, was, and I am quoting, "it is advantageous to provide for court supervision when the parties cannot reach agreement in the cases that may justify a greater number." Nothing prevents a court from allowing a greater number, and, again, this forces judges to focus on the case and make a decision instead of leaving lawyers to their own devices.

Finally, as I mentioned earlier, the current vague and uncertain standard for when sanctions should be imposed is imposing significant costs for overpreserving data. The proposed amendments begin to address that problem by replacing the existing unclear rule with a new somewhat clearer standard.

I think it is important to conclude by mentioning, as Senator Flake mentioned, these proposals are just that—proposals. There is a process underway: 6 months of written comments, 3 hearings. The committee will gather a lot of information considerate of the rules processes working just as Congress intended.

Thank you again for the opportunity to testify, and I look forward to answering your questions.

[The prepared statement of Mr. Pincus appears as a submission for the record.]

Chairman COONS. Thank you very much, Mr. Pincus.

Our next witness is Sherrilyn Ifill. Ms. Ifill is president and director-counsel of the NAACP Legal Defense and Educational Fund. Ms. Ifill began her legal career as an attorney with LDF where she litigated voting rights cases for many years. Even after joining the law faculty at the University of Maryland, Ms. Ifill taught civil procedure and civil rights courses and, in addition, continued to be involved in civil rights cases as a consultant and litigant. Now in her current role as president of LDF, Ms. Ifill is ideally suited to pro-

vide the Subcommittee with an overall assessment of how these proposed rules changes may affect the ability of civil rights plaintiffs to prove their cases in court.

Ms. Ifill, please proceed.

STATEMENT OF SHERRILYN IFILL, PRESIDENT AND DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NEW YORK, NEW YORK

Ms. IFILL. Thank you very much. Good morning, Chairman Coons, Senator Flake, and other members of the Subcommittee. Thank you for inviting me to testify today.

In the 20 years that I taught civil procedure, I began my first class always by quoting Robert Cover, who said that procedure is the blindfold of justice. And it is perhaps for that reason that so many of the Rules of Civil Procedure have been actually shaped within the context of civil rights cases, cases that would be familiar to any of us who took a first-year law course, *Conley v. Gibson*, *Adickes v. S.H. Kress*, *Hansberry v. Lee*, *Martin v. Wilks*, *Anderson v. Bessemer City*, now *Wal-Mart v. Dukes* and *Iqbal v. Ashcroft*. And the reason for that, of course, is because of the unique role that civil rights cases play in opening the opportunity for access to justice for those seeking justice.

I represent lawyers who represent these clients, bringing claims under the Constitution of the United States and other civil rights laws at the federal and at the State level. And what is essential to our clients is the opportunity to obtain the information that will prove their claim.

Professor Miller talked about the pretrial landscape being littered with stop signs, and that is undoubtedly true, from the summary judgment decisions of several decades ago to the recent pleadings decisions by the Supreme Court. And in each of those cases, the concern that was raised was whether or not judges were properly managing the litigation process. And now here again we have returned to that same argument in the area in which it can be without question that trial judges have the greatest expertise and latitude: the management of discovery.

For those of us who represent civil rights plaintiffs, discovery is the essential stage of any litigation, and that is, of course, because of the nature of our claims. The information that would support a claim of discrimination is often, as the Chairman pointed out, within the possession of the defendant. And the only way we can get that information is through the discovery process.

It is also true that one of the great successes of our work, the fact that we now find discrimination socially unacceptable, means that our ability to find that information, to gather that information, and to make a case for discrimination largely based on circumstantial evidence requires us to gather a range of information and data within the possession of the defendant. That information for us can only be obtained through discovery.

At the outset, Chairman Coons talked about a worrisome set of cases and the potential for collateral consequences, and I think this is where the inquiry really is most appropriately targeted. Without question, there is a narrow band of cases, perhaps those discussed by Mr. Pincus, in which there are real problems with discovery and

in which the costs are exorbitant. But those are not the majority of cases. As Professor Miller pointed out, no study has supported the idea that litigation has run amuck, either from costs or from overburdensome discovery. And the question is: What will we do with that small band of cases? And will we allow that small band of cases to essentially imbalance our civil litigation process against the vast majority of cases and in our instance, of course, civil rights cases?

Judges do have the power to manage discovery, and judges do have the power to ensure that discovery is not burdensome. And we have found in the cases that we litigate judges exercise that authority. Magistrate judges are experts in managing discovery in complex cases, and they do so. They play a very active role in setting appropriate timetables and schedules for the parties and ensuring that discovery is managed and maintained in a way that is fair to all sides.

For our cases, we are not, frankly, very wealthy lawyers. We always seek the most cost-efficient way to engage in discovery and, therefore, there are certain kinds of discovery that are actually most effective for us—interrogatories, for example, and requests for admission. And so any effort to limit the number of interrogatories and requests for admission, the cheapest forms of discovery, are borne disproportionately by those of us who are most interested in most efficiently and effectively using the resources that we have available to engage in litigation.

This is a critical moment in which this Committee has an opportunity to stop and reflect on what has happened to civil litigation over the last 30 years and what it means for our clients. The list of cases that I rattled off at the beginning, cases in which clients were able to bring forward discrimination claims that revealed not just for those individual plaintiffs but for our entire society the ongoing nature of discrimination and violations of constitutional rights of citizens who live at the bottom and at the margin, are imperiled when those citizens do not have access to their day in court.

Professor Miller described it as a "meaningful day in court," a "meaningful opportunity" to participate in the process of litigation. We would respectfully ask that this Committee refrain from adopting these proposed changes to the discovery rules, recognize that this is a moment when we have the opportunity to turn back from what has been an effort to close the door on those who need the litigation system most.

Thank you.

[The prepared statement of Ms. Ifill appears as a submission for the record.]

Chairman COONS. Thank you, Ms. Ifill.

We will now begin questions in 7-minute rounds. If I might start with you, Ms. Ifill, since you began litigating civil rights cases, can you speak about the impact a whole series of decisions have had? Professor Miller referenced a series of stop signs that now litter the pretrial landscape for those litigants who are seeking to establish their case and advance their case. Can you speak about the impact these changes have had on your ability to bring civil rights cases and how these further proposed changes to the discovery rules would play into that?

Ms. IFILL. Well, of course, it begins decades ago with a series of three decisions that the Supreme Court decided on summary judgment, and, of course, we know that over the last 30, 40 years, the percentage of cases that go to trial have greatly diminished. Everyone recognizes that summary judgment is the name of the game. And because summary judgment is the name of the game, it actually has put pressure on the front end of litigation—pressure on the pleadings, pressure on discovery. It makes those two moments in the litigation process more important because of the likelihood that you will not get to trial unless you can surmount summary judgment.

And then, of course, the changes to the pleadings rule and the heightened pleading that has resulted as a result of the *Iqbal v. Ashcroft* cases. A number of studies are still being done to determine what the effect of that decision was on civil rights cases, but I can certainly tell you that one of the effects is essentially what we talk about with our clients, what claims we think can survive a motion to dismiss. And, remember, at the pleading stage we are talking about before you have ever done discovery, what you are able to pull together.

As I just mentioned in my testimony, it is very important for us to remember that the success of the work that organizations like mine have done has resulted in the reality that finding the smoking gun in which people use discriminatory language openly and so forth, it still happens, unfortunately, in far too many cases, but it is more likely not to be left about in open and plain view. This is information that people recognize that they have to hide.

And so what we have to do in the discovery process is dig even deeper than we ever had to do in the past to ensure that we can gather this information and use it for our claims. And, frankly, because of the societal view against discrimination, we frankly have a harder time proving that discrimination in fact exists.

And so the work that we have to do as litigators in civil rights claims has actually been increased. I mean, we are happy for it in some ways. We do not want there to be blatant forms of discrimination. But we bear the burden and the litigation process, nevertheless, of ferreting out discrimination where it exists.

Chairman COONS. And how would these proposed changes to the discovery rules, which some view with alarm and others views as moderate and reasonable and balanced and modest, how would they affect your ability or those you work with, their ability in civil rights cases to seek redress for ongoing harms?

Ms. IFILL. Well, the idea of the proportionality requirement is deeply troublesome to us. Imagine a claim in which an individual believes that they have been discriminated against in employment or believes that they have been barred from shopping in a store or racially profiled in some way. That is one individual claim. How do we measure the proportionality of the data that that plaintiff would need to prove whether or not discrimination had occurred or was occurring with that institution?

Even though we may not be talking about a case that involves millions of dollars, the interests that are at stake in civil rights cases in which we are really dealing with the issue of the denial of constitutional rights and rights held under federal statutes by

individuals, how do we measure the importance of those claims against an argument that it would cost the defendant too much to find the information?

And then, second, for us in the litigation, the costs involved in actually litigating the question of proportionality. It seems to me this is opening up a door to yet more expensive and time-consuming motions practice as we argue over what is proportional to the importance of the case.

Chairman COONS. Thank you.

Professor Miller, you suggested that these changes might not actually accomplish the goal of reducing discovery costs, and in fact, very expensive and complex motions practice over these elements of proportionality will simply be the result, that there will be significant harms for those cases that are vital to fulfilling the societal role of private attorneys general enforcing some of our most important and treasured legal advances of the last decades. Do you have anything further to add to this or to the evidence of a cost problem in discovery?

Mr. MILLER. There is no doubt in my mind that establishing proportionality as a front-end consideration in terms of availability of discovery and, in effect, putting the burden on the plaintiff to demonstrate proportionality is sort of like hanging a carrot in front of the horse's nose. The defense bar will simply do what it has done consistently since the early 1980s: make the motion, make the motion, make the motion, which, it turns out, becomes a very high cost in terms of money, resources, and judicial time.

One of the interesting byproducts of what has been mentioned, the 1986 Summary Judgment Trilogy, let us get cases out on summary judgment and save resources from being expended at trial, well, that has simply magnified the sort of Armageddon quality of the summary judgment motion so that both sides are forced to put in enormous time, effort, and resources to make and meet that motion. And there is now some evidence that the cost of the summary judgment motion is about the same as the cost of trial.

So what have we done? We have robbed Peter to pay Paul, and we have denied people what we call "the gold standard of trial," let alone jury trial. I just think we have not really developed the sophisticated empiric data that justifies these changes.

Chairman COONS. Thank you, Professor Miller.

Mr. Pincus, how does this current effort to change the rules to limit discovery expenses differ from the previous five? You had suggested in your testimony judges do not manage—I am paraphrasing—and this, the proportionality rule, will solve the problem. How will these rules prompt judicial intervention, as you suggested, when some complain that the previous five rules changes have failed to elicit that judicial engagement?

Mr. PINCUS. Well, I think that is the hope. I do not think there is any guarantee, but I think what the Rules Committee, what the Advisory Committee has said—and it makes sense to me—is we are taking a standard that already exists in the law, the proportionality standard that has been referred to, and we are giving it somewhat more prominence because we hope that will encourage people to focus on it. So either it will have no effect, in which case none of these bad things are going to happen and it will have been

a failed effort to get judges to manage more aggressively and appropriately; or it will have more effect, in which case I think the effect will be in appropriate cases judges will conclude that the discovery being sought does not make sense.

I think the important thing to recognize about how the standard is applied is—as I said in my opening statement, it does not just talk about the amount at issue. It talks about the issues at stake and the clear messages to look at just the issues that Ms. Ifill mentioned and to make those highly relevant to the inquiry.

So I think we trust judges to make lots of decisions, and there is no reason why if they are focused on the issue—and if they have the time to manage, which is an important question about our judicial system. But the whole thrust of these changes is to bring the judge into the process to make the decisions instead of just having the lawyers go off by themselves, which does not seem to work very well.

And just to respond, if I might, to Professor Miller's concern about motions practice, I guess I would say two things.

First of all, I think many clients today—and, Mr. Chairman, you mentioned this in your testimony—manage what their defense lawyers do. So defense lawyers, at least the ones that I practice with, are not authorized to file every motion unless they want to do it on their own nickel. They have got clients that have budgets and that force them to prioritize what they do.

And the second thing is, again, getting the judge involved, most lawyers recognize that pestering the judge frequently with motions that are going to get denied is a very, very bad strategy for the person who ultimately is going to preside over your case. And so that has quite an inhibiting effect.

Chairman COONS. I look forward to another round with you, but I will defer now to Senator Sessions, who has joined me as Ranking Member.

Senator SESSIONS. Well, thank you. It is an important issue, and I like the way the judicial rule process proceeds. And I believe it is proceeding in the proper way with public hearings beginning, I believe, this week. And so we ought to—I am a little uneasy about having congressional political hearings while this process is going on, because we will have an ultimate role in it.

Mr. Pincus, Congress will have to vote, or not vote, I guess, once these rules are proposed. Is that correct?

Mr. PINCUS. Absolutely. The rules will be sent by the Supreme Court. If there ultimately is a product that goes forward to the Supreme Court, the Supreme Court will deliberate and make its decision and then send the package to Congress, which will then have 6 months to consider it.

Senator SESSIONS. One of the biggest damages to justice in America I think has been bogus lawsuits filed at great cost. Professor Miller, I think motion practice may be costly in some areas, but I do not think there is any doubt that it has short-cut, short-stopped bogus lawsuits or claims. Maybe you have got five claims, and one of them is good. The punitive damages are not good. The sooner that is out of the case, the better settlement prospects are. And we are reaching incredible settlement numbers.

Do you know, Professor Miller, it seems like I have heard that it is 97 percent of civil cases are now settled short of trial?

Mr. MILLER. If I might make a modest change to that, 97 percent of cases—and this figure is not dissimilar at the State level—are terminated before trial. Some of them are settled. Some of them are summary judgmented. Some of them are motion to dismissed. Some are class action denied. And some of them just fall out of fatigue. But there is no doubt that we live in a settlement and not in a trial culture. And your point, Senator, is absolutely right. Some of the motions do skin the cat. They get rid of the garbage. That can be done under the existing motions structure which has been in the rules since 1938. It does not implicate curtailing discovery or some of the other things that have happened in the last 25 years. What it does implicate is what I think everybody has talked about this morning: somehow we must enhance and sophisticate judicial management.

Senator SESSIONS. Well, I think one of the goals that Congress and the courts have talked about is more settlements, and that is occurring. And I hope that they reflect justice and not injustice. I hope they do not weaken justice in the process.

But I think, I do not believe a case should be sent to a jury, as used to happen, with a punitive damages claim for $50 million when there was no basis for it, and then the defendant feeling they had to settle because there was some remote possibility they might get hit for $50 million.

And, Mr. Pincus, maybe you can—I understand you mentioned something about the cost of discovery. But this is a huge factor in forcing defendants to pay judgments at times that they do not really feel like they should pay, but just the cost of defending it is so great that they are not able to justify the litigation. And that is not justice, I guess you would agree, number one. And, number two, can you give us any more thought about how the cost can rise in a discovery proceeding?

Mr. PINCUS. Certainly, Senator. Well, I think the reality is—I say this in my testimony. You know, you have a client who is sued, and they want to know what is going to happen. And they feel unjustly accused. They feel the allegations in the complaint are false. The allegations may well be sufficient to withstand a motion to dismiss, and so you have to then say to them you will be—the time you get to say those things are false is in a motion for summary judgment, and that is not going to happen until after there is some discovery. So you are looking at discovery, and the unfortunate fact is that in many, many cases, as I discuss in my testimony, the discovery costs, in the world of electronic discovery that we are now in, can easily exceed $1 million just for the electronic discovery, not counting the legal fees and other costs associated with the rest of the litigation. So if a client is looking at that potential expenditure, recognizing that he does not have a good motion to dismiss, or maybe he has filed one and it has been denied, what is the rational course? The rational course is to say, gee, if I can settle this case for not much more than what it is going to cost me to get to that summary judgment phase, that is a rational economic decision and I should do that.

Senator SESSIONS. But it is not necessarily justice if you do not owe the claim, number one. It is not justice if you do not owe the claim.

Number two, there has been some suggestion that this is not a problem, this cost. Apparently the courts—the Committee has made some recommendations, I think modest, frankly, and they perceive there is some problem here. Can you give an opinion, Mr. Pincus, as to what the prevailing view out there is among lawyers and judges as to whether or not we need to do something about the discovery practice as it now exists?

Mr. PINCUS. Well, my view is the best groups to look to for that kind of view are groups of smart lawyers that are balanced, that are not just the defense bar, they are not just the plaintiffs' bar. And so I look at two groups, and I mention them in my testimony: the American College of Trial Lawyers and the Sedona Conference on Discovery, which is a group of lawyers, both sides, that have come together to try and address discovery issues. And both of those groups have said in no uncertain terms that electronic discovery is a mess and we need some changes to deal with it.

So I think that is a pretty good indication of what the people who are giving a lot of thought to this problem and who are out there in the trenches think about it. And, again, I think it is important to say that the solution that has been proposed here is not some draconian change introducing some concept that was never in the rules. It is basically taking this existing proportionality concept and saying let us give it more focus in a way that will force judges to grapple with it in hopefully more cases.

Senator SESSIONS. Well, thank you, Mr. Chairman. I do not know if this is the appropriate time to have a congressional hearing on the matter, but so be it. It is all right. And I think this is a good panel to begin discussing it. Just having had some experience in how the process works, they do this very carefully. They have a judicial panel, and they take testimony. Then they have public hearings. And I think there is a concern—I heard it pretty regularly among friends in the profession—that discovery is being abused too often in our system. And I do not believe we need dramatic, draconian changes in discovery. I do not think this proposal would do that. But I do think there is a problem, and it needs to be addressed, and I believe the process now going forward through the Judicial Conference will help us improve it without weakening the right of a plaintiff or any other party to find out necessary facts for the litigation.

Thank you.

Chairman COONS. Thank you, Senator Sessions.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

With my time, I would like to make two points. The first is that I think some of the questioning and testimony has been very one-sided in the sense that the inference has been drawn or the implication made that when there are flaws in a judge's deliberate and effective prosecution of his courtroom and case management responsibilities, the burden always falls on the poor defendant; and that to the extent that there are discovery problems, it is abuse by plaintiffs against the defense bar. And maybe Rhode Island is dif-

ferent than other places, but that runs very contrary to my experience.

My experience has been that plaintiffs want to get to court as fast as they possibly can. They want to get that case into court. They all think that they are brilliant in front of a jury or in front of a judge, and they want the moment when they are arguing for their plaintiff in the courtroom.

On the other side, my experience of the defense bar has been that their number one goal is to delay the trial, to postpone it for as long as possible—the larger the defendant, the bigger the blizzard of motion practice and stall filings and efforts basically to burn up the plaintiff's money and starve out the case before it ever gets to trial. And at that point you end up with a plaintiff who has to go to their client and say, "I cannot do this any longer. I am all done. I am out of the budget that I have for the case. We are going to have to settle for a pittance. I cannot go through."

Discovery is very often extended by defendants in order to keep the blizzard rolling and hurt the plaintiff and prevent them from getting their day in court. And the sort of blizzard technique and the starve-the-plaintiff technique I think are so well known that it is surprising to me that neither Mr. Pincus nor any of our questioners have mentioned that there are actually two sides to this equation.

I was in a case, as both a lawyer and—I was a counsel and because I was Attorney General I was also the client—where a very concerted defense opposition with essentially unlimited money, I want to say that they listed 100 trial witnesses, forcing us to go to I cannot remember how many States around the country and interview all of the witnesses so we were not caught cold when they were brought to trial. And then when the great day came at trial, how many of the hundred witnesses were actually called? Zero. Zero. The entire exercise was one in trying to burn up the plaintiff's side of the aisle in order to prevent this from happening.

Now, frankly, we were able to withstand that, but that is a technique that is out there. And I think it is important that this hearing reflect that it is at least as bad on the other side, and maybe even worse.

The second thing that I think the record of the hearing should reflect is that the jury in our country is not just a place where you go to get a judgment. It is in our Constitution. It is in our Constitution and Bill of Rights three times. The Founding Fathers put it there for a reason. If you go back and look at the record of the American Revolution and the grievances leading up to it, the jury trial is front and center with our Founding Fathers. Front and center. And if you go back to Blackstone, he sees and writes about its institutional value, its value in our community, its value in our system of government, or in a system of government, because he was preceding our system of government. De Tocqueville writes about it. He writes about it, if I remember correctly, in the chapter that says on limiting the excessive powers of government, or on, you know, sticking up for the rights of the people, and he calls it one of the forms of the sovereignty of the people.

And I think it has that role. I think it is very important. I think we can all see a situation in which, you know, something has been

done wrong to you, and you try to go—let us use the State as an example so I am not personalizing this in any way. You go to your State General Assembly, and the other side, they have got lobbyists everywhere. You cannot touch them. They have got that place locked down. The Governor is their pal. You have got no shot. The newspaper is on their side, so you cannot even get an honest story in the paper. You are just getting slaughtered by all of the existing forces of power. When you are in that circumstance, the Founding Fathers had an idea about what your last stand could be, where your last stand could be, and that was in a courtroom, where even the most powerful and wealthy citizens stood equal before the law.

Now, big and powerful and wealthy American corporations do not want to stand equal before the law with menials like regular Americans. They like the legislature where all their money and all their lobbyists and all their power and all their campaign contributions and the super PACs can all help grease their skids. And ditto the executive branch. They can throw an absolute armada of warfare against a regulatory body.

Stand them before a jury where they are equal with the person that they have injured, where if they try to mess around with the jury, that is called "tampering." It is a crime. They try to tamper with us all the time. It is their daily occupation. And I think that is a context that is very important for the civil jury. It is not just a place where two people go and have a dispute resolved. It is a part of the American system of government. It is a part of the sovereignty of the people, and it is a check and balance on the more formal part of government, and a check and balance on the more powerful and wealthy citizens.

I am sorry I have gone over my time, but—well, not quite. I have used all my time, let me put it that way. But I think it is important. And when Professor Miller says we are at 97 percent of cases that get filed that never get to a jury, I think that is a sad fact. I do not think that is a good fact. I do not think we should push 97 to 98 to 99. I do not think it is a perfect world when we do not have jury trials any longer and everything gets fixed in the paper blizzard back and forth.

I think that having every American have the ability to stand before a jury and be treated equally to whoever is on the other side of them and have 12 Americans, or 6, or however many it is, depending on the local rules, to sit in that jury box as deciders, as a part of government, as people who are completely independent, who cannot be lobbied, who are not professional, they are just there to do a citizenship duty, I think that is a thing of real value. And it gets overlooked all the time as we talk about the efficiency of the courts.

And our Founding Fathers would be horrified to see this. They fought, bled, and died from Valley Forge on, and they thought about the jury as one of the things that they protected. The founders of all our States put the jury into their Constitution, and they fought hard for that, and they meant it. And now here we are, 97 percent, 98 percent, all gone. I do not think that is a good path, and I do not think the Founding Fathers would approve.

Chairman COONS. Thank you, Senator Whitehouse.

Senator Franken.

Senator FRANKEN. I apologize for not being here for your testimony. I was down in the HELP hearing. I want to thank you, Chairman Coons, for holding this hearing. I know that civil procedure reform is extremely important. We can enact laws to protect workers and consumers and to establish civil rights, but those laws have limited effect if the procedures necessary to enforce them are eroded. And that is exactly what we have seen in recent years. We have seen changes that make it harder and harder for ordinary folks to enforce their rights, to get into court. *Iqbal* and *Twombley* made it harder to get into court in the first place. *Concepcion* and *Italian Colors* elevated arbitration agreements over access to courts, and *Dukes* and *Symczyk* made it a lot harder for workers to band together as a class. So that is the broader context within which I am looking at the proposed rules. And my sense is that they could be just one more obstacle that blocks access to justice.

Professor Miller, in your written testimony, you noted that, "The ability of a citizen to get a meaningful day in federal court is now in question." How do the proposed rules changes that we are considering today fit within that larger context of eroding access to justice? In particular, what is at stake here for workers and consumers?

Mr. MILLER. Well, Senator, to me, these proposals represent what I have been calling "stop signs." They are sort of time-outs. Let us fiddle around, let us make a motion, let us have a fist fight about proportionality—which, by the way, came into the federal rules in 1983. I am the unindicted co-conspirator. I was the reporter at the time. But the notion of the proportionality in the 1983 amendment is a far cry from the notion of proportionality that is now being proposed, which puts it on an equal plane with relevancy, making it harder to get at discovery, more resource consumptive in getting to discovery, more of a deterrent to initiate claims when you feel you have merit and want your day in court.

Senator Whitehouse said something very interesting. He perceived—and I happen to agree with him—that this business of cost is the 800-pound gorilla in the discussion. But the question of cost for a corporation is very different from the question of cost for a worker or someone who believes his or her civil rights have been violated.

Defense lawyers bill by the hour, and even with client control, they have an incentive to mount the hours, increase the blizzard of paper, delay the litigation, and let the plaintiff fall, as I have said, from fatigue. Many plaintiffs' lawyers in the public interest environment are not working on the clock. They at most are on a contingent fee arrangement, or they hope for a court-awarded fee if the rainbow ever produces a pot of gold. They have no incentive to delay, to attrit, to make motions.

So this question—I think Senator Sessions argued this in a sense—that defenses are sort of compelled to settle lest they run the risk of trial, which may produce truth, which may not be to their liking. I think that the littering of the pretrial process with stop signs and motion practices and detours creates a situation in which the compulsion is on the plaintiff to settle because he/she lacks resources, lacks the energy, and cannot afford the risks. So what we are ending up with perhaps is compelled settlements that

are too low, not too high. They are too low, given the possible merit in the case. That means undercompensation. That also means underenforcement of statutes that this Congress has passed and presumably meant to have enforced, like the discrimination, pension, consumer, environment, safety statutes that have characterized federal substantive law since the 1950s. I view that as a major social problem.

Senator FRANKEN. Thank you.

President Ifill, first I want to thank you and the NAACP for your leadership in securing and enforcing the Nation's civil rights laws.

In the National Journal's recent profile of you, you are quoted as saying that you were focused on debt collection abuse and foreclosures and other "practices that are blocking people from being able to move into the middle class."

How would the proposed rules changes affect the NAACP's ability to stop those kinds of anti-consumer policies?

Ms. IFILL. Thank you very much. There is a reason why those of us who represent plaintiffs in civil rights cases are called "private attorneys general," and that is because the cases that we litigate are cases in which we represent individuals, but the issues that we raise on behalf of those individuals are in the public interest. And so these are cases that seek not just to vindicate the right of the individual, but because of the nature of the rights and the claims that we raise, it is in the interest of the public to know about the case, to have a resolution for the case, to be involved in the case.

The reality is that no one, no defendant, certainly no defendant I have ever brought suit against who has been charged with discrimination has received a complaint and said, "I give in. Uncle"; or who has, even as we began the process of discovery, said, "You know what? This is going to cost me too much. Never mind."

No one wants to admit that they have engaged in discriminatory conduct. The onus is on us to prove it. We represent clients at no cost to the client. And so as has already been alluded to, we actually have no interest in slowing down the proceedings. We have no interest in the war of attrition. Our interest is in moving the claim forward as quickly and as expeditiously and efficiently and in the most cost-effective way possible. And that is the interest of all of us who play in this field.

And the question, I think, before you and the question that goes, I think, to what you have raised, Senator Franken, is when we look at this what has been called "modest proposal" to change discovery rules, where should our attention be focused? Should it be focused on the small slice of cases in which there may be judicial management problems that err on the side of one party or another? Or should we be looking at that class of cases for which the Rules of Procedure are elevated in importance? Those cases in which the claimants, whether they are civil rights plaintiffs, whether they are workers, whether they are those who do not have the resources to litigate long and hard, for those people, the only thing that equalizes them in the process are the Rules of Procedure. That is what makes them equal to the other side.

And so the ability to obtain the information, not to have to now litigate another motion about proportionality, but to obtain the information in order to prove their claim, a claim that at least from

our perspective most often will be fought, lies in the discovery process and lies in our ability to move the claim forward so that we can obtain the information that will support our claim, particularly given the reality that summary judgment is bearing down on us. We all know what we have to do in that process of discovery.

And as I testified earlier, our experience is that judges are actually quite active in managing that process, in managing the process of discovery, in making sure that things move quickly, in making sure that costs are contained.

And my concern is: Are we going to throw out the baby with the bath water? Are we going to, because of a small slice of cases—you will remember the *Twombley* decision was originally supposed to just be about antitrust cases, and then *Iqbal* came and it was about everything.

So are we going to take a small slice of cases and the problems that may arise in those cases, and are we going to impose a solution that will have the effect of essentially cutting off claims? Because I really want to be clear, in the civil rights context, if we do not have free access to the information in discovery, it is the end of the claim. The defendants hold the information. They have the information. If you are raising a claim of intentional discrimination, which often you have to prove through circumstantial evidence that is within the power of the defendant, and you do not have access to that information, your claim cannot go forward.

So for civil rights claimants, this is not modest. It is a potential death knell for a whole variety of claims.

Senator FRANKEN. Thank you.

Mr. Chairman, I have to go back to the HELP Committee. I got a message from staff that you would indulge me another question, but I am way over, so—well, I have got a question that is brief, but might warrant a long answer. Do you want to risk it?

[Laughter.]

Senator FRANKEN. Senator Sessions says no, and I do not want to push this. Okay. Well, Professor Miller, what is your theory of justice—no.

[Laughter.]

Senator FRANKEN. Okay. Professor Miller, the Federal Arbitration Act and reform of it has been one of my top priorities, and I think that the need for it has become clearer since the *Italian Colors* decision last term. In a footnote in your written testimony, you wrote, "There has been an extraordinary expansion of the Federal Arbitration Act, far beyond its original scope, by the Supreme Court."

Can you elaborate on that? In your view, what was the FAA's original scope and purpose? And how has that changed given cases like *Italian Colors* and *Concepcion* and others?

Mr. MILLER. The 1925 Federal Arbitration Act was designed to deal with inter-corporate disputes, two sophisticated combatants going to arbitration rather than to the great courthouse in the sky.

As you well know, the string of Supreme Court decisions which end with *Concepcion* and *Italian Colors* has simply taken that and expanded it to embrace every conceivable contractual situation, even though we know that when you or I rent a cell phone or do much of anything in society, we are now subjected to adhesive arbi-

tration provisions. And now the court says you cannot deal with this in the aggregate, knowing that the individual claim on a consumer fraud or a product defect or an employment situation is economically unviable.

So, in effect, what we have had is to cushion shop. First we move dispute resolution out of the courts to arbitration. Then we say you can only arbitrate one by one, good-bye. Good-bye.

Now, Senator Sessions earlier did make the point that yours is a political body. I suggest that there is a role for this political body in thinking about revising the 1925 statute. So it says there are apples and there are oranges; there are commercial contracts between sophisticated parties, and there are adhesive contracts. And the two should not be subjected to the same rules with regard to taking the right of the day in court, the right of the trial, the right of the jury trial away from citizens.

In addition, by the way, Senator, I think it is time for Congress to consider removing the word "general" from the Rules Enabling Act, because that word prevents the establishment of special rules for this thin band of complex cases that should be treated differently because of their resource consumptiveness and that are completely contorting our discussion about the 95 to 98 percent of the cases involving civil rights, consumers, et cetera, et cetera.

It was a good idea in 1938, but transsubstantivity, which I think is a word created at the Yale Law School, may have gotten long in the tooth and one size does not fit all anymore. That to me is another area that Congress should consider.

Senator FRANKEN. Thank you, and sorry it took so long, but "transsubstantivity"——

Mr. MILLER. It is a Minnesota word.

Senator FRANKEN [continuing]. Took a long part of that. That was a long part of that. Thank you.

[Laughter.]

Chairman COONS. Thank you, Senator Franken.

As I said in my opening statement, there are essentially four questions before us in this hearing today, and I will close with a few questions around this basic theme.

First, what are these reforms designed to accomplish? What are the problems or abuses alleged? And, second, how effectively would they actually accomplish those changes? But, third, are there collateral costs to our system of justice? And if there are these collateral costs, how do we strike a fair and appropriate balance?

If I might, Ms. Ifill, if restrictive procedural changes reduce your ability to challenge civil rights violations, are there other viable alternatives open to Americans seeking to advance or protect their civil rights or any of the other range of statutes? Are there other viable options if these changes preclude access to the courthouse? And if the costs of discovery, which are not allocated entirely on the producing party, are a significant burden, can you just speak something, as you have before, to the resource limitations that are natural drivers that reduce an excessive discovery initiative by those seeking redress of fundamental claims like civil rights?

Ms. IFILL. Well, we simply do not have the kind of resources to engage in delay of any litigation that we are involved in. We do not take cases unless we believe we possess the resources to litigate

them adequately. But as I said, our interests are always in keeping costs down and moving the litigation forward. Therefore, there are certain kinds of discovery that are particularly important to us. Discovery like interrogatories and requests for admission, which are the cheapest form of discovery—they are not the most surgically efficient as depositions are, but they do provide us with information at very low cost to us and, frankly, at very low cost to the defendant as well, to give us information that allows us to continue, you know, some of the digging ourselves. We obviously use a lot of public records and other kinds of materials that can support our claims and that do not cost either side any money.

So anything that would limit our ability to use the cheapest forms of discovery would be deeply problematic for civil rights plaintiffs and for those who lack abundant resources in the litigation of claims.

You know, what we have talked about today and what I think we all agree on is that there are issues that involve judges and their management of cases and their management of discovery. And the question is: Where is the place, the appropriate venue, the appropriate forum to begin to address that issue? I think, Senator Coons, at the very beginning, you talked about training issues and other means of ensuring that judges are able to appropriately manage cases. I will tell you that over the course of my career as a civil rights lawyer, when I first began litigating cases, as I recall, in those days discovery even was filed, and so people had the opportunity to see, you know, deposition transcripts and so forth, and that went by the wayside. But, you know, there are many things that have emerged that at least in my view have made things better. The assignment of magistrate judges and sometimes, Senator Sessions, settlement magistrates to complex cases in certain jurisdictions to begin to move that process along at a very early stage, to get the parties talking with one another, to figure out what are the essential pieces of information we need to bring the case to a posture where we can even talk credibly in an equal way about what a settlement might look like, those are some of the changes that have already happened and that I think actually are working.

So I think the place—if our concern is about judges and their management of trials, I do not think this is the way to encourage judges to do that, that judges need the training to be able to do it, I think your point at the very outset about judges being overworked, particularly as we have an increase in federal crimes and you have the speedy trial requirement, civil cases are crunched in that. And we do need to have our bench filled with judges where they are necessary in order to manage the workload so that they can appropriately manage cases.

So I think those are all the ways in which we can move that process forward if that is the problem. And we should meet the problem where it exists, not invade the federal rules in ways that are going to deeply and, quite frankly, negatively affect civil rights plaintiffs.

Chairman COONS. Thank you, Ms. Ifill.

If I might, I am going to suspend for a moment. Senator Sessions wanted to make a brief statement before he departs.

Senator SESSIONS. Well, thank you, Mr. Chairman. You always conduct fair and good hearings, and you are so thoughtful on all the issues that come before us.

I think proportionality, as in this rule, does seem to bring the judge in. Some judges are good, some magistrates, you know, bring cases to expeditious, fair solutions early that are just. But people can hold out. They can refuse to settle. So we want to ask ourselves: Is this a dramatic change in the rules? And if so, what is the impact of it? Ultimately we will be called on to be counted on it.

Ms. Ifill, you have submitted testimony to the Committee, which I salute you for, and others have that opportunity, and they will evaluate all of those comments, I know, as they go forward. And the pendulum is always—I think we always should analyze it. People have a right to file a lawsuit against the biggest corporation in America, as Senator Whitehouse said, and hold them to account. But other systems have the "loser pay." I think Senator Graham and some others favor "loser pay" legislation here. That would be a dramatic change in the ability we have that when you win—if you sue and you lose against a corporation, you cost them $10 million, you do not have to pay anything unless it is abusive, deliberately abusive.

So I do not know. I think we have a good legal system. I am proud of it. I believe the court system is correctly analyzing discovery. I hear a lot of complaints about it. I hope they have wisdom in the course of it, and I look forward to further discussions.

Thank you again. I have a budget issue with the Defense Department, and I have to get to that.

Chairman COONS. Thank you, Senator Sessions, and I, too, have a meeting of the Appropriations Committee, which has already begun. But I just have a few more questions I really want to get through, so with the forbearance of our witnesses, if I might, Ms. Ifill, thank you for summarizing. There are other ways other than these rule changes to manage the significant costs of discovery on a small band of cases. And if I hear you right, the potential impact on a wide range of plaintiffs who are seeking redress and where access to a key piece of information is for legitimate reasons going to be difficult and unlikely and inobvious, these rules may have a significant burden, and they do not have other good alternative ways to seek justice.

If I might, Mr. Pincus, if the federal courts are overburdened—and I certainly agree that many of them are. Our previous hearing was about the significant number of judicial vacancies and the Judicial Conference report on the need for even more judgeships given the steady increase in caseload. To what do you attribute the overload? And would you just briefly reflect on whether you would support raising the amount of controversy for diversity as a way of easing the burden on the federal courts? Because a significant amount of cases, I believe it is 75,000 today, so a significant number of cases end up in federal courts that could just as easily be resolved in State court.

Mr. PINCUS. Well, just to take your last question first, Mr. Chairman, I think the problem is that State courts are even worse, frankly. I mean, whatever the burdens are of the federal courts, es-

pecially in the most recent round of budget crises that have sort of ricocheted across the country, the closings of courts, especially trials courts, have been quite dramatic in States like California—but all across the country. So I think the problem is you are just putting the monkey on someone else's back if you do that, and the litigants who have at least an opportunity to get into court will really be thrown into a very, very large pot. So I would be very worried about that solution.

You know, I think that the courts are very crowded right now. Obviously criminal cases take priority, and I think—and I am sure you hear this from your constituents. The problem is, because of the Speedy Trial Act, civil cases have to move to the back when there are criminal case demands, and criminal dockets are large. And so that dynamic really creates a problem in the processing of civil litigation, and I think more judgeships would certainly help with that and I think would help judges to have the time for either them or magistrates to get engaged in the process.

I wonder if I might make just one observation about the two parts of the proposal that we have been talking about, just talking first about the presumptive limits. I think the Advisory Committee's goal in the presumptive limit numbers was really to focus in on the cases that we are talking about, the relatively small number of cases that consume the largest resources. And, in fact, the numbers, for example, of depositions were based on a study of sort of what is the median, what is the routine of depositions in cases. And I think they would be very interested in comments that say the presumptive limits that are proposed for interrogatories and requests for admissions are going to affect a wide range of cases because I do not believe that is the intent. But I think the intent is to really focus in on the cases—to have the wide range of cases be within the presumption, and the cases that we are worried about that really consume a lot of resources, so the ones where you want to get the judge involved, and that is where there is an effort to move past the presumption.

And I think just one anecdote is the initial thought on deposition limits was 4 hours because there had been some very good experience on that in the State courts, and there was commentary before the Advisory Committee that that really was not going to be enough for this sort of median federal case, and so they went up to 6 hours. So I really think that is the goal of that part of the process.

Chairman COONS. Thank you, Mr. Pincus.

Professor Miller, as the person not just before us today but probably more broadly with the longest and deepest experience with this process by which the Judicial Conference reviews rules, as the person who was involved—I think you described yourself as an "unindicted co-conspirator" in the 1983 addition of proportionality—should we have any concern that the courts will, subsequent to an enactment or an adoption of some revision to the rules, that they will interpret them going forward even more restrictively than they appear on their face? Several Senators have referenced the whole series of decisions over the years since 1983 that have suggested more and more hostility to class actions, to plaintiffs, to, as you put it, a variety of stop signs being erected on the pathway to-

ward the courthouse. Should we have concern that these modest proposals will subsequently become immodest, be interpreted and applied in ways that are even more restrictive in the future?

Mr. MILLER. Yes. It is the law of unintended consequences, and we have seen it over the years. A modest revision to Rule 11 in 1983 produced a cottage industry of sanction motions. You just cannot predict.

What I think you have to worry about in the context we find ourselves in this morning is I am not the only one who has seen the stop signs. You have seen the stop signs. And if you are a United States district judge, you can read tea leaves. You can see the sequential movement of disposition earlier and earlier in the case. And I think what we run the risk of is analogous to what I think is happening in the summary judgment and motion to dismiss context, namely, everybody is making the motions, and judges I think are moving closer and closer to pretrial merit determinations based on fact finding or factual conclusions, which is exactly what you are not supposed to do on either a motion to dismiss or a summary judgment motion.

I think there is a mode or a force toward disposition that is trenching upon the right to trial and the right to jury trial, because judges are reaching conclusions earlier and earlier and earlier based on less and less and less information. And the fear I would have is that judges will read this, "I do not believe it is a modest proposal." I believe when you bring proportionality up to a plane of equality with relevance, you will find more and more judges making what are really fact-dependent decisions at the threshold of the case as to what is proportional and what is not proportional. I do not understand how a judge, just after the pretrial motion to dismiss, can decide what is proportional, what the needs of the case are. So that is the risk I see that these signals will be read as more than they are intended to be.

Chairman COONS. I share those concerns, and before I welcome Senator Blumenthal, I just want to ask unanimous consent to include statements from Chairman Leahy, from the Alliance for Justice, and from Professor Paul Carrington of the Duke Law School.

[The information referred to appears as a submission for the record.]

Chairman COONS. If I might, Mr. Pincus said the cases we are talking about, the cases I have been trying to have us talk about here today, are not the small number of cases in which discovery costs are, arguably, massive but those cases where there is a demonstrable problem, and then the much wider, much broader range of cases where changes to the rules may end up denying any access to justice. Balancing those two, finding a path that is appropriate, and ensuring that we do not deny access to justice for those who are aggrieved and who are vital and whose interests are central, and weighing that appropriately really was my focus of concern for today.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman, and thank you for having this hearing. Thank you all for being here on a very, very important subject and one that really should have the attention of many more of our members than perhaps is evident today,

and I hope it will. And I have been following a lot of the testimony and have read your written testimony.

Let me ask you, Mr. Pincus, when I read your testimony, what I expected to see was evidence that the costs of discovery are generally astronomical. What I found was evidence that some extremely large businesses, which presumably have a lot of resources, have high costs for electronic discovery. So if the problem is electronic discovery, why not go back to the drawing board and develop reforms targeted just at electronic discovery? For example, I see no reason to limit requests for admissions in response to a problem with the cost of electronic discovery, and the same goes for other proposals.

Mr. PINCUS. Senator, I think there are two issues. I think one is electronic discovery, and I think that is a principal reason for the moving of the proportionality standard to a place of more prominence, because I think that is the place where that determination could be made, because as you say, that is the place where the very large costs, this $1.8 million median cost, can arise, and where there is an opportunity to have some focus.

With respect to the presumptive limits on depositions, interrogatories, and requests for admission, I think what the Advisory Committee's thinking was there—and, frankly, the record on which they based their decision—was an effort to establish presumptive limits that would not apply, that would not be reached in the wide range of cases, the cases that Chairman Coons was talking about that do not present a huge discovery morass, and to try to use those presumptive limits to distinguish the cases, the wide range of cases from these fewer cases that need more judicial attention and the request to exceed the presumptive limits would be the device that would get the judge involved in making that decision. And, in fact, on the deposition limit, for example, they based their proposal for five depositions on some research that the Federal Judicial Center did on the sort of median deposition level and their evidence, at least that they had, was that will not affect the large number of cases.

Now, the comment process obviously might turn out to be the fact that the information they had before them was wrong, in which case my guess is they are going to look at the limits, because as I mentioned earlier, I think before you came in, their initial thought on the time limit for deposition was 4 hours. There had been some experience in the Arizona State courts, and several other State courts have that presumptive limit, and the experience was that in the federal courts in Arizona, parties routinely agree to that because it worked well for them. They had some commentary from the public saying, Gee, for the sort of median federal case, that seems like it is going to be a little short, and so they went to 6 hours on the theory that that is really a full day.

So I think what the Committee is looking for in this comment process that is underway is: Have we gotten those presumptive limits right? Have we done something that will leave the bulk of cases untouched but bring the judge in on the cases that the judge should be brought in on? And I think that is what the comment process is going to find out.

Senator BLUMENTHAL. And let me ask you and perhaps the other folks as well, you know, we have all these rules, we have a lot of smart people looking at the rules. Do we have any objective data, anything comprehensive about how much discretion judges use in enforcing those rules, how much they adhere to the rules, how much they make exceptions to the rules, and to what degree the rules are actually effective and fair in the way that they operate?

Mr. PINCUS. I do not think we have empirical experience. Unfortunately—and Professor Miller is much wiser on this subject than I am—the entire justice system would benefit greatly from a lot more empirical data because a lot of things are talked about without really empirical data to make a reasonable decision. I think this latest study on electronic discovery course finally gives us some empirical data, but I think we could use a lot more.

So I think the short answer is we do not know. We have anecdotal information from lawyers. Two groups that I think have been very focused on this—the American College of Trial Lawyers and the Sedona Conference on Discovery—both of which are made up of plaintiff side lawyers and defense side lawyers who are frequently in trial situations, and both of those groups have said we have a big problem here in terms of judges using the discretion that they have in an effective way.

Senator BLUMENTHAL. Would you agree, Professor Miller?

Mr. MILLER. Mr. Pincus and I are old friends, so this is almost a love feast between us. I agree with him. We have no empiric data. None. The surveys that are run are generally impressionistic or anecdotal. Fortunately, I think the system, through the Federal Judicial Center and Sedona, is starting to get very sophisticated about this.

My experience with district judges ranges from judges who think that the rules are suggestive and read it like the Constitution, and other judges who think it is Holy Scripture and read it like the Tax Code. And the world of judging is between those two goal posts on electronic discovery. It is so frightening to everyone, but I think that fear is clouding our thinking about it. There is every reason to believe—and some district judges have already sort of drunk the Kool-Aid—that there are technological solutions to electronic discovery—not real solutions but ways to use artificial intelligence, highly sophisticated programming and analytics really to bring the cost of electronic discovery way down from what our sort of first-generation experience with it is.

I was blessed when I became the reporter with the advice of my Chair, Judge Walter Mansfield of the Second Circuit, and my sainted senior co-author, Charles Alan Wright, both of whom—and this was our view: Do not tinker. Do not tinker. This reduction of interrogatories and discovery strikes me as sheer tinkering. And do not make proposals until you have a demonstrated need for one, and make sure it is the least draconian of all the possibilities.

Ms. IFILL. Just very briefly, Senator Blumenthal.

Senator BLUMENTHAL. Yes, thank you.

Ms. IFILL. I think your question actually is a really important one, because I think it draws our attention to what we are doing, what is at stake here. Without empirical data demonstrating that there is a widespread problem that must be addressed through the

rules, we stand at the precipice of changing the rules in a way that we know will have a particular effect on those for whom the rules are the most important. Those who lack the resources, who lack the power, who cannot play the war of attrition, the rules are their equalizer. And so every time we tinker with the rules, we are essentially affecting those claimants. And if we are to do it, we should be doing it on the basis of a demonstrated problem and on the basis of a solution that we have figured out will actually address the problem.

And instead, frankly, to my view as a civil rights lawyer leading an organization of civil rights lawyers who litigate in courts all over this country, you know, we basically get to be the staging ground. We get to be kind of thrown under the bus. We are basically thrown under the bus in favor of very dramatic stories about the $1 million in discovery costs from one piece of litigation or another. And those anecdotes are driving a view about litigation—earlier this conversation about what it means to go to trial, about what it means to face a jury, our clients want their day in court. They do not enjoy bringing these claims. For every claim we bring, there are thousands that will never be brought. People have learned to take discrimination on the chin. That is what they are taught. When they decide to file a claim, it is because they believe they must do it. And we are essentially taking the claims of those individuals who, frankly, have the courage to engage the system, and we are making it harder and harder for them to use the means that we all want them to use, right? We all want them to use the legal means to vindicate their claims. We want them to play in the system. And yet we are increasingly changing and transforming the system to make it a hostile territory for them to have their claims heard and vindicated. And I think it is important just by that question that you asked that we pause and that we recognize what we are preparing to do and to whom we are preparing to do it.

Senator BLUMENTHAL. Thank you. I really appreciate those comments from all of you. The lack of empirical data really concerns me because any of us who have practiced law have war stories and anecdotes and, you know, they can be used so misleadingly for changes or to resist change. So I thank you all for those comments.

Thank you, Mr. Chairman.

Chairman COONS. Thank you, Senator.

I would like to thank the witnesses on behalf of the Subcommittee on Bankruptcy and the Courts for your testimony today. As the Judicial Conference moves forward with their proposed rules changes, I hope they will consider the lessons of this hearing and ask themselves: What problems are we really trying to solve? What empirical evidence is there that these changes will actually solve those problems? And at the same time, what are the collateral costs or potential harms? And are there ways to achieve their stated goals while reducing or eliminating those harms?

Professor Miller, you said in passing that some judges apply the Tax Code as Holy Scripture. If it is the Tax Code and not the Constitution that is applied as Holy Scripture, we are in bigger trouble than I thought.

I am concerned that because the Rules Enabling Act gives Congress the opportunity to review proposed rules even after the Con-

ference acts, some say that we still have a central role here, but most often the legislative calendar means the decision of the Conference may well be the final word. So I believe it is critical the Conference be certain to consider the interests of all Americans, and especially those who critically depend on the courts being open to them to resolve disputes on a level playing field, especially those disputes that are at core enforcing constitutional protections and not a place where needless barriers or stop signs are erected that add expense while obscuring truth.

The record of this hearing will remain open for members who wish to submit additional testimony, and this hearing is, therefore, adjourned.

[Whereupon, at 11:55 a.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary
Subcommittee on Bankruptcy and the Courts

On

"Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"

Tuesday, November 5, 2013
Dirksen Senate Office Building, Room 226
10:00 a.m.

Arthur R. Miller
Professor
New York University School of Law
New York, NY

Andrew Pincus
Partner
Mayer Brown
Washington, DC

Sherrilyn Ifill
President and Director-Counsel
NAACP Legal Defense and Educational Fund, Inc.
New York, NY

PREPARED STATEMENT OF HON. CHRISTOPHER A. COONS

U.S. SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE *on* BANKRUPTCY *and* THE COURTS

FOR IMMEDIATE RELEASE: November 5, 2013
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Opening Statement of Senator Coons

Senate Judiciary Subcommittee on Bankruptcy and the Courts hearing:
"Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"

- As Prepared for Delivery on November 5, 2013 -

The purpose of this hearing today is to examine a suite of changes to the Federal Rules of Civil Procedure proposed by the Judicial Conference's Advisory Committee on Civil Rules. Under current rules, all relevant material is discoverable, but a party may seek court relief from an otherwise valid discovery request if the request is out of proportion to the needs of the case. The proposed changes would invert this standard, allowing responding parties themselves to decide what is proportional and what is not.

The changes are also designed to increase the frequency with which courts assign the costs of discovery to the requesting, rather than the producing, party.

The changes would also place stricter presumptive limits on depositions – from 10 to 5 and lasting no more than 6 hours, as compared to 7 under current rules; interrogatories – from 25 to 15; and requests for admission, currently not limited, would be limited to 25.

Although in service of an important goal—reducing unnecessary discovery costs—these proposed changes have sparked no small amount of controversy in the civil rights, consumer rights, antitrust and employment rights communities. These advocates worry that limitations on civil discovery will unduly hamper the ability of those who have been subject to discrimination and other violations to obtain the evidence that they need to prove their cases in court.

Under the Rules Enabling Act, it is the role of the judiciary to propose, and for Congress to review, changes to the rules that govern litigation in our courts.

Despite the mechanism for rules changes under the Rules Enabling Act, however, over the past 30 years courts have eschewed the role of Congress and used decisional law time and again to reinterpret the Federal Rules. In nearly every case, the reinterpretation has narrowed the path for a citizen to have his case decided by a jury according to the facts and the law. Most recently, a suite of decisions has sharply

limited the availability of the class action, raised pleading standards, and foreclosed federal and state courts entirely for those who are unlucky enough to find their dispute subject to an arbitration clause.

Today, however, I am glad to report that the Judicial Conference is proposing that the rules be changed through the mechanisms set out in the Rules Enabling Act, which gives the public and Congress a valuable opportunity to be heard before any changes take effect.

In conducting my review of the proposals I am guided, as I hope is the Judicial Conference, by four critical considerations:

First, what specifically, are the reforms meant to accomplish? What problems or abuses are they hoping to remedy?

Second, how effectively would the reforms succeed in addressing the abuses?

Third, are there collateral costs to our system of justice?

And finally, if there are collateral costs, we must weigh the costs and benefits in light of the public's interest in a fair, efficient, and effective court system.

As to the first question, what are these changes meant to accomplish, let me start with what I think is an unobjectionable statement: Civil litigation in America can be very expensive. As a former in-house counsel for a materials-based manufacturing company, I knew the challenges that corporate defendants face in controlling the cost of lawsuits, where even a meritless complaint could put settlement pressure on my client.

But, to the second question--are these rules likely to significantly reduce discovery costs that are unnecessary to resolve the case? Studies cited by the Judicial Conference note that discovery costs are not a problem in the majority of cases, and that discovery is a problem in a, quote "worrisome" number of cases. In those cases where discovery costs are a problem, which is to say that they are, quote "out of proportion," to the needs of the case, it tends to be in cases that are high stakes, highly complex, or highly contentious.

In these cases, presumptive discovery limits are likely to be of no impact at all. In smaller cases, however, presumptive limits are likely to play a normative role, restricting the ability of the plaintiff in a small case to take needed depositions from a defendant who holds all of the information relevant to a fair lending or employment discrimination claim.

Without objection, I would submit for the record letters from Barry Dyller and the Delaware Trial Lawyers Association setting forth some of these concerns.

As to proposals to restrict the scope of discovery, the import and impact of these discovery changes is likely to be highly litigated. Motions practice is not cheap and, when all is said and done, these changes would be implemented by the same judges who today, according to the Judicial Conference itself, are not doing a good enough job limiting discovery in the cases before them.

Five times since 1980, the Judicial Conference has tweaked civil discovery rules in an attempt to curb perceived abuses. In 1980, a pretrial conference was added to reduce the burdens of discovery. In

1983, proportionality was first added as a limitation on discovery. In 1993, the rules were amended to add presumptive discovery limits. In 2000, the scope of discovery was narrowed. Finally, just a few years ago in 2006, the proportionality provision instituted in 1983 was revised in an attempt to reflect the increased burdens of electronic discovery.

Today, we are faced with yet another incremental restriction on discovery. Why would we expect these changes to work where others have failed? And if discovery cost is not a problem in the majority of cases, is it appropriate to narrow the scope of discovery across the board?

Next, even if we are to assume that these changes would have some positive impact curbing discovery abuse, we must still consider the third question in my line of inquiry – what harms are risked if these changes are implemented?

Discovery is, of course, a critical stage in litigation that allows parties to marshal evidence in support of their claims or defenses, as well as to evaluate the claims and defenses of the counterparty. Without discovery, parties would ask judges and juries to decide cases based on incomplete information, which can only degrade the ability of the legal system to deliver justice under the law.

If discovery is important to the civil justice system, it is absolutely indispensable to many civil plaintiffs. Plaintiffs, not defendants, must bear the burden of persuasion in proving their claims, yet often, especially in employment, discrimination, and consumer fraud cases, most of the relevant evidence is in the possession of the defendant. Less access to information could mean that responsible parties will remain unaccountable, not because the plaintiff's allegations are untrue, but because the plaintiff lacks the evidence to prove them.

If so, this would be a very real cost, and not just to the plaintiffs whose meritorious cases would be thrown out. In many areas of the law, notably antitrust and discrimination, the law recognizes the societal value of so-called "private attorneys general." Recognizing the limitation of government resources, the law provides encouragement for civil plaintiffs to bring suit and help ensure compliance with the law.

Where we can cut costs without doing damage to our civil justice system, we should absolutely do so.

When there is the possibility of collateral costs to our courts and the ability of Americans to enforce their substantive rights, however, we must tread more carefully.

Before we amend the rules to limit the ability of litigants to marshal evidence to prove their cases, therefore, we must examine whether any of these potential harms are likely to come to pass. We must also examine whether other reforms are more likely to achieve the goals of reducing unnecessary litigation costs and less likely to have the collateral consequence of reducing access to justice.

Commentators are in general agreement that judges could do more under the Rules than they are doing currently to narrow issues for discovery and reduce the burdens on producing parties. Why aren't they doing so?

Are judges overworked? If so, perhaps the problem could be addressed by creating some or all of the 91 new Article III judgeships recommended by the Judicial Conference, as would be accomplished by the Federal Judgeship Act of 2013 that I introduced with Chairman Leahy. Would a greater investment in

technical and support resources in the courts allow for more efficient management of cases, leading to significant savings to litigants? Is judicial training a limiting factor, and how might we address that?

Clients also have tremendous power to limit litigation costs incurred by their legal representation. Clients can and do negotiate down hourly rates, the size of legal teams, and even the hourly-billing model that has created a divergence of incentives between attorney and client. Do these paths, either in isolation or in concert, offer a more promising avenue for reform?

These are just a few of the questions we will explore with the witnesses today.

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PREPARED STATEMENT OF HON. PATRICK J. LEAHY

Statement of Chairman Patrick Leahy (D-Vt.),
"Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"
Subcommittee on Bankruptcy and the Courts
Senate Judiciary Committee
November 5, 2013

Today the subcommittee will consider the impact of changing the scope of civil discovery in our courts. I thank Senator Coons for chairing this important hearing.

While our civil justice system operates effectively to resolve disputes, it is not without flaws. Many courts are over-burdened and carry significant delays. Too often those with legitimate grievances are ill-equipped to go toe-to-toe with better-financed litigants. For some Americans, justice is simply too slow and too expensive. Reforming the system to address these concerns is certainly something worth considering.

Here, however, the amendments at issue provide for some of the most significant changes to the rules of civil discovery in decades. In a marked departure from past changes, these amendments would narrow the scope of discovery obligations. The changes would institute proportional discovery, limit the number of depositions and interrogatories, and impose uniform rules on sanctions when a litigant fails to preserve certain documents. We should proceed with caution, then, and be careful to gather the full scope of how these changes may impact litigants seeking to obtain justice through our Federal courts.

It can be a difficult balance between protecting access to legitimate discovery and preventing its exploitation. We all agree there must be some limitations on discovery. We cannot let the process be subject to unchecked abuse, or a vehicle for harassment or for needlessly driving up the cost of litigation. Fair discovery obligations, with proper judicial oversight, help ensure that cases are decided on the merits, not on distractions.

But we must also be mindful of the purpose of discovery: to obtain evidence necessary to level the playing field and, ultimately, to reveal the truth. The rules must protect the ability of everyday, hardworking Americans to seek justice in court. Without strong discovery obligations, deserving litigants will be left in the dark.

So it is imperative that we get this right. Today's hearing is an important step in this process and I am confident it will help senators make informed and thoughtful judgments on how we can make our system of civil justice stronger, more efficient, and more fair. I thank Senator Coons for calling attention to this important topic and I thank today's witnesses for their testimony.

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PREPARED STATEMENT OF HON. JOHN CORNYN

Hearing entitled "Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"

November 5, 2013

Statement of Senator John Cornyn

Mr. Chairman,

In two days, the Judicial Conference begins a series of hearings soliciting input on proposed changes to the Federal Rules of Civil Procedure. The proposals include common-sense amendments to the rules of civil discovery that address dramatic changes in communications technology and data storage, which have changed the face of modern civil litigation. Discovery, in particular electronic discovery, dominates modern civil litigation; and its complexity and expense have distorted the ends for which civil litigation is intended.

The hearings beginning later this week are an important step in the rulemaking process established under the Rules Enabling Act. They are part of a public comment period through which stakeholders can provide input on the proposals, a process culminating eventually in promulgation of new rules by the Supreme Court and either codification or Congressional action. This process is designed to solicit input widely, and Congress is given a role at the end.

I am concerned that this hearing is intended to give congressional input to prevent that process from working properly. First, the timing coincides directly with the public hearings being conducted by the Judicial Conference. There is no need for congressional input at this point, especially since Congress has a clearly-defined role in the process. Second, the title of this hearing, which asks whether the proposals will "diminish accountability and leave Americans without access to justice," suggests its intended conclusion.

The Judicial Conference-led process should proceed apace. Not only is it a thorough one, in the case of dealing with the proliferation of e-discovery the proposed rule changes follow years of study by professionals, including the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System. According to a report they published in 2009, based on surveys of plaintiff and defense litigators, "there are serious problems in the civil justice system generally."[1] The litigators surveyed believed that modern discovery deters the prosecution of meritorious claims, encourages the settlement of frivolous ones, "costs too much and can become an end in itself" and is poorly managed by judges.[2] Reform is necessary – it is not a threat.

Technological change is the most important driver of the discovery crisis that litigants face. The rise of electronic communication and the expanded capacity for data storage have resulted in a proliferation of

[1] *See* "Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System" (Mar. 11, 2009, rev. Apr. 15, 2009) at 2.
[2] *See id.*

documentation in modern life that cannot have been anticipated by the drafters of the rules. Even simple litigation now requires the storage, review and production of gigabytes of data. In complex litigation, the volume multiplies. So does the cost. And the arcane details of e-discovery are often lost on lawyers and judges, preventing effective management.

Technological progress is a good thing, but the law must change to account for it. That is, at core, what the Judicial Conference is trying to achieve through this rulemaking process.

PREPARED STATEMENT OF ARTHUR R. MILLER

STATEMENT OF

ARTHUR R. MILLER

University Professor
New York University School of Law

Before the
Subcommittee on Bankruptcy and the Courts of the United States Senate

Changing the Rules: Will limiting the Scope of Civil Discovery Diminish Accountability and Leave American's Without Access to Justice?

Tuesday, November 5, 2013

Good afternoon, Mr. Chairman and Members of the Subcommittee. It is an honor to appear today and assist in this important discussion about our federal courts.

By way of introduction, I am a University Professor at New York University; before that I was the Bruce Bromley Professor of Law at Harvard Law School for over 35 years. I have taught the first year civil procedure course and advanced courses in complex litigation for more than fifty years. Beginning in the late 1970s, I served as the Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States and then as a member of the Committee (by appointment of Chief Justice Burger and reappointment by Chief Justice Rehnquist) and as the Reporter for the American Law Institute's Project on Complex Litigation. I have argued cases involving issues of federal procedure in every United States Court of Appeals and in the United States Supreme Court on several occasions and I am now the senior co-author of the multivolume treatise *Federal Practice and Procedure*.

First some perspective. When the Federal Rules of Civil Procedure were promulgated in 1938, they reflected a policy favoring citizen access to our federal courts and sought to promote the resolution of civil disputes on their merits rather than on the basis of the technicalities that plagued earlier procedural systems. Federal judges applied that philosophy for many years. However, the last quarter century has seen a dramatic shift in the way the federal courts, especially the United States Supreme Court, have interpreted and applied the Federal Rules and decided a number of other procedural matters. This shift has led to the increasingly early termination of cases prior to trial often without any real consideration of the merits. This is the result of the judicial erection of a series of procedural stop signs. Indeed, civil trials, especially jury trials, are very few and far between. Thus one of today's clichés refers to "The Vanishing (Jury) Trial" and one reason for it is this early termination phenomenon. The ability of a citizen to get a meaningful day in federal court is now in question.

The shift in judicial attitude can be traced back to three summary judgment decisions by the Supreme Court in 1986 promoting the use of this pretrial dispositive motion.[1] Additional procedural stop signs that impede the pathway to a resolution of the merits—often justified in the name of judicial gatekeeping—that have emerged include (1) the increased screening of expert testimony,[2] (2) the establishment of several obstacles to securing class action certification,[3] (3) the enforcement of arbitration clauses in an extraordinary array of consumer contracts entered into by average Americans (many adhesive in character), most of them effectively prohibiting aggregate arbitration, thereby rendering the arbitration option economically unviable,[4] (4) the Supreme Court's abandonment of notice or simplified pleading and substitution of "plausibility" pleading (which, in effect, is a return to the burdensome code fact pleading of the Nineteenth Century), thereby significantly raising the access barrier,[5] (5) the promulgation of a number of limitations on pretrial discovery that have resulted from Rule amendments during the last twenty-five years,[6] and (6) the opinion of four Supreme Court Justices that would narrow the reach of in personam jurisdiction in a way that will prevent citizens from bringing suit in a convenient forum.[7] I have written about these matters at length.[8] I urge the Subcommittee to evaluate the proposed Rule changes in light of this background because they represent more of the same.

All of these changes restrict the ability of plaintiffs to obtain a determination of the merits of their claims, which has resulted in a narrowing of citizen access to a meaningful day in court—our procedural gold standard, trial and when appropriate jury trial, is in jeopardy. Beyond that, but certainly of equal, if not greater, importance, these restrictive procedural developments work against the effectiveness of private litigation to enforce various significant public policies and Congressional enactments involving such matters as civil rights, antitrust, employment discrimination, consumer protection, defective products, and securities regulation. Cases involving several of these subjects are dismissed at an alarming rate by some federal courts leading to the under-enforcement of important statutes. The current proposals limiting the availability of discovery that are the subject of this hearing should be seen as the latest impediment to citizen access to meaningful civil justice in our federal courts.

Throughout the past twenty-five years claims of abusive and frivolous litigation, extortionate settlements, and the high cost of today's large-scale lawsuits have been asserted by

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1 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *See generally* Arthur R. Miller, *From Conley to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

2 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

3 *Wal-Mart Stores Inc. v. Dukes*, 131 S.Ct. 2541 (2011). *See also Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

4 *See, e.g., American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *Compucredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). There has been an extraordinary expansion of the Federal Arbitration Act, far beyond its original scope, by the Supreme Court. Congress might usefully consider imposing limitations on the Act's application in contexts such as consumer and employment contracts.

5 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). One should ask why JP Morgan is willing to settle with the government for thirteen billion dollars for its conduct relating to the mortgage crisis but many lawsuits for compensation by the actual victims of that conduct have been dismissed without ever reaching trial, often on basis of the complaint alone.

6 *See* the discussion below at notes 12-24, *infra*.

7 *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011)(a plurality of four Justices departed from sixty-five years of personal jurisdiction jurisprudence in a way that would contract that jurisdiction and might well force plaintiffs to litigate in a distant forum – possibly foreign countries – or abandon their claims)(two-Justices concurred in result; three Justices dissented).

8 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 (2013); Arthur R. Miller, *From Conley to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

defense interests and repeated in judicial opinions to justify the erection of these procedural stop signs. I have heard these arguments throughout my professional life. But these claims ignore other systemic values, are speculative, not empirically justified, and overstated. They simply reflect the self-interest of various groups that seek to terminate claims against them or their clients as early as possible to avoid both discovery and a trial. They are undocumented assertions that have been refuted by several studies and other sources[9] and have properly been characterized as "myth."[10]

Important hard questions have not been studied. What are the sources of litigation costs and who is causing them? To what extent are defendants, who generate motion practice and resist discovery, the source of cost and delay? Why haven't alternative mechanisms for cost and delay containment been considered by the courts and studied in depth by the rulemakers rather than simply using the blunt instruments of erecting procedural stop signs and constricting discovery?[11] What legislative changes might be requested of Congress? Some restoration of the earlier philosophy of the Federal Rules seems necessary if we are to preserve the procedural principles that should underlie our civil justice system and maintain the viability of private litigation as an adjunct to government regulation for the enforcement of important societal policies and values.

The current proposals to amend the discovery rules are part of the pattern I have described. They reflect the significant turning away from the vision of the original Federal Rules of a relatively unfettered and self-executing discovery regime—a true commitment to "equal access to all relevant data." This shift is seen in a series of periodic amendments to the Rules supposedly motivated by a desire to reduce the density and cost of discovery. That seems unobjectionable—the same may be said of the current proposals. But that justification is deceptive; the past and proposed changes are not benign. They certainly also have been motivated by the ongoing concern of defense interests that broad discovery allows plaintiffs to look behind their clients' curtains, thereby providing access to otherwise unobtainable oral and documentary information that may well cut too close to the substantive bone and endanger the defense because it will reveal a claim's merits increasing the risk of liability and enhancing the case's settlement value. Vulnerability to discovery, after all, always has been a *bête noire* of both business and government defendants.

The changes in the discovery regime began in 1983, during my service as Advisory Committee Reporter, when Rule 26 was amended to eliminate a sentence that stated: "Unless the court orders otherwise . . . , the frequency of use of these [discovery] methods is not limited."[12] The deletion of that sentence was designed to eliminate any lingering notion that discovery was limitless.[13] As the Advisory Committee's Note accompanying the amendment makes clear, the

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9 Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765 (2010); EMERY G. LEE III & THOMAS E. WILLGING, NATIONAL CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 27–33 (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf (median costs, including attorney's fees are between 1.6% and 3.3% of defendants' reported stakes).

10 Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C.L.REV. 603 (1998). *See generally* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1116–23 (2012)(comprehensive critique of repeated complaints about discovery).

11 The materials cited in notes 9 and 10 cast doubt on the claim that discovery costs represent the lion share of litigation costs. Clearly, litigation costs reflect a variety of economic, tactical, and human factors other than discovery. *See* Charles Silver, *Does Civil Justice Cost too Much?*, 80 TEXAS L. REV. 2073 (2002).

12 FED. R. CIV. P. 26(a) advisory committee's note, *reprinted in* 97 F.R.D. 165, 216 (1983). *See generally* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2003.1 (discussing the 1983 amendments).

13 *See, e.g.*, *In re Convergent Techs. Secs. Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985).

deletion was a signal that only "excessive" and "needless" discovery was to be curtailed.[14] That message was reinforced by the simultaneous addition of the language now found in Rule 26(b)(2)(C) directing district judges to avoid discovery that is unreasonably cumulative, duplicative, or obtainable from some other source, as well as discovery that is unduly burdensome or expensive given the needs of the particular case. Thus, it has been said, was born the concept of "proportionality" in discovery.[15] The amendment also emphasized the importance of judicial involvement in the discovery process and was intended to work in tandem with the simultaneous amendment of Federal Rule 16, which validated and promoted judicial management as a method of improving efficiency and economy. Many believe that greater and more effective judicial management—rather than limiting discovery—hold the key to cost and delay containment.

In describing the 1983 amendments at that time, I remarked on several occasions that the changes represented a "180-degree shift" in thinking about discovery.[16] And I would give the following example: "In a $10,000 damage case, rendering $50,000 on discovery is disproportionate."[17] I must confess, from my Reporter's vantage point I did perceive the need for imposing some restraint on cumulative and excessive discovery. Discovery's cost seemed to be rising (which at least in part appeared to be a product of it having become a "profit-center" for many law firms billing on an hourly-fee basis), the overuse and high cost of experts was becoming apparent, and discovery activity was thought by some to be causing occasional marginal, unnecessary, and even unethical lawyer behavior.[18] But the 1983 provision was designed to have limited application, as my example indicates. It was viewed as a modest exception to the basic and fundamental principle that all parties would have access to anything relevant to their claims or defenses. It was not intended and did not undermine the basic scope-of-discovery provision. Nonetheless, it was a discovery limitation—the first in a series of such amendments.

In retrospect, the Committee's and my collective judgment was impressionistic, not empirical.[19] The practice of invoking the aid of the Federal Judicial Center to study and report on matters being considered by the Advisory Committee and the development of sophisticated research techniques were to come later. Also the stimulus for the 1983 changes may have reflected too narrow a range of cases and a number of undocumented assumptions about discovery practice. Time has cast doubt on some of the assertions that were voiced at the time of the 1983 amendments to Rule 26.[20] Those doubts are equally applicable today.

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14 97 F.R.D. at 216.

15 *See* 8 WRIGHT, MILLER & MARCUS, *supra*, § 2008.1 (discussing the meaning and application of the principle of proportionality in discovery). The Advisory Committee Note also urged judges to be more "aggressive" in "discouraging discovery overuse." 97 F.R.D. at 216.

16 ARTHUR R. MILLER, THE AUGUST 1883 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 32-33 (1984).

17 Ibid.

18 *See* Am. Bar Ass'n, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 141–42 (1980) ("Discovery . . . is too easily abused . . . ."). The Special Committee's First Report is reprinted as an appendix to the Second Report. *Id.* at 149. *See generally* David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979).

19 The one discovery study relied on by the Committee and cited in its Note did not indicate that anything was fundamentally wrong with the discovery system. PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 35 (1978).

20 Advisory Committee composition also may have contributed to its willingness to accept the representations concerning discovery hyperactivity.

The Committee and I may have failed to put enough weight on the fact that in the vast array of lawsuits discovery did not (and still does not) pose any particular difficulty. But certainly we did not intend to limit let alone impair the ability of parties whose access to relevant data is essential to establishing the bona fides of their claims. We recognized the very serious problem of parties having asymmetrical access to relevant data. In many litigation contexts critical information is in the defendant's possession and is unavailable to the plaintiff. That problem is even greater today because of the complexity of contemporary litigation and because the Supreme Court has increased the plaintiffs' pleading burden and barred discovery unless the almost inevitable motion to dismiss is denied and the complaint upheld. The proposed amendment will exacerbate this problem.

The attack on discovery has continued over the years even though there is considerable reason to believe that in the vast majority of cases discovery usually works well, is quite limited (indeed, it is nonexistent in many cases), and its burdensomeness poses problems in a relatively thin band of complex and "big" cases.[21] Yet the past discovery amendments and the current proposals indiscriminately apply to all cases. In 1993, Rule 30 was amended to limit the number and duration of depositions that could be taken without judicial authorization,[22] and Rule 33 was amended to create a presumptive limitation on the number of interrogatories that could be propounded.[23] (I have often wondered why these changes were necessary.) Then, in 2000, Rule 26(b)(1) was modified to limit the scope of discovery to material "relevant to any party's claim or defense" rather than to the more open-ended "subject matter" of the action as it had been since 1938.[24] I think this change, which is a textual limitation on the scope of discovery, sends an unfortunate restrictive signal despite its uncertain purpose.

Although one might argue that these changes (and the current proposals) do not represent a fundamental undermining of federal discovery, they clearly depart from the philosophy of the original rules. All of the enumerated rule alterations were designed to and do limit discovery.[25] The Committee's present proposals would magnify these limitations. Discovery restrictions can negatively impact a citizen's meaningful access to civil justice and impair the enforcement of many important public policies embedded in federal statutes. Rule amendments should be undertaken only with great caution and require a demonstrated need as well as the absence of less Draconian solutions.[26] Broad access to discovery is a necessity because in many substantive

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[21] *See* Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684–86 (1998) (reviewing studies showing that one-third to one-half of all litigations involve no discovery). *But cf.* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (arguing that discovery is "dysfunctional, with litigants utilizing discovery excessively and abusively").

[22] *Compare* FED. R. CIV. P. 30 (1992) (requiring leave of the court to take more than thirty depositions), *with* FED. R. CIV. P. 30 (1993) (requiring leave of the court to take more than ten depositions). *See* 8A WRIGHT, MILLER & MARCUS, *supra*, §§ 2104, 2113 (discussing this change).

[23] *Compare* FED. R. CIV. P. 33 (1992) (permitting service of interrogatories by each party), *with* FED. R. CIV. P. 33 (1993) (permitting service of up to twenty-five interrogatories by each party).

[24] *See* 8 WRIGHT, MILLER & MARCUS, *supra*, § 2008 (explaining the 2000 amendment and its impact); Carl Tobias, *The 2000 Federal Civil Rules Revisions*, 38 SAN DIEGO L. REV. 875 (2001) (analyzing the amendment); *see also* Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13 (2001) (warning that the 2000 amendment will increase procedural barriers to relief without curbing litigation costs). The shift in orientation of the Advisory Committee and other participants in the rulemaking process is evidenced by the fact that in 1978 a virtually identical proposal was rejected. *See* Memorandum from Walter R. Mansfield, Chairman of the Advisory Comm. on Civil Rules to the Comm. on Rules of Practice and Procedure 6–8 (June 14, 1979). Rule 26(b)(1) does provide that on a showing of "good cause," the court may expand discovery to cover "any matter relevant to the subject matter" of the action.

[25] The discovery rules were amended on several other occasions during the period under discussion in ways that are not presently relevant.

[26] *See generally* Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 818 (1981) (explaining that discovery is essential to "the evolution of substantive law").

contexts we are quite dependent on private litigation to augment governmental enforcement of federal normative standards. Recent events in the financial, real estate, and pharmaceutical markets, for example, have laid bare the consequences of under-enforcement of federal regulatory policies.

It seems inappropriate, therefore, to be impeding the availability of this important procedure for effectuating national as well as state policies and providing people with a meaningful day in court. Discovery is often the key that opens the door to information critical to the remediation of violations of important constitutional, statutory, and common law principles as well as providing compensation for injuries sustained by citizens because of those violations. Effective discovery is the lifeblood for proving one's case. Without it, even meritorious cases may fail or not even be instituted. Therefore it is imperative that limitations on access to discovery, such as those imposed by the Supreme Court in the pleading cases (*Twombly* and *Iqbal*) and on the scope of discovery (the Rule amendments)—particularly those that are inconsistent with the underpinnings of the 1938 Rules—be shown to be justified and carefully balanced against the need to preserve the enforcement role performed by civil litigation. Moreover, any limitations on access to discovery or its scope must be limited to take account of the negative effects that they may have and the significant differences in what is needed in various substantive contexts.[27]

The Advisory Committee's proposals lack any empiric justification whatsoever and the case for them has not been made. Moving present Rule 26(b)(2)(C), which is now under the caption "Limitations on Frequency and Extent," to a place of prominence in Rule 26(b)(1), which is the critical scope of discovery provision, is not merely a neutral or benign relocation. It is a limitation on the scope of discovery as the proposed Advisory Committee Note acknowledges. Similarly the proposals that would once again reduce the number of as of right depositions and interrogatories is quite unnecessary and sends a restrictive message to the Bench that will be heard and exploited by resource consumptive and dilatory conduct by the defense bar. The proposals are not paper cuts, and when they are added to the 2000, 1993, 1983 amendments, and the restrictive pleading, summary judgment, class action, expert testimony, and arbitration decisions by the Supreme Court, one has to be concerned that effective access to civil justice is being seriously compromised.

Instead, the proposed amendment to Rule 26(b)(1) represents a threat to the jugular of the discovery regime as we have known it. It would replace the longstanding principle that the scope of discovery embraces anything that is relevant to a claim or defense with dual requirements—note the use of the conjunctive "and" in the proposal—that the material sought be both relevant and proportionate according to five criteria that are both subjective and fact dependent. The Advisory Committee Note makes it clear that the proponent of discovery must show the request's relevance and proportionality. This is a dramatic reduction in the scope of discovery. It may well produce a tidal wave of defense motions to prevent discovery on the ground that one or more of the five proposed proportionality criteria is absent. The proposed amendments could produce increased motion practice costs, delays, consumption of judicial time better spent in other ways, fact-dependent hearings, inconsistent application, and potential restrictions on access to information needed to decide cases on their merits. These effects will fall most heavily on important areas of public policy—discrimination, consumer protection, and

[27] The Honorable Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 751-52 (2010).

employment, for example. If promulgated these changes may well deter the institution of potentially meritorious claims for the violation of statutes enacted by Congress. The current proposals represent yet another procedural stop sign.

Debates about the positives and negatives of wide-angle discovery have gone on for decades—often with great intensity—and they undoubtedly will continue; the subject always has been an attractive target for defense interests. The focal point of contention occasionally changes: Sometimes it is the scope of discovery, or the number or length of depositions, or alleged excessive or intrusive document discovery. At present, discovery relating to electronically stored information is raising issues that some think may dwarf all that has come before; it already is dramatically altering today's discovery debate and certainly will impact future discussions.[28] Defense interests have made it the 800 pound gorilla in the debate in an attempt to justify the latest discovery limitations that have been put forth by the Advisory Committee. Once again one hears Chicken Little crying that the sky is falling. It is not.

The increased pretrial termination of cases and the limitations on discovery in recent years has downgraded our commitment to the day-in-court principle, diminished the status of the jury trial right, and substituted accelerated decision-making by judges—or arbitrators—for adversarial trials of a dispute's merits. It should be obvious that procedural stop signs primarily favor defendants, particularly those who are repeat players—large businesses and governmental entities. A number of the Justices, and other federal judges, appear to have a definite (or subliminal) predilection that favors business and governmental interests.[29] And I do not think it unfair to say that the current Court and some members of the federal judiciary (and perhaps some of the rulemakers) wish to limit litigation—in a sense they are lawsuit-phobic—which negatively impacts citizen access and works against those in our lower and middle classes seeking entre to the system.

I don't think the current focus on gatekeeping, early termination, and posting procedural stop signs befits the American civil justice system. To me this is a myopic field of vision that completely fails to undertake a comprehensive exploration of other possibilities for dealing with assertions of "cost," "abuse," and "extortion," let alone even make an in depth evaluation of how real of these charges are. Our courts, rulemakers, and Congress should focus on how to make civil justice available to promote our public policies—by deterring those who would violate them and by providing efficient procedures to compensate those who have been damaged by their violation.

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[28] The burdens and challenges of e-discovery are being confronted by various groups including the Advisory Committee on Civil Rules and the Sedona Conference. In 2006, for example, Rules 26(f), 33(d), 34, and 37(f) were amended to deal with certain aspects of electronic information. *See generally* 8, 8A & 8B WRIGHT, MILLER & MARCUS, *supra*, §§ 2003.1, 2051.1, 2178, 2218–19, 2284.1 (explaining the process and impact of the amendments). Rulemaking and other e-discovery efforts continue, and a second generation of Federal Rule amendments seems contain. Some relief from the rigors and expense of electronic discovery as well as greater accuracy of retrieval apparently can be achieved, ironically, by the growing availability of sophisticated digital search techniques. *See Moore v. Publicis Groupe*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 607412, at *1 (S.D.N.Y. Feb. 24, 2012), *adopted sub nom. Moore v. Publicis Groupe SA*, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) (holding that computer-assisted document review can be appropriate in large-data-volume cases). *See generally* Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11 (2011), http://jolt.richmond.edu/v17i3/article11.pdf (analyzing and comparing automated and manual document review techniques).

[29] Another indication of the non-neutrality of the current proposals is the suggested elimination of Rule 84 and the forms. Eliminating the forms showing the intended simplicity of pleading under the Federal Rules will be construed as the rulemakers' acceptance of plausibility pleading under *Twombly* and *Iqbal* without any fundamental re-examination of the possible deleterious effects of those cases or an exploration of other possible solutions for the concerns defense interests have voiced over the years.

I urge the Subcommittee to see the current proposals against the background of the last twenty-five years, to recognize that our civil justice system is in an unbalanced state, and to see that the proposed diminutions on discovery lack justification. There are a myriad of possibilities other than the blunt instrument of erecting stop signs. The rulemakers should fully explore other options to deal with the relatively small band—at least in terms of numbers—of complex cases that need special treatment by our federal judges, This might well include the possibility of asking for Congress' help regarding the current text of the Rules Enabling Act[30] as well as with the enforcement of arbitration clauses in several contractual contexts[31] and certain aspects of pretrial procedure.

Our aspirations should be those that our Founders embedded in the Constitution, that motivated the original rulemakers, that committed us to the rule of law, and that led to engraving "equal justice under law" on the front of our Supreme Court. They should not be to obstruct citizen access to our justice system or to impair the enforcement of important public policies by constructing a procedural wall of stop signs around our court houses. The goal is worth the effort.

Thank you.

30 Consideration might be given to eliminating the concept of "general" rules now found in the Rules Enabling Act, 28 U.S.C. § 2072, so that special provisions might be formulated to deal with different categories of cases, perhaps in terms of dimension or complexity or substantive area. It simply may be time to recognize that one set of procedural rules no longer fits all cases.

31 It is very doubtful that the 1925 Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*., was intended to reach such matters as consumer or employment contracts.

PREPARED STATEMENT OF ANDREW PINCUS

Statement of

Andrew Pincus

Partner, Mayer Brown LLP

"Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"

Hearing Before the Subcommittee on Banking and the Courts

of the

Committee on the Judiciary, United States Senate

November 5, 2013

Chairman Coons, Ranking Member Sessions, and members of the Subcommittee:

My name is Andrew Pincus, and I am a partner in the law firm Mayer Brown LLP. I am honored to appear before the Subcommittee to discuss the preliminary draft of proposed amendments to the Federal Rules of Civil Procedure released for comment by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

My law practice focuses on advising clients with respect to legal strategy in trial courts as well as representing them in appellate courts and the Supreme Court (I also am co-director of the Yale Law School Supreme Court Clinic, which provides pro bono representation to parties in approximately a dozen cases each year). In addition, my firm has significant expertise in electronic discovery matters, and represents numerous clients with respect to discovery issues.[1]

My testimony makes five basic points:

- The cost of the U.S. legal system – which is growing significantly as a result of electronic discovery – is increasingly producing outcomes unrelated to the merits of cases, but rather tied to the defendants' litigation costs. A key barrier to foreign investment in the United States is the concern, expressed repeatedly by leaders of non-U.S. businesses, about excessive litigation costs in our country. These costs also make it more difficult for U.S. companies to compete with businesses headquartered in other countries.

- The tremendous growth in electronically stored information – combined with discovery rules formulated for the typewriter-and-paper era – have produced an exponential growth in discovery-related litigation costs. A recent independent study found a *median cost of $1.8 million per case* for producing electronically stored information, and companies must incur additional costs, in the millions of dollars, to preserve electronic information that might be demanded in discovery.

[1] My testimony today is not on behalf of any client or my firm; it represents only my own views.

- The principal proposed amendment relating to the scope of permissible discovery simply moves a standard already in the Rule – requiring that discovery be proportional to the needs of the case – in order to give it increased emphasis. As the Advisory Committee observed, "[t]he problem is not with the rule text but with its implementation – it is not invoked often enough to dampen excessive discovery demands." The proposal is designed to remedy that deficiency, and hopefully it will have that effect.

- The amendments also would modify the provisions of the current rules establishing presumptive limits on some forms of discovery, modestly reducing existing limits on depositions and interrogatories and establishing a new presumptive limit for requests for admissions. The proposed limits are based on information regarding the norms in most federal court litigation, and the Advisory Committee's eminently reasonable conclusion that "it is advantageous to provide for court supervision when the parties cannot reach agreement in the cases that may justify a greater number." Nothing prevents a court from allowing a greater number of discovery requests upon a proper showing.

- Finally, the current vague and uncertain standard for determining when sanctions should be imposed for failure to preserve electronic information is forcing companies to incur very substantial costs to "over-preserve" electronic information. The proposed amendments address this problem by replacing the existing rule with a new, somewhat clearer standard. Two modifications to the proposal would significantly increase the chances that it will have a significant effect in reducing the over-preservation costs that now plague businesses and other organizations.

The Troubled U.S. Legal System

Our legal system has significant problems:

- Federal district courts are already overburdened[2] and, because government fiscal constraints are likely to increase in the coming years, the problem is likely to worsen.

- A procedural system adopted 75 years ago – the Federal Rules of Civil Procedure, which incorporated some procedures that had been in place for hundreds of years – that has not been subject to a comprehensive review in light of the revolutionary changes in every aspect of the society in which our judicial system operates: technology, law practice, government, business, and the personal lives of every American. It is difficult to think of any other process used by hundreds of thousands of private individuals and government employees, whether in the public or the private sector, that has not been substantially revised to account for these dramatic changes.

- Most everyone agrees that civil litigation costs too much and takes too long.

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[2] For example, the number of civil and criminal cases filed per authorized district court judgeship increased from 408 in 1970, to 462 in 1990, to 533 in 2010 – an increase of 30%, notwithstanding the more-than-doubling of the number of authorized judgeships. (Analysis based on Administrative Office of U.S. Courts, *Judicial Facts and Figures*, *available at* http://www.uscourts.gov/Statistics.aspx.)

- Asymmetry between the costs of litigation for plaintiffs and for defendants has increased tremendously – largely as a result of the cost of electronic discovery.

As the American College of Trial Lawyers and Institute for the Advancement of the American Legal System put it in their final report – based on a survey of plaintiff and defense lawyers:

> "Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them."[3]

These problems are producing very substantial real-world adverse consequences.

First, Resolutions Are Increasingly Unrelated To the Merits of the Underlying Claim. If every lawsuit filed were meritorious, the litigation costs imposed on defendants would be a matter of much less concern. Although litigation would be inefficient and the transaction costs associated with litigation would still be unduly large, the burden would at least fall only on actual wrongdoers.

But every lawsuit filed is not meritorious. These costs therefore fall to a significant degree on defendants who have been wrongly accused, and they are costs that those defendants almost always are forced to bear themselves. Moreover, these unjustified, excessive costs are – as the American College of Trial Lawyers recognized – forcing innocent defendants to settle meritless cases. A survey of chief legal officers of large and small companies found that "the merits of a case generally do not prevail over cost considerations in determining the result. Over 80% disagreed with the statement that 'outcomes are driven more by the merits of the case than by litigation costs.'"[4]

The decision to settle is rational, indeed economically compelled, when the costs of litigating exceed the costs of settling. That is true even when the defendant is certain that it would prevail if it litigated the case to conclusion. And it is true when, as is more likely the case, the defendant believes that it has a strong chance of prevailing but cannot be certain of the outcome.

As the costs of litigating increase, moreover, plaintiffs can demand higher settlement payments, because it remains economically sensible for defendants to settle at any price lower than the litigation costs. Because electronic discovery is substantially increasing defendants' litigation costs, it is also substantially increasing the incentive to settle, and producing higher settlement costs.

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[3] American College of Trial Lawyers & Institute for the Advancement of the American Legal System, *Final Report* at 2 (2009) ("*Final Report*").

[4] Institute for the Advancement of the American Legal System, *Civil Litigation Survey of Chief Legal Officers and General Counsel* 19 (2010) ("*CLO Survey*"), *available at* http://www.uscourts.gov/uscourts-/RulesAndPolicies/rules/Duke%20Materials/Library/IAALS,%20General%20Counsel%20Survey.pdf.

The bottom line: it is easier today for a plaintiff filing a meritless claim to command a large settlement as long as the case can survive a motion to dismiss.[5] That phenomenon does not just create a significant incentive for the filing of meritless claims, it also diminishes respect for our legal system.

Second, Foreign Investment in the United States is Deterred. Just last week, President Obama – speaking at a conference to encourage foreign businesses to invest in the US – stated:

> "There are a lot of wonderful countries out there. But this is a place where you can do business, create great products, deliver great services, make money, and do good at the same time. So you should find out why there's no substitute for those proud words: 'Made in America.' And here's three more words: 'Select the USA.'"[6]

This emphasis on encouraging foreign investment in the United States makes good sense. Foreign-owned firms employ 5.6 million Americans and, according to the White House, compensation for those employees "has been consistently higher than the U.S. average over time, and the differential holds for both manufacturing and non-manufacturing jobs."[7] These firms also account for 16% of the private sector's research and development spending.[8]

Our country has many advantages over other nations. An educated workforce; good infrastructure; declining energy costs; top research universities.

But the cost and inefficiency of the U.S. legal system is a significant disadvantage when businesses compare the United States to other countries around the world. Survey after survey shows that litigation costs here are higher than anywhere else.[9] The message is unavoidable: "You'll get sued in the USA."

Business executives are well aware of this fact. A survey of global business leaders conducted under the auspices of Senator Schumer and Mayor Bloomberg found that a key disadvantage of

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[5] Denial of the motion to dismiss says nothing about the ultimate merit of the claim, of course, because the court must assume that the allegations of the complaint are true. They often are not.

[6] Remarks by the President at SelectUSA Investment Summit (Oct. 31, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/10/31/remarks-president-selectusa-investment-summit.

[7] U.S. Department of Commerce and President's Council of Economic Advisers, *Foreign Direct Investment in the United States* (Oct. 31, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/10/31/new-report-foreign-direct-investment-united-states.

[8] *Id.*

[9] *See, e.g.*, NERA Economic Consulting, *International Comparisons of Litigation Costs: Canada, Europe, Japan and the United States* (June 2013), *available at* http://www.-instituteforlegalreform.com/resource/international-comparisons-of-litigation-costs-europe-the-united-states-and-canada/; U.S. Department of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment* 4-5 (Oct. 2008) ("*Commerce Department Report*"), *available at* http://2001-2009.commerce.gov/s/groups/public/@doc/@os/@opa/documents/content/prod01_007457.pdf; *see also CLO Survey* at 17 ("an astonishing 97% of respondents responded that the system is 'too expensive,' with 78% expressing strong agreement").

New York, when compared to London and other key financial hubs, was "the high legal cost of doing business. . . . When asked which aspect of the legal system most significantly affected the business environment, senior executives surveyed indicated that propensity to legal action was the predominant problem."[10]

The U.S. Department of Commerce reached the same conclusion, stating that "the concerns with excessive litigation and navigating what is seen as an expensive U.S. legal system are among a small number of issues that are front and center whenever the U.S. climate for [foreign direct investment] is discussed."[11] Also, "[f]ear of litigation is among the top issues listed by senior executives who manage internationally-owned U.S. businesses."[12]

Those of us who grew up in the U.S. legal system can forget how very different it is from the global norm. I've several times had the experience of explaining our system to the general counsel of a foreign-based company sued in a U.S. court.

The client will call, having read the complaint, and say, "Most of what they assert is not true – let's point that out right away." I'm forced to respond, "That isn't how our system works. First, a court will evaluate the legal sufficiency of the claim and assume that every fact alleged in the complaint is true – even though we know many of them are not."

"If the complaint is legally sufficient, then the plaintiff will be entitled to require us to turn over documents, including electronic information, and perhaps interview a couple of employees. That could cost $1 million or more."

"Then, we will be able to argue that the facts alleged in the complaint are wrong and we are entitled to judgment."

The client asks, "And if we win, will I be entitled to get my $1 million back?"

"No," I have to respond. "In the U.S. system, those costs can be recovered only rarely and it would cost more money to try to do that."

"So," the client says, "I'm innocent, but I have to pay $1 million to prove it and that money is gone forever."

"Yes," I say, "that is the U.S. legal system."

It is extremely difficult to defend the rationality of that result.

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[10] *Sustaining New York's and the US' Global Financial Services Leadership* 75 (2007), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

[11] *Commerce Department Report* at 2 (footnote omitted).

[12] *Id.* (footnote omitted); *see also* Robert E. Litan, *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System* (Aug. 2007), *available at* http://www.instituteforlegalreform.com-/uploads/sites/1/Chamber_Litan_book_LO_RES.pdf (discussing adverse effect of U.S. legal system on foreign investors' willingness to invest in the United States).

The reason our system is so "foreign" to the rest of the world is that many other countries' legal rules would require the losing party in my example to pay the prevailing party's litigation costs, including attorneys' fees. But the "American rule," under which each party pays its own fees in the absence of a statutory rule to the contrary, is firmly embedded in American law.[13]

That means there is little reason for a plaintiff not to file a lawsuit – the filing fee is minimal; the plaintiff's litigation costs, including discovery, will be minimal compared to the costs inflicted on the defendant; and there is no real risk of having to pay the defendant's costs in the event it prevails. And the higher the litigation cost faced by the defendant, the more likely the defendant will settle, which in turn increases the incentive to file cases with minimal merit.

As the President recognized last week, global businesses have many choices in deciding where to locate factories, or regional headquarters, or research facilities. The U.S. litigation system is well-recognized as a disadvantage to doing business here. Failing to address the deficiencies of our system – and allowing them instead to fester – will increase this barrier to foreign investment in the United States. In an increasingly globalized and competitive world, that is something our Nation simply cannot afford.

Third, the Global Competitiveness of US Companies is Harmed. The excessive costs of the U.S. legal system do not simply deter foreign investment in our country. They also disadvantage U.S. companies seeking to compete in other markets around the world.

U.S. companies typically locate their central operations here – including their corporate headquarters, research and development facilities, factories, training facilities, etc. Indeed, we want to encourage U.S. companies to do just that in order to maximize employment opportunities for our citizens.

These companies also are more likely to have a disproportionate share of their business in the U.S., which, after all, is their home market.

As a result of all of these U.S.-based activities, U.S. companies have substantial exposure to the U.S. legal system.

Companies headquartered elsewhere, on the other hand, have a disproportionate exposure to *their* home country's legal system. That system almost certainly will impose significantly lower costs on them than the U.S. legal system imposes on U.S.-based companies.

What happens when two companies – one headquartered in the U.S. and one headquartered elsewhere – compete in a third country?

The U.S. company, weighed down by the larger costs of the inefficient U.S. legal system, starts with a disadvantage. Luckily, American ingenuity often finds other ways to level the playing

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[13] The Supreme Court has recognized that the American rule regarding attorneys' fees "is deeply rooted in our history and in congressional policy." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 271 (1975).

field and win. But that does not eliminate the fact that our companies have a competitive burden that makes it more difficult for them to compete effectively.

We wouldn't send U.S. runners to the Olympic Games with fifty-pound weights tied to their ankles. We shouldn't impose the same sort of burdens on U.S. companies competing in today's globalized economy.

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The proposal released for public comment by the Rules Committee begins to address these problems – and the associated adverse consequences – through measured steps that may, depending on how they are implemented by federal judges across the country, moderate the crushing burden of electronic discovery costs.

The Tremendous – And Wholly Asymmetric – Costs of Electronic Discovery

"The internet changes everything" has become a cliché, but it is no exaggeration to say that electronically stored information has revolutionized discovery practice in civil litigation.

Some of us may be old enough to remember a world in which "mail" meant physical letters delivered by the Post Office; a "document" was produced on typewriters using paper and ink; a "file" was composed of physical documents stored in a physical filing cabinet; and conversations took place either in person or over the telephone.

Those days – the very days in which the current discovery rules were formulated – are long past. E-mail, text messaging, and chats have replaced conversations and physical letters. While some documents may be produced in physical form, often temporarily, all exist electronically. And electronic filing on massive servers has largely replaced physical file rooms.

The result has been explosive growth in the amount of electronically stored information possessed by businesses and other organizations – a trend that is likely to continue for the foreseeable future. For example:

- "'In the three year period from 2004 to 2007, the average amount of data in a Fortune 1000 corporation grew from 190 terabytes to one thousand terabytes (one petabyte)'" – which is *fifty times* the amount of text in all of the books in the Library of Congress. Over the same time period, the average data sets at 9,000 American, midsize companies grew from two terabytes to 100 terabytes – or five times the text in all of the Library of Congress's books.[14]

[14] Gregory P. Joseph, *Electronic Discovery and Other Problems* at 2-3 n.5 (2009) (citation omitted), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/-Gregory%20P.%20Joseph,%20Electronic%20Discovery%20and%20Other%20Problems.pdf.

- Businesses alone are estimated to send 100 billion emails *each day* this year, an amount predicted to increase to 132 billion per day in 2017.[15]

- One company explained to the Civil Rules Advisory Committee that the average amount of electronic information generated per employee whose data was preserved for litigation purposes increased by 250% in just three years (from 2008-2011) – from 7 gigabytes (the equivalent of 306,271 pages) to 17.5 gigabytes (765,678 pages). It explained that "[s]ome of this growth stems from the fact that . . . employees store increasing amounts of data in Outlook folders, and some comes from the increased use of new technologies."[16]

The tremendous growth in electronically stored information – combined with discovery rules formulated for the typewriter-and-paper era – have produced an exponential growth in discovery-related litigation costs. These costs fall into two basic categories.

First, the expenses associated with responding to discovery requests. A recent study by the RAND Institute for Civil Justice of discovery costs in a representative sample of cases found a *median cost of $1.8 million per case* for producing electronically stored information.[17] The cost-per-case ranged from $17,000 to $27 million.[18]

The RAND study found that, in general, the cost of producing electronic data was $18,000 per gigabyte of data reviewed for relevance and privilege.[19] In 2008 even a midsize case was likely to involve 500 gigabytes of data[20] – which equates to a cost of $4.5 million if only half of the data reaches the review stage. It is easy to see how these costs will continue to multiply as the amount of electronic data continues to grow.

Moreover, an organization is forced to incur additional costs in connection with producing electronic data. According to one expert, companies should plan on spending an average of $500,000 for the IT support needed for cases involving documents from 10 or more employees and/or more than three different systems. If a company has 5 lawsuits involving documents from 10-20 employees in a year, the IT support costs alone could be between $25 and $50 million.[21]

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[15] The Radicati Group, Inc., *Email Statistics Report, 2013-2017* at 4 (April 2013), available at http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf.

[16] Letter to Honorable David G. Campbell from Microsoft Corporation (Aug. 31, 2011).

[17] Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* at 17 (RAND Institute for Civil Justice 2012).

[18] *Id.* These costs are incurred in collecting electronically stored information, processing it to a form suitable for review and other tasks, and revising it to identify responsive documents and withhold privileged materials. *See id.* at 27-28.

[19] *Id.* at 20.

[20] Institute for the Advancement of the American Legal System, *A View from the Front Lines* 5 (2008).

[21] Debra Logan & John Bace, *E-Discovery: Project Planning and Budgeting 2008-2011* (Feb. 2008).

Second, parties incur significant costs to preserve electronically stored information beginning when a legal claim is reasonably anticipated and during the entire course of a litigation, because of the threat of onerous sanctions in the event a party is subsequently found to have erased information deemed to be subject to discovery – even if the deletion was unintentional. The standards governing preservation are vague and uncertain, and sanctions are applied by courts in hindsight. Companies are forced, therefore, to take a conservative (and thus expansive) approach to preservation in order to avoid the adverse consequences, both within a litigation and more generally to brand and reputation, of a spoliation finding.

For example, Microsoft informed the Civil Rules Advisory Committee in 2011 that "[t]he burden of over-preservation grows heavier by the day"; it reported that, on average, 6,732 of the company's employees are subject to litigation holds (a remarkable 12.5% of Microsoft's U.S. employees), meaning that it is storing 115 terabytes of information, or *more than five times* the text of all of the books in the Library of Congress.[22]

The costs of storing this information are quite substantial. For example, one witness testified before the House Judiciary Committee in 2011 that the preservation of information for just a single case, amounting to 16 million pages of data – a small fraction of the amount of information stored by Microsoft – cost $100,000 per month.[23] In addition, the fixed costs of implementing a system to preserve documents for litigation can be very large: "[t]wo companies report that implementing such systems cost approximately $800,000 to$900,000, with upkeep and maintenance costs of $150,000 per year. Other examples include a tool for collecting data to be preserved separately that cost $4,800,000 to implement. One company's data vault system cost $12,000,000 to implement and maintain in 2010."[24]

Moreover, when a lawsuit involves a claim by an individual or small entity against a large business or other organization, both of these categories of costs fall disproportionately – indeed, almost exclusively – on the business or large organization. After all, the plaintiff in such a case will have little or no electronically stored information – and therefore will incur little or no costs – but the defendant (or defendants) will have extensive amounts of electronic information. While it always has been true that defendants are likely to bear a heavier burden from discovery than plaintiffs in cases of this sort, the weight of that burden and the degree of the disparity have increased geometrically as a result of the explosion of electronic information.

Unfortunately, there is significant evidence that plaintiffs' attorneys exploit this asymmetric burden to gain a litigation advantage unrelated to the merits of the underlying claim. The American College of Trial Lawyers/Institute for the Advancement of the American Legal System report concluded that "cases of questionable merit and smaller cases are settled rather than tried

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[22] Letter to Honorable David G. Campbell from Microsoft Corporation (Aug. 31, 2011).

[23] *Costs and Burdens of Civil Discovery*: Hearing before the House Committee on the Judiciary, 112th Cong., 1st Sess. 318 (2011).

[24] *Id.* at 74.

because it costs too much to litigate them" and 71% of the lawyers surveyed (including both plaintiff and defense attorneys) "thought that discovery is used as a tool to force settlement."[25]

The continued application, in this new environment, of discovery rules largely formulated in an earlier era is allowing these problems to fester. As the American College of Trial Lawyers/Institute for the Advancement of the American Legal System report put it,

> "Electronic discovery, in particular, needs a serious overhaul. It was described by one respondent as a 'morass.' Another respondent stated: 'The new rules are a nightmare. The bigger the case the more the abuse and the bigger the nightmare.'"[26]

The Moderate Proposal Released by the Advisory Committee

In the face of this indisputable evidence, the Rules Committee has released for comment a modest proposal for changes in the rules governing discovery, with the principal focus on proposed changes in the scope of discovery, in the presumptive limits on various forms of discovery, and in the standard for imposing sanctions.

The Scope of Discovery (Rule 26). Rule 26(b)(1) establishes the general scope of permissible discovery. The proposed amendment would change this provision in three basic respects:

- Place more emphasis on the existing requirement that discovery must be proportional to the case by moving the "proportionality" language currently in Rule 26(b)(2)(C)(iii) into Rule 26(b)(1).

- Eliminate the court's power to authorize, for good cause, discovery that is not relevant to the parties' claims or defenses but is in some way relevant to the "subject matter involved in the action," while making clear that a party may obtain discovery relevant to newly-uncovered claims or defenses by moving to amend the pleadings to add those claims or defenses.

- Confirm that the standard for permissible discovery requires that the "matter" sought must itself be relevant to the claim or defense, not merely calculated to lead to the discovery of relevant information.

Proportionality

Much attention has been focused on the proportionality issue. But proportionality *is already an element of Rule 26's scope-of-discovery test.* Rule 26(b)(2)(C) today provides that

> "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . **the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the**

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[25] *Final Report* at 2, 9.

[26] *Id.* at 2.

> **issues at stake in the action, and the importance of the discovery in resolving the issues**."

And Rule 26(b)(1) today expressly states: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)," which of course includes the language quoted above.

What the proposal would do is eliminate the cross-reference and move the Rule 26(B)(2)(C) factors into Rule 26(b)(1), so that the provision would read, in pertinent part (new material underlined, deleted material stricken out):

> "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expensive of the proposed discovery outweighs its likely benefit ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter~~.

The Advisory Committee explained that "[a]lthough the rule now directs that the court 'must' limit discovery, on its own and without motion, it cannot be said to have realized the hopes of its authors. Surveys . . . indicate that excessive discovery occurs in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate contentious adversary behavior. The number of these cases and the burdens they impose present serious problems. Those problems have not yet been solved."[27]

The Advisory Committee noted that many observers found the proportionality criteria "suitably nuanced and balanced"; "[t]he problem is not with the rule text but with its implementation – it is not invoked often enough to dampen excessive discovery demands."[28] It therefore is proposing to "transfer[] the analysis required by present Rule 26(b)(2(C)(iii) to become a limit on the scope of discovery," with the intent that the proportionality analysis be undertaken more frequently by judges and invoked more frequently by litigants subject to unreasonable discovery demands.

It is difficult to understand the objection to this proposal.

Does anyone seriously believe that significant discovery burdens should be imposed on a party even when that discovery is disproportional to the needs of the case, considering not just the amount at issue but also the importance of the issues, the importance of the discovery to resolving those issues, and whether the burden outweighs the benefit? The only basis for such a conclusion would be the view that every plaintiff in every case is entitled to the full range of permissible discovery – even if the demand cannot be justified on any rational basis.

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[27] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure* 265 (Aug. 2013) ("*Preliminary Draft*").

[28] *Id.*

Perhaps such an approach could have merit in a system in which the losing party is obligated to pay the winner's costs of litigating, because the threat that it could eventually have to shoulder the cost of an irrational discovery demand might moderate a party's willingness to push to the limits of permissible discovery. But that approach guarantees unfair gamesmanship in a system in which the party complaining about discovery burdens is likely to be stuck with the entire cost of the other's side's demands.

Not surprisingly, the proportionality approach has been endorsed by a broad range of participants in the legal system. The Sedona Conference – which includes both plaintiff and defense lawyers – has specifically endorsed proportionality, stating that "[i]n the electronic era, it has become increasingly important for courts and parties to apply the proportionality doctrine to manage the large volume of [electronically stored information] and associated expenses now typical in litigation," and specifying a list of recommended principles that closely resemble the factors listed in the proposed amendment.[29] And the American College of Trial Lawyers/Institute for the Advancement of the American Legal System report specifically endorsed the application of a proportionality test to discovery.[30]

If the merits of the proportionality standard cannot reasonably be disputed, then the only argument against the proposal would be that federal judges cannot be trusted to apply this standard fairly. But where is the evidence for such a claim? Our entire legal system is based on the assumption that trial judges will fairly apply a myriad of procedural and substantive legal rules, subject to review and correction when appropriate (although the realities of the litigation process place many decisions off-limits to appellate review and correction). No one has explained, or can explain, why the opposite should be presumed here.

Indeed, the history in the discovery area is one of judicial *reluctance* to intervene to stop abuses or address overbroad requests, as the Advisory Committee pointed out. Certainly that is borne out by the available data regarding electronic discovery, which reveal a tremendous disparity between the pages of documents produced and the pages used as exhibits.

For example, Microsoft has provided the following information regarding the production of electronically stored data in an average case in 2011:

- Collected and processed: 12,915,000 pages
- Privilege/relevance review: 645,750 pages
- Produced: 141,450 pages
- Used as evidence: 142 pages[31]

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[29] The Sedona Conference, *Commentary on Proportionality in Electronic Discovery* 4 (Jan. 2013).

[30] *Final Report* at 7, 14.

[31] Letter to Honorable David G. Campbell from Microsoft Corporation (Aug. 31, 2011).

Another study of litigation involving Fortune 200 companies found that an average of 4,980,441 pages of documents were produced in discovery, but the average number of exhibit pages totaled 4,772—the same 1000:1 ratio found in the Microsoft data.[32] Needless to say, there appears to be significant leeway available for more efficiency in requests for electronically stored information.

Some of the objections to this proposed amendment seem to rest on the belief that the party receiving a discovery request is entitled to make a unilateral proportionality analysis that is not subject to review by the court. That is plainly wrong. A party declining to comply with a request on the ground that the scope of the request violates Rule 26(b)(1) would be required by Rule 34 to state that objection in responding to the discovery request. The requesting party could then move under Rule 37 for an order compelling disclosure on the ground that the objection lacks merit. That would bring the issue before the court, which would decide the proportionality question for itself.

In sum, the proportionality proposal is a modest alteration in the rules designed to focus additional attention on a legal standard that already exists.

Limitation of Discovery to Matters Relevant to the Parties' Claims or Defenses

The purpose of discovery is to enable the parties to obtain evidence relevant to the issues in the case; in the words of the rule, "matter that is relevant to any party's claim or defense." A second aspect of the proposed amendment to Rule 26(b) would eliminate the court's authority to expand the scope of discovery – by removing the sentence in the current rule stating, "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."

This sentence, which was added to the Rule in 2000 in connection with the distinction between party-controlled and court-controlled discovery, has not proven necessary in practice. As the Advisory Committee explains in recommending the sentence's deletion, "[i]f discovery of information relevant to the claims or defenses identified in the pleadings shows support for new claims or defenses, amendment of the pleadings may be allowed when appropriate," and further discovery relating to those new issues will then be permissible under the general discovery standard. There is no need for this additional authority.

Confirmation that Material Sought Must be "Relevant" to the Parties' Claims or Defenses

Although material sought in discovery must be "relevant" to a claim or defense, it has long been recognized that discovery should not be denied solely because the information sought would not be admissible evidence. As the Advisory Committee explained, "[a] common example was hearsay. Although a witness often could not testify that someone told him the defendant ran through a red light, knowing who it was that told that to the witness could readily lead to admissible testimony."[33] To address this concern, Rule 26(b)(1) now includes the following

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[32] Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies* 17 (2010).

[33] *Preliminary Draft* at 266.

sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

The Advisory Committee explained that the word "relevant" was added in 2000 to address "concern that the 'reasonably calculated' standard 'might swallow any other limitation on the scope of discovery.' 'Relevant' was added 'to clarify that information must be relevant to be discoverable.'"[34] However, "[d]espite the 2000 amendment, many cases continue to cite the 'reasonably calculated' language as though it defines the scope of discovery, and judges often hear lawyers argue that this sentence sets a broad standard for appropriate discovery."[35]

The proposed amendment replaces the sentence that has caused this confusion with the statement that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." That ensures—in the words of the Committee Note—that "[d]iscovery of inadmissible information is limited to matter that is otherwise within the scope of discovery, namely that which is relevant to a party's claim or defense and proportional to the needs of the case."

* * * * *

The proposed amendments to Rule 26(b)(1) thus serve primarily to clarify and emphasize pre-existing legal standards, rather than creating new limitations on the scope of discovery. Indeed, the proposal does not include a number of other valuable suggestions for addressing the electronic discovery explosion – such as limiting discovery to matters that are "relevant ***and material***" to the parties' claims or defenses, which would clearly prevent burdensome discovery targeted on only insignificant matters; changes in the presumption that each party should bear the costs imposed by discovery requests (a matter that the Advisory Committee will consider in future meetings); and defining the scope of the preservation obligation, which would have a significant effect in reducing over-preservation.

The public comment process now underway will provide a wealth of information for the Rules Committee to consider in its final deliberations. Hopefully, the proposals that the Committee sends forward to the Supreme Court will have a real impact on the dramatic increase in discovery-related legal costs. Otherwise further measures will surely be necessary to preserve fairness in our legal system.

Presumptive Limits on Depositions, Interrogatories, and Requests for Admission (Rules 30, 31, 33, and 36). The current civil rules establish presumptive limits on some forms of discovery: ten depositions per side with seven hours for an oral examination; and 25 written interrogatories. There is no presumptive limit for requests to admit.

The Preliminary Draft released for comment includes proposals to reduce the presumptive limits on depositions from ten to five and the presumptive limit on an oral examination from seven hours to six hours; to reduce the presumptive limit on interrogatories from 25 to 15; and to establish a presumptive limit of 25 for requests for admission. These are reasonable reforms

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[34] *Id.*

[35] *Id.*

designed to encourage lawyers to be more efficient, and therefore decrease cost and delay, while preserving judicial discretion to allow additional discovery in appropriate cases.

For example, as the Advisory Committee explained in its transmittal memorandum, a number of judges have "expressed the view that civil litigators over-use depositions," and Federal Judicial Center research "suggests that a presumptive limit of 5 depositions will have no effect in most cases" and that, "when both plaintiffs and defendants take more than five depositions, about 43% of plaintiffs' lawyers and 45% of defendants' lawyers report that they consider the discovery costs to be too high relative to their clients' stakes in litigation."[36] "[T]he lower limit can be useful in inducing reflection on the need for depositions, in prompting discussions among the parties, and – when those avenues fail – in securing court supervision. The Committee Note addresses the concerns expressed by those who oppose the new limit by stressing that leave to take more than 5 depositions must be granted when appropriate."[37]

The shortened presumptive length of a deposition was based on "experience in some state courts. Arizona, for example, adopted a 4-hour limit several years ago. Judges in Arizona federal courts often find that parties stipulate to 4-hour limits based on their favorable experience with the state rule."[38] The Advisory Committee received comments that four hours would be too short for some cases, but also that "squeezing 7 hours of deposition time into one day, after accounting for lunch time and other breaks, often means that the deposition extends well into the evening."[39] The Advisory Committee stated that "[t]he reduction to 6 hours is intended to reduce the burden of deposing a witness for 7 hours in one day, but without sacrificing the opportunity to conduct a complete examination."[40]

With respect to the presumptive limit on interrogatories, the Advisory Committee stated that "15 will meet the needs of most cases, and that it is advantageous to provide for court supervision when the parties cannot reach agreement in the cases that may justify a greater number."[41]

Finally, the presumptive limit on requests to admit "did not draw much criticism" from commenters. Significantly, the proposal "exempts requests to admit the genuineness of documents, avoiding any risk that the limit might cause problems in document-heavy litigation."[42]

Sanctions Authority (Rule 37). The ubiquity of electronically stored information has created an enormous problem for businesses and other organizations: the risk that information deleted inadvertently or as a result of the routine operation of an information management policy will produce a motion for sanctions for alleged spoliation of evidence. This is not a hypothetical

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[36] *Preliminary Draft* 267.

[37] *Id.* at 268.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 269.

concern – the frequency of such motions has increased very significantly in recent years, principally grounded in claims of failure to preserve electronically stored information.[43] Indeed, many observers believe that a significant number of discovery requests are not motivated by the desire to obtain information, but rather by the hope that information will have been mistakenly deleted and provide grounds for a spoliation claim.[44]

Because the standards applied by courts deciding such motions are varied and uncertain, companies are forced to implement standards that "over-preserve" electronic information. As one former United States Magistrate Judge (now a District Judge) has explained:

> How then do such corporations develop preservation policies? The only 'safe' way to do so is to design one that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.[45]

The 2006 amendments attempted to address this problem by adding Rule 37(e), which was designed to provide protection against unjustified sanctions. It provided: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."

Unfortunately, this provision has not served its intended purpose. The "safe harbor" has been applied rarely, with courts pointing to the Committee Note observing that the prospect of litigation might require alteration of the routine operation of an information system. Courts have used widely varying standards to determine whether sanctions are appropriate in particular cases and – because of the absence of a clear, uniform rule – over-preservation of electronically stored information continues to be the norm for most companies. The Microsoft example discussed earlier demonstrates the point.

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[43] *See, e.g.,* Laura A. Adams, *Reconsidering Spoliation Doctrine Through the Lens of Tort Law*, 85 Temp. L. Rev. 137, 154 (2013); Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 Fed. Cts. L. Rev. 178, 204 (2013); Dan H. Willoughby, Jr., *et al.*, *Sanctions for E-Discovery Violations: By the Numbers*. 60 Duke L.J. 789, 791 (2010).

[44] "[S]ome attorneys may seek [electronically stored information] that likely does not exist, rather than seeking out the specific evidence to make their case, hoping to get a severe sanction against the opposing party when that party is unable to produce the requested information. This search for the absence of evidence, rather than the evidence itself, raises troublesome ethical questions." Institute for the Advancement of the American Legal System, *Electronic Discovery: A View from the Front Lines* 21 (2008), *available at* http://iaals.du.edu/images/wygwam/documents/publications/EDiscovery_View_-Front_Lines2007.pdf; *see also* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 570-71 (2010).

[45] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 532 (D. Md. 2010); *see also Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010) ("[t]he frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information") (Lee Rosenthal, J.).

The Advisory Committee's proposal would replace existing Rule 37(e) with a new provision that would:

- Apply to all failures to preserve discoverable information, not just a failure to preserve electronically stored information.
- Authorize the court to order additional discovery or other curative measures, and to require the party that lost the evidence to pay the expenses and attorneys' fees resulting from the loss.
- Permit the imposition of sanctions only if the court finds that the party's actions either "caused substantial prejudice in the litigation and were willful or in bad faith" or "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." The proposed amendment includes a list of factors for courts to consider in making the willfulness/bad faith determination.

There is much that is positive in the proposed amendment. The Advisory Committee's goal is "to replace the disparate treatment of preservation/sanctions issues in different circuits by adopting a single standard."[46] And the proposal specifically rejects a Second Circuit decision holding that negligence is sufficient to support sanctions.[47] Moreover, the focus on curative measures should help redirect attention away from "gotcha" requests designed to lay the foundation for sanctions motions and toward the real purpose of discovery: to provide information relevant to the issues in the case.

The proposed amendment appropriately applies to all types of discoverable information. As the line between "electronic" and "physical" blurs, a standard limited to electronic information would produce wasteful litigation over that dividing line. And the considerations identified in the proposed rule are equally applicable to all types of information.

Although the proposal is an improvement over the current rule, changes are needed to achieve the goal of providing sufficient certainty to stop the wasteful "over-preservation" now endemic among businesses and other organizations.

First, the Rules Committee asked for public comment on the question whether sanctions should be available in the absence of a showing of bad faith, based solely on a finding that a party was "irreparably deprived . . . of any meaningful opportunity to present or defend against the claims in the litigation." The answer to that question is "no."

The Advisory Committee states that this provision is intended to apply only "[i]n a very narrow group of cases" where there was a "crippling loss of evidence," "the affected claim or defense

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[46] *Preliminary Draft* at 272.

[47] *Id.*

was central to the litigation," and "the catastrophic loss was caused by 'the party's actions'" and not "a natural disaster or malicious action of a third person."[48]

All of those caveats, however, appear in the Advisory Committee's explanation and Committee Notes, not in the text of the Rule. Any spoliation claim asserted today could be reframed to fit the language of the Rule, and courts would be required to make case-by-case determinations about when a loss of evidence is "crippling" or "catastrophic" (must the claim be impossible to prove or is it sufficient that proof is much more difficult?); when a claim or defense is "central" (what if the plaintiff has alternative theories of recovery, or alternative means of proving the claim in question, but those alternatives would lead to reduced damages?); and when the loss resulted from a party's actions (would but-for causation suffice or would proximate causation be required?). The litigation over this standard would exceed the litigation over today's spoliation claims.

More fundamentally, the entire notion of sanctions inherently requires proof of *wrongdoing* as an indispensable element. And that proof should be required given the substantial adverse consequences for the reputation of a party, and of its counsel, that result from a finding of spoliation. But this standard eliminates any such requirement.

Some courts have argued that imposing sanctions only upon proof of wrongdoing will lead parties to shirk their preservation obligations, secure in the knowledge that they can avoid sanctions. That view, however, ignores the ethical obligations of counsel (both in-house and external counsel) to ensure that clients comply with the law – the assumption that those obligations will be carried out is the basis for many presumptions in our legal system and it applies here is well. Also, although bad faith is a higher standard than strict liability, no rational business could decide to ignore its legal obligations, because the business could not be sufficiently certain that a fact-finder viewing the circumstances in hindsight would refuse to impose sanctions. That is especially true in view of the draconian impact of sanctions. And the proposed amendment's emphasis on curative measures and imposition of the financial burden on the party that failed to preserve information provide an additional, significant incentive to comply with preservation obligations.

Finally, the Advisory Committee is wrong in its belief that this exception to the wrongdoing requirement is needed to conform to existing caselaw. For example, in one of the cases cited by the Committee – *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) – the evidence was more than sufficient to support a finding that the plaintiff's sale of the car in which he was injured constituted intentional wrongdoing: the plaintiff's experts inspected the car soon after the accident, the plaintiff's counsel was aware that the car was a central piece of evidence and should have been preserved, and the defendant was not notified of the claim for three years. The court in the other case cited by the Committee – *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005), found that a plaintiff who similarly failed to preserve a vehicle had engaged in culpable conduct for similar reasons, including the fact that he was on notice of the defendant's desire to inspect the vehicle.

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[48] *Preliminary Draft* at 273.

Although these courts may not have grounded their decisions in a finding of culpable conduct, because the legal standard being applied did not require such a determination, the parties subject to sanctions clearly had engaged in wrongdoing. There simply is no basis for authorizing sanctions in the absence of such a finding.

Second, the proposal's principal standard for the imposition of sanctions – "caused substantial prejudice in the litigation and were willful or in bad faith" – should be revised to address the ambiguity inherent in the term "willful." (The Rules Committee has asked for public comment on whether it should add to the proposal a definition of "willfulness" or "bad faith.")

As the Supreme Court has recognized, "willful . . . is a word of many meanings, its construction often being influenced by its context."[49] That term can mean "[m]erely voluntary . . . as distinguished from accidental,"[50] only excluding acts undertaken involuntarily, such as under the influence of alcohol or mental disability. Or it can require "some element of evil motive and want of justification."[51]

For the reasons discussed above, the sanctions standard should require proof of culpable conduct. Therefore, the standard should be revised to replace "willful or in bad faith" with "willfully ***and*** in bad faith," "***purposefully or otherwise*** in bad faith," or some other formulation that will eliminate this ambiguity.

The proposed amendment, with these changes, would have a significant effect in reducing the over-preservation costs that now plague businesses and other organizations.

Thank you again for the opportunity to testify before the Subcommittee today. I look forward to answering your questions.

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[49] *Spies v. United States*, 317 U.S. 492, 497 (1943).

[50] *Id.*

[51] *Id.*

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Testimony of Sherrilyn Ifill
President and Director-Counsel
NAACP Legal Defense and Educational Fund, Inc.

Before the United States Senate Judiciary Committee
Subcommittee on Bankruptcy and the Courts

Hearing on
"Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?"

Dirksen Senate Office Building
Room 226

November 5, 2013

I. INTRODUCTION

Good morning Chairman Coons, Ranking Member Sessions, and members of the Subcommittee. My name is Sherrilyn Ifill. I am President and Director-Counsel of the NAACP Legal Defense & Educational Fund, Inc. ("LDF"). I am pleased to testify today on the important question raised by this morning's hearing: whether the proposed amendments to the Federal Rules of Civil Procedure ("Federal Rules") that are currently under consideration by the Judicial Conference of the United States' Advisory Committee on Civil Rules (the "Advisory Committee"), will diminish accountability and leave Americans without access to justice. As I will explain in greater detail during my testimony, these proposed changes—many of which are designed to limit the scope of civil discovery—will, if adopted, undermine the ability of many Americans, and especially plaintiffs in civil rights cases, to obtain relief through the federal courts.

LDF, which was founded by Thurgood Marshall in 1940, is the nation's oldest civil rights legal organization. Throughout our history, we have relied on the Constitution and civil rights legislation passed by Congress to pursue equality and justice for African Americans and other people of color, and have worked to create an anti-discrimination principle that applies to employment, public accommodations, education, housing, police treatment, political participation, and economic justice. LDF has been on the front lines of many great civil rights battles, and has served as counsel of record in a number of landmark civil rights cases.[1]

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[1] *See, e.g., Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

Throughout our nation's history, federal courts have played a special role in protecting civil rights.[2] As former Supreme Court Justice Harry Blackmun once observed:

> Congress [has] deliberately opened the federal courts to individual citizens in response to the States' failure to provide justice in their own courts. . . . Congress specifically made a determination that federal oversight of constitutional determinations through the federal courts was necessary to ensure the effective enforcement of constitutional rights.[3]

Congress has repeatedly passed civil rights legislation providing victims of discrimination with private rights of action in federal court so that they can serve as "private attorneys general" and ensure that their fundamental rights are not jeopardized due to "prejudice, passion, neglect, intolerance" or any other reason.[4]

It is just as well established that the Federal Rules, which were first adopted in 1938, were created for the purpose of promoting access to the courts. Judge Jack Weinstein, who was a member of the team that assisted LDF's first Director-Counsel Thurgood Marshall in litigating *Brown v. Board of Education*, and has served as a federal judge on the United States District Court for the Eastern District of New York for almost five decades, has explained that the Federal Rules were designed so that "[l]itigants would have straightforward access to courts, and courts would render judgments based on facts not form."[5] The Federal Rules have played a vital role in civil rights cases; indeed, many of the seminal cases in which the Supreme Court has interpreted the meaning and scope of the Federal Rules of Civil Procedure have been cases raising civil rights claims.[6]

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[2] *San Reno Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 343 (2005).

[3] *Allen v. McCurry*, 449 U.S. 90, 108 (1980) (Blackmun, J., dissenting).

[4] *See Monroe v. Pope*, 365 U.S. 167, 180 (1961).

[5] Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 108 (2008) (citations and quotation marks omitted).

[6] *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Martin v. Wilks*, 490 U.S. 755 (1989); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Conley v. Gibson*, 355 U.S. 41 (1957); *Hansberry v. Lee*, 311 U.S. 32 (1940).

On August 15, 2013, the Advisory Committee proposed a number of substantial amendments to the Federal Rules, many of which would fundamentally alter the manner in which discovery is conducted in all civil litigation. While the Advisory Committee claims these changes are warranted in order to reduce costs and delays in civil litigation,[7] they will, in essence, not only undermine the principles that led to the creation of the Federal Rules, but also adversely impact the ability of civil rights litigants to obtain the redress they deserve.

Moreover, the proposed amendments to the Federal Rules under consideration by the Advisory Committee should not be considered in a vacuum. Rather, they must be evaluated in light of the decisions issued by the Supreme Court in recent years, which have imposed a number of significant procedural hurdles on civil litigants. For example, the heightened pleading standards the Supreme Court adopted in *Bell Atlantic Corp. v. Twombly*[8] and *Ashcroft v. Iqbal*[9] elevated the threshold pleading standard that all plaintiffs must meet to pursue their legal claims. Likewise, the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*[10] raised the standard for establishing class certification under Rule 23. These and other decisions have completely shifted the procedural landscape for civil litigation. In actions where litigants survive these hurdles, their efforts to obtain necessary and vital discovery should not be stymied by overly restrictive rules and procedures. This is especially true for civil rights plaintiffs, given the well-recognized policy in federal litigation of favoring broad discovery in civil rights cases.

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[7] *See* PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, p. 260 (Preliminary Draft August 2013) [hereinafter "PROPOSED AMENDMENTS"].

[8] 550 U.S. 554 (2007).

[9] 556 U.S. 662 (2009).

[10] 131 S. Ct. 2541 (2011).

II. THE PROPOSED PROPORTIONALITY REQUIREMENT

One of the most significant changes under consideration by the Advisory Committee involves Rule 26(b)(1), the provision in the Federal Rules that governs the scope of discovery in civil litigation. Currently, Rule 26(b)(1) provides that "parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."[11] This principle—that there should be a broad, liberal standard of discovery in civil litigation—has been in place since the Federal Rules were first promulgated in 1938.[12]

The proposed amendment, however, would add a "proportionality" requirement to the Rule, which would permit a litigant, when responding to a discovery request, to consider "the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[13] Thus, if a litigant determines, in its own estimation, that a discovery request is not "proportional" to the needs of the case, it can refuse to provide the requested discovery. The Advisory Committee's proposal represents a sea-change in the manner in which discovery is conducted in civil litigation. The amendment would wholly impede the ability of plaintiffs in civil rights actions to obtain necessary and vital discovery.

The discovery process, which serves an important role in a vast array of civil litigation, is especially vital in civil rights actions. Plaintiffs in civil rights cases often are not, at the start of litigation, in possession of the information they need to fully substantiate their allegations, and so they rely extensively on the discovery process. In many civil rights cases, most, if not all, of the

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[11] FED. R. CIV. P. 26(b)(1).

[12] *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986) (explaining that the "drafters of the Federal Rules set out to devise a procedural system that would install what may be labeled the 'liberal ethos,' in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.").

[13] PROPOSED AMENDMENTS, pp. 289-90.

pertinent information required for proving discrimination is within the exclusive province of the defendant—through its agents, employees, records, and documents.[14] The "information asymmetry" between civil rights plaintiffs and defendants is compounded in intentional discrimination cases, where liability turns on proof of subjective intent. Depositions, interrogatories, requests for admission, and other discovery tools are essential for plaintiffs to obtain specific facts to substantiate a defendant's state of mind.

In recent years, discovery has become even more important in civil rights litigation given the subtle and sophisticated types of discrimination that are more commonplace in today's society than instances of overt racial animus. As the Court of Appeals for the Seventh Circuit has noted, "[d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it."[15] Civil rights plaintiffs increasingly must "build their cases from pieces of circumstantial evidence which cumulatively" prove the alleged discrimination.[16] Moreover, even when direct evidence of discrimination does exist, the fact that overt forms of discrimination are no longer socially tolerated creates a powerful incentive for defendants in civil rights cases to obscure or conceal evidence of discriminatory conduct. In light of these obstacles, federal policy has favored broad discovery in civil rights cases.[17]

The addition of a proportionality requirement to Rule 26(b)(1) will not equally burden plaintiffs and defendants in civil rights cases. We believe that it is plaintiffs who will be stymied from obtaining discovery. Instead of providing relevant information in response to discovery

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[14] For instance, when a plaintiff alleges she has been the victim of a discriminatory practice, she typically must expose the defendant's "private, behind-closed-doors conduct," including "particular meetings and conversations, which individuals were involved, when and where meetings occurred, what was discussed, and ultimately, who knew what, when, and why." *See* Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Litigation*, 14 LEWIS & CLARK L. REV. 157, 168-69 (2010).

[15] *Riodan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987).

[16] *See Hollander v. Am. Cyanamid Corp.*, 895 F.2d 80, 85 (2d Cir. 1990).

[17] *Cf. Inmates of Unit 14 v. Rebideau*, 102 F.R.D. 122, 128 (N.D.N.Y. 1984) (observing that "[f]ederal policy favors broad discovery in civil rights actions").

requests, defendants will be allowed to invoke the factors enumerated within the proportionality requirement's cost-benefit analysis to avoid complying with their Rule 26 obligations.

For example, we have experienced situations in which defendants have made clear that they did not consider the civil rights claims brought on behalf of our clients to be important or necessary, and under this proposed amendment, such defendants would be able to attempt to block plaintiffs' access to critical and relevant information. We are also familiar with defendants who have claimed that certain discovery is not important to proving discrimination only to have that particular discovery ultimately play a key role in proving the case. We are concerned that relying on the amount in controversy as a factor in determining the scope of discovery will minimize the significance of civil rights cases which often do not involve large sums of money or which primarily seek injunctive relief as opposed to damages. Such a discovery regime—where civil rights plaintiffs are at the mercy of the opposing party's assessment of the proportionality of their requests—is antithetical to the broad inquiry that the courts and Congress have recognized is imperative to protecting both civil and constitutional protections.

The rationale offered in support of this proposed amendment—*i.e.*, to reduce the costs and delays associated with civil litigation[18]—should warrant consideration and review before the proposed amendment to Federal Rule 26(b)(1) is adopted. We are not aware of any empirical evidence suggesting that civil rights cases are categorically prone to having exorbitant discovery costs. Certainly, that has not been our experience in litigating civil rights cases for decades. It is true that, in light of the adversarial nature of our civil litigation system, there will always be disagreements about discovery between plaintiffs and defendants. And there may even be a small fraction of cases where litigants engage in abusive discovery practices. However, the

[18] PROPOSED AMENDMENTS, p. 265.

appropriate solution is not to narrow the scope of discovery in ***all*** civil litigation. Such a heavy-handed approach will have a devastating result on civil rights actions, and will prevent plaintiffs in those cases from obtaining the relief they deserve.

To be clear, we do not deny that proportionality has a role to play in the discovery process. The current formulation of Rule 26, however, which rests the proportionality review squarely in the hands of the court,[19] strikes a better balance than the proposed amendment to Rule 26(b)(1). Courts—as opposed to parties—are in a far better position to conduct such a review. Given their expertise and experiences handling a wide variety of cases, district court judges are much more capable of making valid assessments about the extent to which discovery should be allowed in a particular case. Additionally, district courts have a vast array of tools at their disposal to ensure that discovery occurs in a reasonable fashion and that any abuses, to the extent they exist, are quickly remedied.[20] LDF has litigated a variety of civil rights cases, ranging from large, complex class actions to smaller cases brought on behalf of an individual plaintiff, and it has been our institutional experience that district court judges and federal magistrates, who are often assigned to handle discovery matters in federal cases, are extremely skilled at exercising their authority over case management and overseeing the discovery process.

Concerns about exorbitant costs in civil litigation are also not supported by research by the Federal Judicial Center ("FJC"). For example, FJC prepared a study in 2009, at the request of the Advisory Committee, to examine, *inter alia*, the discovery costs incurred by parties during civil litigation.[21] The researchers, after surveying attorneys who represent both plaintiffs and defendants, found that in cases with discovery, the median cost for plaintiffs' attorneys was

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[19] *See* FED. R. CIV. P. 26(b)(2)(C)(iii).

[20] *See, e.g., Reilly v. NatWest Markets. Group., Inc.*, 181 F.3d 253, 267 (2d Cir. 1999) (observing that district courts have "wide discretion" when sanctioning parties for discovery abuses).

[21] Emery G. Lee III & Thomas E. Willging, *Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, FED. JUDICIAL CTR. (2009).

$15,000 (approximately 20% of which was related to discovery), while the median cost for defendants' attorneys was $20,000 (approximately 27% of which was related to discovery).[22] Overall, the results of the FJC's 2009 study did not reveal that discovery costs are overly excessive or in need of additional regulation.

Even assuming there are substantial problems concerning discovery costs in at least some cases, the proposed amendment will merely serve to further exacerbate those problems. Requiring parties to conduct proportionality reviews will delay and lengthen the discovery process, and likely have the unintended consequence of increasing the adversarial nature of parties' communications. There will likely be an increase in motions to compel, which, in turn, will lead to greater levels of judicial involvement in resolving discovery disputes. Thus, the net result of this proposed amendment will be discovery processes that are longer, more hostile, and even more expensive.

III. IMPACT OF OTHER PROPOSALS ON CIVIL RIGHTS LITIGATION

Although the proposed change to Rule 26(b)(1) would likely have the most profound impact on civil rights litigation, the Advisory Committee is also considering a number of other changes that, if adopted, would serve as a barrier to preventing plaintiffs in civil rights cases from obtaining necessary discoverable information.

For example, the Advisory Committee has offered a series of changes to the Federal Rules that would lower the presumptive limit of depositions and interrogatories. The changes would also impose, for the first time, a presumptive limit on requests for admission. These amendments would make it very difficult for civil rights plaintiffs to obtain the information they need to substantiate their claims. Many civil rights cases are brought under federal statutes with

[22] *Id.* at 35-39.

burden-shifting frameworks, such as Title VII's disparate impact provision, and so more extensive discovery—including depositions and interrogatories—is not only necessary for plaintiffs to establish their prima facie cases, but also to rebut any justifications or rationale that are being offered by defendants. Similarly, actions with claims brought under 42 U.S.C. Section 1983 typically involve challenges to municipal policies and practices, and it is frequently necessary for plaintiffs in those cases to conduct a number of depositions in order to fully understand the policies at issue. Civil rights cases often require broad discovery not because the parties are being overly aggressive, but rather due to the nature of the claims at issue.

Furthermore, lowering the presumptive limits for interrogatories and imposing limits on requests for admission are unlikely to aid the Advisory Committee's goal of decreasing the overall cost and length of the discovery process. Interrogatories and requests for admission are discovery tools that often involve only minimal expense to either the requesting or responding party.[23] To the extent the Committee is concerned about rising costs in civil litigation, it should consider amendments and proposals that will ***increase***, and not decrease, the use of discovery methods such as interrogatories and requests for admission, that can serve, in many instances, as extremely useful and cost-neutral mechanisms for litigants to obtain discoverable information and narrow the issues at dispute.

Another significant change under consideration involves Rule 37(e), which provides district courts with discretion to impose sanctions if a party fails to preserve discoverable information. The proposed changes place an extremely heavy burden on parties seeking sanctions as a result of an opposing party's conduct during the discovery process. Under the amendments, a moving party would need to show that the spoliating party's actions: (i) caused

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[23] *See Szafarowicz v. Gotterup*, 68 F. Supp. 2d 38, 42 (D. Mass. 1999) (noting that written interrogatories and requests for admissions are less expensive ways to conduct discovery).

substantial prejudice in the litigation ***and*** were willful or in bad faith, or (ii) ***irreparably deprived*** a party of any meaningful opportunity to present or defend against the claims in the litigation.[24] Both prongs impose a very high standard; in many cases, the moving party may be unable to demonstrate the degree of harm it has suffered since it will not fully know what the lost information would have revealed. As one court has recently noted:

> To shift the burden to the innocent party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators. That is, it would allow parties who have destroyed evidence to profit from that destruction.[25]

Like the other proposed amendments, this change would harm many litigants, but would be especially detrimental to civil rights plaintiffs, given that they often must obtain most, if not all, of the discovery from defendants in order to establish their claims.

IV. CONCLUSION

Throughout much of the history of this nation, the federal courts have played a vital role in protecting the civil rights of African Americans and other racial minorities. However, the proposed amendments to the Federal Rules—especially when considered in conjunction with the Supreme Court's recent decisions in cases such as *Iqbal* and *Wal-Mart*—threatens to undermine that great tradition. We are hopeful that Congress will continue to monitor these proposed amendments, and that Congress makes sure, pursuant to its authority under the Rules Enabling Act,[26] that no procedural changes are adopted that will adversely affect the ability of civil rights plaintiffs from litigating and substantiating their claims.

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[24] PROPOSED AMENDMENTS, p. 314-15.

[25] *Sekisui American Corp. v. Hart*, --- F. Supp. 2d ---, 2013 WL 4116322, at *7 (S.D.N.Y. Aug. 15, 2013) (quotation marks and citation omitted).

[26] *See* 28 USC § 2074.

QUESTIONS SUBMITTED BY SENATOR FLAKE FOR ANDREW PINCUS

Written Questions of Senator Jeff Flake
"Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"
U.S. Senate Committee on the Judiciary
Subcommittee on Bankruptcy and the Courts
November 12, 2013

Andrew Pincus, Partner, Mayer Brown

1. Some at the hearing suggested that excessive discovery costs are driven by the defense as much as the plaintiff. Moreover, it was suggested that one way to reduce costs of discovery would be to reduce the size of the defense's legal team. Do you agree with these suggestions?

2. Some of the hearing statements and testimony suggested there was no empirical data or demonstrated need to support the proposed changes to the Federal Rules of Civil Procedure. Do you agree?

3. At the hearing, Professor Arthur Miller was asked about arbitration provisions in consumer and employee contracts. Do you agree with Professor Miller's response?

4. In your written testimony, you argue the current discovery rules, combined with other elements of the U.S. legal system, provide a significant incentive for the filing of abusive lawsuits. Please elaborate on that issue and explain how the proposed amendments may address this concern.

RESPONSES OF ANDREW PINCUS TO QUESTIONS SUBMITTED BY SENATOR FLAKE

Answers to Written Questions of Senator Jeff Flake
to Andrew J. Pincus
"Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"
Senate Committee on the Judiciary
Subcommittee on Bankruptcy and the Courts
Held on November 5, 2013

1. Some at the hearing suggested that excessive discovery costs are driven by the defense as much as the plaintiff. Moreover, it was suggested that one way to reduce costs of discovery would be to reduce the size of the defense's legal team. Do you agree with these suggestions?

The suggestion that defendants typically over-litigate discovery issues or expend unnecessary resources conducting discovery simply does not reflect the reality of civil litigation today. To the contrary, defense counsel face ever-greater pressure from their clients to keep the overall cost of litigation *down*, including both attorneys' fees and vendor costs, and that pressure has intensified in the wake of the economic downturn.[1] Clients are increasingly involved in managing their cases and in keeping those cases on budget, which includes setting limits on the work that their lawyers can do and the motions that will be filed in a case.

In addition, defense lawyers have a powerful incentive not to vex and annoy the judges who will ultimately preside over their case by making frequent, meritless motions. Defense counsel know that such motions are much more likely to prejudice the client's case than to accomplish anything constructive. The chastening influence of clients and judges is more than sufficient to rein in motions practice on the defense side.

The source of run-away discovery costs is not excessive use of defense resources or motions practice but rather—as I explained in my written testimony—the costs associated with the retention, collection, processing, review, and production of an ever-growing volume of electronically-stored information. These costs fall disproportionately on *defendants*. In civil lawsuits in which the plaintiff is an individual or small entity and the defendant is a business or larger organization, it is the defendant who possesses a much greater amount of electronically-stored information and who accordingly incurs much greater costs to preserve that information and produce it in discovery. Indeed, the fact that the objections to the proposals—such as the presumptive limits on depositions, interrogatories, and requests for admission—have come overwhelmingly from the plaintiffs' bar confirms the asymmetric distribution of these very large costs.

[1] *See, e.g.*, Susan Kelly, *Big law coming under cost pressure*, CRAIN'S NEW YORK BUS. (Nov. 4, 2013).

2. Some of the hearing statements and testimony suggested there was no empirical data or demonstrated need to support the proposed changes to the Federal Rules of Civil Procedure. Do you agree?

I stated in response to questions that we have little empirical data regarding how the Federal Rules are applied in the courtroom—just as we have little empirical data about the grounds on which cases are resolved in federal court litigation. We all would benefit from greater research about how judges enforce the existing rules and how previous changes to the Rules have affected judicial behavior and discovery costs.

But that does not mean that there is no empirical support for the proposed Rule changes. There is very substantial evidence documenting the trends requiring changes in the Rules.

First, the overwhelming empirical evidence demonstrates that discovery costs have exploded in recent years—led by costs related to electronic discovery—and that there is a significant disparity between plaintiffs' and defendants' shares of those costs. The study by the RAND Institute for Civil Justice that I cited in my written testimony found that the median cost of simply *producing* electronically stored information is $1.8 million per civil case, and the study further described a variety of ways in which storing and processing electronic data can entail additional costs for litigants.[2] And as I have already mentioned, defendants bear the brunt of such costs. The burden on a large company such as Microsoft of storing, preserving, and producing the vast amounts of data its business generates for litigation can be onerous—anywhere from several hundred thousand dollars to millions or more.

Second, reports by organizations such as the American College of Trial Lawyers and The Sedona Conference—organizations that include both plaintiff and defense lawyers—recognize the crisis in discovery costs based on *input from the organizations' own members, who are "in the trenches" litigating in federal courts every day.*[3] I discuss these organizations' statements in my written testimony.

Third, the available data indicate that discovery and litigation costs are a burden to U.S. businesses and a disincentive to foreign firms when they consider investing in this country. I cite several studies documenting the high costs of litigation in the United States in my written testimony.[4] In addition, I discuss a 2007 study conducted under the

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[2] Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* at 17 (RAND Institute for Civil Justice 2012).

[3] American College of Trial Lawyers & Institute for the Advancement of the American Legal System, *Final Report* (2009) ("*Final Report*"); The Sedona Conference, *Commentary on Proportionality in Electronic Discovery* (Jan. 2013).

[4] NERA Economic Consulting, *International Comparisons of Litigation Costs: Canada, Europe, Japan and the United States* (June 2013), *available at* http://www.instituteforlegalreform.com/resource/international-comparisons-of-litigation-costs-europe-the-unitedstates-and-canada/; U.S. Department of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment* (Oct. 2008), *available at* http://2001-2009.commerce.gov/s/groups/public/@doc/@os/@opa/ documents/content/prod01_007457.pdf; Institute for the

auspices of Senator Schumer and Mayor Bloomberg; the study found that "propensity toward legal action was the predominant problem" with the U.S. legal system, in the opinion of senior executives at leading financial services firms.[5]

The implications of all of this empirical information could not be clearer: discovery costs are growing exponentially, they are acting as a drag on our economy and on the competitiveness of American firms in the global marketplace, and they need to be brought under control. The Advisory Committee is thus on solid ground in concluding that there is room for improvement in the current discovery rules. And although no one can predict the effect of the Committee's proposed changes with perfect accuracy, its proposals will, at a minimum, help ameliorate the cost problems in our discovery system.

3. At the hearing, Professor Arthur Miller was asked about arbitration provisions in consumer and employee contracts. Do you agree with Professor Miller's response?

I disagree completely with Professor Miller. His response is based on two erroneous premises—that the Federal Arbitration Act ("FAA") wasn't meant to apply to consumers' and employees' claims, and that arbitration of such claims on an individual basis leaves consumers and employees worse off than pursuing their disputes in court.

First, the FAA was intended to apply to consumer and employee disputes. Congress enacted the FAA to enable parties to avoid "the delay and expense of litigation." That benefit of arbitration, Congress anticipated, would appeal "to big business and little business alike, . . . corporate interests [and] individuals."[6] Justice Breyer has written that "Congress, when enacting [the FAA], had the needs of consumers, as well as others in mind," noting that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."[7] Likewise, the FAA was intended to cover employment relationships. The relevant text of the FAA, unchanged since its enactment in 1925, expressly carves out only employment contracts for transportation workers ("contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce")—therefore implicitly bringing all other employment contracts within its scope. In short, the FAA was meant to cover consumer and employee disputes as well as business-to-business disputes. There is no merit to Professor Miller's suggestion that the Supreme Court has departed from that original purpose by applying the FAA to consumer contracts and employee relationships.

Advancement of the American Legal System, Civil Litigation Survey of Chief Legal Officers and General Counsel (2010) ("*CLO Survey*"), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules-/Duke%20Materials/Library/IAALS%2C%20General%20Counsel%20Survey.pdf.

[5] *Sustaining New York's and the US' Global Financial Services Leadership* 75 (2007), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

[6] S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924).

[7] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

Second, far from preventing consumers and employees from vindicating their rights, arbitration significantly *expands* the class of claims that consumers and employees can vindicate.

Litigating in court is complicated and requires legal representation. While some plaintiffs with large-value claims can find attorneys to represent them, many wrongs suffered by employees or consumers result in small-value claims that are too small for lawyers to agree to pursue *in court*.[8] And although small-claims courts were designed to help individuals pursue their claims in arbitration, they do not present a realistic alternative because of budget cuts and resulting delays.[9]

In contrast to the slow court system that requires expensive legal representation to navigate effectively, arbitration provides consumers and employees with a less complex dispute resolution system that is far easier for non-lawyers to navigate. Filings are informal; hearings can be conducted over the telephone at convenient times.

And, most importantly, consumers fare at least as well, if not better, than in court. A study by Professors Christopher Drahozal and Samantha Zyontz examined claims filed with the American Arbitration Association and found that consumers win relief in 53.3% of their disputes.[10] That is a higher rate of success than the average reported 50% win rate for plaintiffs in state and federal courts.[11] The authors also found that "[c]onsumer claimants who bring large claims tend to do better than consumers who bring smaller claims," but that, "[i]n *both types of cases*, the consumer claimant won some relief against the business more than half of the time."[12] What is more, recent data released by an arbitration provider—the American Arbitration Association ("AAA")—establish that a sample of claims resolved in 2007 resulted in consumers obtaining settlements (or otherwise withdrawing their disputes from arbitration) in 60 percent of cases they brought against businesses; in the remaining 40 percent, they prevailed roughly half of the time.[13] Professor Peter Rutledge of the University of Georgia has reviewed the empirical studies comparing arbitration and litigation, and concluded that "raw win rates, comparative win rates, comparative recoveries, and comparative recoveries relative to amounts claimed

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[8] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 783 (2003).

[9] *See, e.g.*, William Glaberson, *Despite Cutbacks, Night Court's Small Dramas Go On*, N.Y. TIMES, June 2, 2011, *available at* http://www.nytimes.com/2011/06/03/nyregion/despite-cutbacks-new-york-small-claims-courts-trudge-on.html; Emily Green, *Budget Woes Mean Big Delays For Small Claims Courts*, Nat. Pub. Radio, May 15, 2013, *available at* http://www.npr.org/2013/05/17/182640434/budget-woes-mean-big-delays-for-small-claims-courts.

[10] Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-903 (2010).

[11] *See, e.g.*, Theodore Eisenberg, et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1995) (observing that in 1991-92, plaintiffs won 51% of jury trials in state court and 56% of jury trials in federal court, while in 1979-1993 plaintiffs won 50% of jury trials).

[12] Drahozal & Zyontz, 25 Ohio St. J. on Disp. Resol. at 898.

[13] See Am. Arbitration Ass'n, Analysis of the American Arbitration Association's Consumer Arbitration Caseload, *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325.

. . . do not support the claim that consumers and employees achieve inferior results in arbitration compared to litigation."[14]

Employees using arbitration also fare as well or better than they would in court. Studies demonstrate that employees who arbitrate their claims are more likely to win their disputes than those who litigate in federal court (46% in arbitration as compared to 34% in litigation), and the arbitrations are resolved 33% faster than lawsuits in court.[15]

Moreover, a study of AAA employment arbitration awards concluded that low-income employees brought 43.5% of arbitration claims, most of which were too small to attract an attorney willing to bring litigation on the employee's behalf. These employees were often able to pursue their arbitrations without an attorney, and they won their arbitrations at the same rate as individuals with representation.[16] Another study examined AAA employment awards and found that win rates (and damages) were essentially equal for higher-income employees. The study found no statistically significant difference in discrimination and non-discrimination claims for higher-income employees in arbitration and in litigation. Yet for lower-income employees, the study did not attempt to draw comparisons between results in arbitration and in litigation, because lower-income employees appeared to lack *meaningful access to the courts*—and therefore the ability to bring a sufficient volume of court cases to provide a baseline for comparison.[17]

Many opponents of arbitration focus only on class actions, arguing the unavailability of class procedures in arbitration by itself demonstrates the claimed deficiency of arbitration. But most wrongs suffered by consumers and employees are individualized and cannot be remedied in a class action. For those individuals, as the above analysis demonstrates, arbitration is by far the superior dispute resolution system.

Justice Breyer has observed that, without arbitration, "the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)" would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[18] Thus, for a large category of injuries suffered by consumers and employees, the choice is "arbitration—or nothing."[19]

And even claims that could be asserted in a class action can be remedied in arbitration. In the recent decision in *American Express Co. v. Italian Colors Restaurant*, even the dissenting members of the Supreme Court—Justices Ginsburg, Breyer, and

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[14] Peter Rutledge, *Whither Arbitration?*, 6 Geo. J.L. & Pub. Pol'y 549, 560 (2008).

[15] Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003 - Jan. 2004).

[16] Hill, 18 Ohio St. J. on Disp. Resol. at 794, 800.

[17] Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 45-50 (Nov. 2003/Jan. 2004).

[18] *Allied-Bruce*, 513 U.S. at 281.

[19] Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 792 (2008) (discussing analogous situation of employees with low-dollar claims).

Kagan—disagreed with the assertion that class procedures are essential to vindicate rights conferred by federal law. They pointed out that other mechanisms, such as the use by many claimants of the same lawyer and expert to file their individual arbitration claims, provided a way to vindicate those rights effectively.[20] That mechanism is available under virtually all arbitration agreements, and it is being used with increasing frequency.

Moreover, skepticism is growing about the benefits of class actions for consumers and employees. Everyone recognizes that class actions are great for lawyers: both those that file them and those who represent defendants. But little actual benefit is conferred on class members. That reality is additional evidence that arbitration is a better deal for consumers and employees than our overcrowded, procedurally complex, and inefficient court system.

In short, Professor Miller's response is based on a mistaken premise that individual arbitration prevents the resolution of what he terms "economically unviable" claims. Yet the empirical evidence demonstrates that, for most claimants, dispute resolution in our overburdened court system is out of reach. Arbitration allows individuals—including consumers and employees—to resolve their disputes to their satisfaction, more efficiently, and with higher win rates and often greater awards than in litigation.

4. In your written testimony, you argue the current discovery rules, combined with other elements of the U.S. legal system, provide a significant incentive for the filing of abusive lawsuits. Please elaborate on that issue and explain how the proposed amendments may address this concern.

Two criteria are relevant in assessing the proposed rule changes: whether they will adversely affect legitimate claims; and whether they will address skewed incentives—resulting from the existing rules—that encourage the filing of abusive lawsuits because the economic burdens on defendants often produce settlements unrelated to the merits of the underlying claims.

Virtually all of the testimony and questioning at the hearing focused on the first question—the potential impact of the proposed amendments on plaintiffs' ability to bring important and legitimate claims, such as civil rights lawsuits. But there is no evidence supporting the claim that the proposed changes to the Rules would have any effect on the viability of such claims. Much has been made, for example, of the potential effect of the change in Rule 26's proportionality language on civil rights lawsuits—but under the current version of Rule 26, judges are *already* required to take into consideration the importance of the issues involved in a case, including the societal significance of small but meritorious civil rights claims, in determining whether to limit discovery that is not proportional to the case. The proposed amendment does not alter this standard. Instead, the proposed amendment merely relocates that proportionality language within Rule 26 in an attempt to focus judges' attention on the issue. That will encourage courts to give more attention to all of the proportionality factors—including the societal significance of

[20] *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2318 (2013) (Kagan, J., dissenting).

small but meritorious civil rights claims. With respect to the presumptive limits, as explained in my written testimony and discussed in my oral testimony, there is no basis for fearing a potential impact on legitimate discovery requests.

In sum, I simply do not believe that the case has been made—or can be made—that federal judges will exercise their discretion under the proposed rules in a manner that will negatively affect legitimate claims.

The discussion during the hearing largely ignored the second question—the significant benefits of the Rules proposal on another, all-too-common type of case: those in which the threat of costly discovery produces outcomes unrelated to the merits. A plaintiff can file a lawsuit against a large defendant relatively easily and, as I have explained, incur little or no discovery costs. The defendant, by contrast, will have to bear significant costs in the discovery phase of litigation, to say nothing of the expense of going to trial to prove its innocence if the case should progress that far. This is true regardless of the merits of the plaintiff's claim: thanks to the longstanding "American rule," even a blameless defendant has little chance of recovering its discovery costs from the plaintiff because, in general, each side must pay its own legal fees no matter who prevails in the case.

Defendants thus have a powerful incentive to settle any case that survives a motion to dismiss, even one that is wholly meritless on the facts, for less than the costs of defense (costs that have ballooned as a result of the costs associated with electronic discovery). And when even meritless lawsuits settle, plaintiffs are only further encouraged to bring frivolous claims. In light of this set of perverse incentives, it is hardly surprising that, when the Institute for the Advancement of the American Legal System surveyed both plaintiffs' and defense lawyers, over 80% disagreed with the proposition that the merits of a case, rather than litigation costs, determine the outcome,[21] or that, in a survey by the American College of Trial Lawyers, 71% of lawyers surveyed—again, both plaintiffs' lawyers and defense lawyers—agreed that discovery is "used as a tool to force settlement."[22]

The proposed improvements to the Federal Rules would alleviate this problem by addressing some of the factors that currently contribute to excessive discovery costs. The proposed amendments to Rule 26 would encourage judges to be more active in managing cases and to reject discovery requests that are disproportionate, and they would restrict the scope of discoverable material to exclude matter that is not relevant to the issues at stake. The new presumptive limits on depositions, interrogatories, and requests for admission would encourage lawyers to be more efficient and judicious in their use of those tools, while permitting judges to authorize additional discovery of each type when necessary. Finally, the proposed amendments to Rule 37 would reduce the risk that innocent defendants will be subjected to draconian sanctions for alleged spoliation of evidence—a risk that leads to costly and needless over-preservation of information.

[21] *CLO Survey* at 19.

[22] *Final Report* at 2, 9.

Ultimately, the changes to the Rules would be effective in helping to restore balance to the discovery process and ensure the "just, speedy, and inexpensive determination of every action and proceeding" that is the goal expressed in Rule 1. By bringing down the costs of discovery in cases in which those costs are currently egregious, the changes would reduce plaintiffs' ability to use those costs as a source of leverage to extract *in terrorem* settlements of frivolous claims and enable defendants to rationally allocate resources toward resolving viable claims and fighting meritless ones. Reducing the costs of discovery thus helps weed out abusive litigation while judicial discretion (and the standards for exercising it specified in the proposal) safeguards the right of plaintiffs with meritorious claims to obtain justice.

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PRESIDENT
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CHAIR
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November 4, 2013

The Honorable Christopher A. Coons, Chairman
The Honorable Jeff Sessions, Ranking Member
U.S. Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Coons and Ranking Member Sessions:

Alliance for Justice ("AFJ") respectfully submits these comments in advance of the hearing scheduled November 5, 2013, titled "Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"[1]

AFJ is a national association of over 100 advocacy organizations, representing a wide array of groups dedicated to the creation of an equitable, just, and free society. At AFJ, we support the advancement of core constitutional values, as well as the fair administration of justice through unfettered access to the courts. A number of our member organizations engage in litigation, representing the interests of those lacking the resources to represent themselves. Additionally, many of our member organizations rely on the availability of information in order to protect the public interest. AFJ member organizations, including the National Employment Lawyers Association, the Legal Aid Society, and the National Lawyers Guild, have submitted comments expressing concern with many of the proposed rule amendments.

We are worried that a number of the proposed changes to the Federal Rules of Civil Procedure will make it more difficult not only for individuals who are victims of discrimination, unfair business practices, and physical injuries to stand up for their rights in court, but also for the public to learn of corporate wrongdoing and threats to their health and safety. These proposed changes present these concerns in their own right, and especially when viewed in the broader context of existing threats to Americans' access to the courts. Our comments focus on this broader context first, and then turn to the specific proposed rules themselves.

Broader Threats to Access to the Courts

The proposed changes to the Federal Rules of Civil Procedure should not be considered in isolation; rather, they must be viewed in conjunction with other factors that are having a negative impact on access to justice. These factors include understaffed and overburdened courts; Supreme Court decisions that have limited the use of the class action device, as set forth in Rule 23; more victims being pushed into arbitration; and the heightening of pleading standards.

[1] That AFJ has limited these comments to the changes proposed to Rules 26(b), 30, 31, 33, and 36 should not be read to imply support for the remaining proposed changes to the Federal Rules of Civil Procedure.

For more than 30 years, Alliance for Justice has tracked judicial vacancies and nominations. Our goal is to ensure that our federal judiciary that is fully staffed with highly qualified judges who are committed to the rule of law. Yet today, our federal judiciary is being forced to operate at well below full strength.

As of October 24, there are approximately 91 federal judicial vacancies, fully one in ten federal judgeships, many of which do not even have nominees.[2] Consequently, many judges are faced with growing caseloads—lengthening the amount of time individuals must wait for justice. Presently, it takes an average of 25 months for a civil case brought in federal district court to reach trial.[3] In some districts, the wait is far longer; for example, in the Eastern District of North Carolina, it takes upwards of 45 months on average for a civil case to reach trial, according to the most recent data.[4] These delays pose a threat to many people's access to justice, as memories may fade, witnesses may die or disappear, and the costs become too cumbersome while victims wait for trial.

The budget sequester has only made matters worse. The funding shortfalls have forced courts around the country to downsize personnel, which in turn has led to delays in civil and bankruptcy cases. As Judge John D. Bates, the Judicial Conference secretary, wrote to President Obama in September, "Several years of flat funding, followed by the sequestration cuts that took effect March 1, 2013, have had a devastating impact on court operations nationwide."[5] The 17-day government shutdown further added to the judiciary's woes.[6]

The potential impact of these proposed rules changes is exacerbated by recent Supreme Court decisions that have threatened individuals' and small businesses' ability to have their day in court. Two recent decisions have sanctioned large corporations' increasing practice of inserting forced arbitration clauses into the fine print of employment and consumer contracts. In *AT&T Mobility v. Concepción*, the Supreme Court upheld a forced arbitration clause that barred AT&T's customers from filing a class action suit. Consequently, many litigants are now being forced into arbitration proceedings that take place in private, conducted by an arbitrator of the company's choosing, with no pre-trial discovery to unearth necessary evidence. The Supreme

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[2] Alliance for Justice, The State of the Judiciary: Judicial Selection During the 113th Congress, Oct. 24, 2013, http://www.afj.org/wp-content/uploads/2013/10/Judicial-Selection-During-President-Obamas-Second-Term.pdf.
[3] United States Courts, U.S. District Courts—Median Time Intervals from Filing to Trial for Civil Cases in Which Trials Were Completed, by District, During the 12-Month Period Ending September 30, 2012 (2012), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/T03Sep12.pdf.
[4] Id.
[5] Letter from Judge John D. Bates, Secretary, Judicial Conference of the United States, to the President (Sept. 10, 2013), http://news.uscourts.gov/sites/default/files/Letter-President-FY14-Funding-enclosure.pdf; see also Letter from Chief Judges of 87 federal district courts to Vice President Joseph R. Biden, Jr. (Aug. 13, 2013) (noting that budget cuts "have forced us to slash our operations to the bone").
[6] Press Release, Judicial Conference of the United States, For Federal Courts, Shutdown Caused Broad Disruptions (Oct. 25, 2013), http://news.uscourts.gov/federal-courts-shutdown-caused-broad-disruptions. Although the budget deal ending the shutdown restored $51 million in the cuts to the judiciary and the Federal Defenders program, that hardly makes up for the $350 million in cuts imposed by the sequester. See Todd Ruger, Federal Judiciary Budget Increases in Last-Minute Budget Deal, The Blog of LegalTimes, Oct. 16, 2013, http://legaltimes.typepad.com/blt/2013/10/federal-judiciary-budget-increases-in-last-minute-budget-deal.html.

Court further expanded the power of corporations with its decision earlier this year in American Express v. Italian Colors Restaurant. In Amex, a case brought by small businesses alleging antitrust violations, the Court held that the Federal Arbitration Act precludes courts from invalidating arbitration agreements—even in cases where the cost of individual arbitration would prevent the vindication of rights under federal law. In this decision, the Court invalidated the longstanding "effective vindication" doctrine that allowed courts to nullify agreements that would frustrate the ability of parties to protect their rights under federal law. As a result, it has become increasingly difficult to hold corporations accountable for their violations of the law, and corporations are able to use the fine print of contracts to opt out of federal laws.

Even where workers and consumers who have been wronged are able to enter the courthouse, they face great obstacles once they arrive because of Supreme Court decisions making it increasingly more difficult for victims to band together to seek justice. For example, in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court significantly limited individuals' ability to join together as a group to fight wrongdoing by large corporations. In *Wal-Mart*, the Supreme Court raised the threshold requirements under Rule 23 for class action certification.[7] In cases where individual recoveries will not be worth the costs of litigation, wrongdoers now have a better chance of escaping liability. As a result of these decisions, the scale is further tipped in favor of powerful interests, at the expense of everyday people seeking justice.

Access to justice was also dealt a severe blow as a result of two Supreme Court decisions regarding pleading standards. In *Bell Atlantic Corp. v. Twombly*[8] and later in *Ashcroft v. Iqbal*,[9] the Court heightened the pleading requirements for a complaint, imposing a new "plausibility" standard. As a result, fewer cases are able to survive the initial pleading stage.[10] Many of the proposed changes to the rules only worsen the potential impact of these decisions. If plaintiffs are somehow successful in making it to discovery, they will still be faced with the arduous task of proving their case under new, more restrictive discovery rules. Victims of egregious wrongs will be dissuaded from speaking out against these bad acts because they will fear that the courts will not provide them the justice they deserve. Additionally, attorneys working under private attorney general statutes and often on a contingency fee basis will be less likely to take these cases from the outset, further limiting the average person's access to justice. Consequently, fewer cases will be filed, and those that are brought will likely be dismissed on technicalities, resulting in even fewer victims having their cases heard than before.

Private enforcement of public policy has long been an effective way to help ensure compliance with the law in a number of important areas, such as civil rights, employment discrimination, and securities regulation.[11] In cases with limited official oversight, private enforcement can supplement, or even replace, government efforts, and serve as an effective deterrent to law-

[7] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).
[8] 550 U.S. 544 (2007).
[9] 556 U.S. 662 (2009).
[10] 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, 331-332 (2013) (discussing the impact of *Twombly* and *Iqbal* on the early disposition of cases).
[11] See id. at 1.

breaking. However, this method of enforcement has weakened over time, due to a wave of anti-litigation sentiment.[12] Subsequently, the burden is now placed more heavily on the shoulders of federal agencies to ensure compliance with federal laws, resulting in an increase in rule breaking.[13]

Proposed Changes to the Discovery Rules

For those victims who are able to avoid forced arbitration, survive the gauntlet of onerous class certification standards, and overcome heightened pleading standards, the proposed changes to the Federal Rules of Civil Procedure threaten to erect new stumbling blocks for those seeking their day in court. These proposed rule changes will create an upsurge in motions and hearings to determine their proper application.[14] Such increased motions practice, in addition to burdening the court, will multiply, rather than reduce, the costs of litigation, heightening the hurdles faced by plaintiffs who already often lack sufficient resources. Moreover, plaintiffs of modest means will find it even more difficult to find lawyers to represent them, as lawyers working on a contingency basis will be hesitant to expend the additional, significant resources necessary to conduct this new motions practice. Combined with the previously mentioned state of the federal judiciary, these proposed rule changes pose an even greater danger to the fair administration of justice.

Specifically, AFJ is concerned that the proposed changes to Rules 26(b), 30, 31, 33, and 36 will impede victims' access to justice:

- **Rule 26(b):** This rule change would require judges to perform a five-factor proportionality test to determine the scope of discovery allowed in each case. Such a test will require a substantial showing on the part of the plaintiff, who, in many cases, is operating with limited resources. Furthermore, by altering longstanding language in this rule, the change will upset decades of precedent and invite disputes and uncertainty regarding the meaning of the new language. In addition, this new test creates the risk of an overreliance on monetary stakes in determining the importance of evidence during discovery. An overemphasis on the monetary recovery sought may severely impact cases where large monetary sums are not at issue, including cases where injunctive relief is sought.

- **Rule 36:** The proposal to impose a new, numerical limit on requests for admission also poses a threat to plaintiffs with limited resources. High-quality requests for admission serve to reduce the number of issues that must be decided at trial, promoting efficiency. By reducing the number of requests, plaintiffs will be forced to allocate some of those limited resources to establishing facts that could have been established prior to trial.

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[12] See, e.g., Paul D. Carrington, Politics and Civil Procedure Rulemaking: Reflections on Experience, 60 Duke L.J. 597, 607-609 (2010) (detailing how private enforcement has been progressively weakened).
[13] See Miller, supra note10, at 304.
[14] Id. at 309-12.

Furthermore, requests for admission are a low-cost method of discovery, and limiting them could affect disproportionately those parties with fewer resources.

- **Rules 30, 31, and 33:** The proposed changes limiting the number of oral depositions, written depositions, and interrogatories, respectively, will increase the difficulty plaintiffs face when pursuing litigation against powerful corporate defendants. Frequently in such circumstances, much of the evidence needed to prove the plaintiff's case is in the hands of the wrongdoer. By limiting discovery in such a restrictive manner, it is likely that more cases will be dismissed in the preliminary stages of litigation due to plaintiffs' inability to procure that necessary evidence to proceed to trial. Such limitations in obtaining the necessary evidence for trial will have a profound chilling effect on whether potential plaintiffs decide to bring these suits in the first instance because it is not economically practical to pursue a case with a high probability of being dismissed.[15]

When first enacted, the Federal Rules of Civil Procedure were intended to encourage the resolution of cases on the merits—in direct contrast to previous procedural systems.[16] These proposed rule changes severely threaten that original intent, with significant risks to access to justice.

Thank you for your consideration and for the opportunity to comment on these proposed changes.

[15] Id. at 322.
[16] Id. at 1.

TO THE ADVISORY COMMITTEE ON CIVIL RULES

RE: Amendments Published for Comment in 2013

Paul D. Carrington
Draft of October 8, 2013, to be presented November 7, 2013

Our Federal Rules of Civil Procedure, for which you are the honored custodians, were established in 1938 in reaction to late 19th century politics protecting the extraction of wealth by an emerging upper class engaged in new and very profitable interstate commerce. Wealth was then extracted with little or no regard for the rights or interests of individual citizens across the continent, such as employees, franchisees, patients, passengers, tenants, or consumers. The underlying premise of the 1938 Rules was first wisely expressed at the 1906 meeting of the American Bar Association in St. Paul by Roscoe Pound in his famous remarks on *The Causes of Popular Dissatisfaction with the Administration of Justice.* The ABA took Pound's point and persuaded Congress in 1934 to enact the Rules Enabling Act creating a rulemaking process more likely to achieve popular satisfaction with civil justice. As the original Rule 1 states, the aim is to assure that everyone's legal rights are enforced. I beg the Advisory Committee not to forsake that inclusive aim and thus serve the regressive political aims of enterprises seeking to weaken the ability of citizens and firms to enforce their claims or defenses in disputes with larger adversaries.

The central features of the 1938 Rules enabling the enforcement of citizens' legal rights were those confirming the right of litigants to use the power of government to investigate events and circumstances giving rise to their claims or defenses. The right to compel the disclosure of pertinent information was not a wholly new idea, but its extension to the enforcement of all civil claims was central to the aim stated in Rule 1 to assure that every litigant's rights would be enforced. The extension of the right to discover information was well received by our growing urban law firms representing large business firms. They soon learned to charge astoundingly high fees for hours spent fetching pertinent documents from vast corporate files and sitting as teams to conduct depositions of prospective witnesses. And it appears to be this development of big firms' hourly fees that has led to the 21st century outcry against the allegedly excessive cost of discovery, especially of document discovery in the age of vast electronic files and prolonged depositions. But I do not think we need a law limiting the hourly fee of lawyers responding to subpoenas of documents resting in vast corporate files or limiting the number of lawyers in the room in which a prolonged deposition is conducted. Attorneys' fees are declining and Richard Susskind's 2013 book makes a persuasive forecast that modern technology will accelerate that trend as business clients are learning to control excessive expenditures on legal services.

Moreover, the generalized claim that the cost of discovery pursuant to the 1938 Rules is excessive is not valid, as the report of the Federal Judicial Center clearly

demonstrates. Yes, there are occasional excesses in cases in which the stakes are very large, but abuse of discovery is otherwise not evident in the official data.

Meanwhile, some citizen-litigants would surely be disserved by the proposed amendment of Rule 26(b)(2)(C)(iii) that would impose a duty on the court, perhaps even on its own motion, to limit discovery when it appears that the burden or expense of the proposed discovery would outweigh its likely benefit to the party seeking the information. Such a disparity can sometimes occur when an entity bears the big cost in defending citizens' claims for relatively modest compensation. Indeed, the monetary cost of discovery is most likely to be perceived to be possibly disproportionate to its monetary benefits to citizen-plaintiffs in civil rights and employment rights cases because the citizen-plaintiffs advancing those relatively small claims often need to search a lot of a defendant-employer's documents and interrogate their superiors and fellow employees in order to find and assemble the evidence needed to make their cases. Similar obstacles may be faced by franchisees or minor competitors seeking to enforce their rights against big-business. This proposed amendment will thus weaken the private enforcement of laws governing the conduct of employers, franchisors and big marketing firms and may reward some defendants for extravagance in spending on legal services that could be supplied more economically. And it would further diminish the transparency of the judicial process and thus our trust in law, as Judge Patrick Higginbotham observed over a decade ago.

A justification for such a concealing amendment is said to lie in the vast electronic files increasing greatly the sizes of files on hand to be searched in some cases. But taking note of the utility of the word search, other electronic technologies, and the availability of low-cost clerical assistants around the world, the cost of document searches can generally be contained. And the transparency of business practices is essential to the deterrent effect of the law on many abusive practices of employers, franchisors, or competitors that might be exposed through costly discovery. The proposed amendment to Rule 26(b)(2)(C)(iii) takes no account of the resultant weakening of law enforcement that depends on the document search. Some, and perhaps many, workplaces would become more tyrannical, and many small businesses may be placed at disadvantage.

The acquisitive politics of the proposed amendment to Rule 26(b)(2) are also reflected in the proposed amendment to Rule 1 that would impose a duty on parties and their lawyers to cooperate in securing the "just, speedy, and inexpensive determination of every action and proceeding". That proposal brings to mind the controversy over the 1993 amendment to Rule 26 that imposes a duty on the parties (and thus their lawyers) to disclose basic information without awaiting formal discovery requests. That amendment evoked an outcry from the American Bar Association that viewed the provision as an impairment of the duty of lawyers to be loyal to their clients' interests. The House of Representatives voted unanimously to reject that amendment, but the matter did not get to the Senate in time to be considered. The 2013 proposal to amend Rule 1 goes a bit further in constraining lawyers from performing their duties as advocates by obligating them more generally to help the court to secure a "just, speedy and inexpensive" disposition of the a

case. There are, of course, numerous other more specific provisions in the Rules and in the proposed amendments that invite the imposition of sanctions on lawyers causing needless costs and delays. Do we need to empower judges to make a more generalized disapproval of the role of an advocate in failing to maintain a cooperative spirit in the conduct of adversary litigation? I question the need for this generalized extension of the power and responsibility of the federal judge to punish parties and counsel for excessive zeal in contesting their cases.

I thank the Advisory Committee for its attention.

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October 31, 2013

The Honorable Christopher A. Coons
Chairman
Subcommittee on Bankruptcy and the Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Coons:

I understand that you are holding a hearing on "Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?," and I wanted to follow up on a conversation we had about this topic back in July. My practice focuses on federal civil rights litigation. I spoke to you about some of my concerns about the changes to the Rules, and mentioned a specific case I had litigated.

The case we discussed was one in which I represented a young boy who had been repeatedly raped by a foster child who was placed in his home. The case concerned the child protective services agency's decision to put the foster child in to my client's home. The child protective services agency and its personnel were aware for approximately a year that this boy was sexually molesting other children, but decided that they should place the boy in my client's home anyway. The agency personnel specifically instructed the prior foster parents not to disclose the boy's history to my client's parents, because it would "sabotage his chances for adoption." After the boy was placed, the inevitable happened and he raped my male client approximately 10 to 15 times. In order to uncover the details of what happened and to successfully obtain compensation for my client (who was devastated by what had happened to him), 27 depositions were taken in this case. Also, thousands of pages of documents were produced. The depositions were necessary because there were quite a few defendants, caseworkers and their supervisors who were involved in the underlying matter. Further, this was an interstate placement. Therefore, we had to trace all communications from the local child protective services agency to the agency in the state

capitol involved with interstate placements, to the receiving state capitol's agency, and then to the local child protective services agency. I also should note that many of the depositions were taken by the defendants as well, so that they could have a full opportunity to defend themselves. The case was successful only because I was able to take all of the depositions I needed and because the defendants were able to take all of the depositions they needed. With regard to the depositions the defendants took, the case eventually settled because the defendants knew what they were facing. Had I not been able to engage in full discovery, I could not have proved what I needed in order to prevail. Similarly, had the defendants not been able to obtain discovery they believed they needed, they could not have made an assessment of what would happen at trial. We discussed this case, and how civil rights cases frequently require significant numbers of depositions in order to prove the underlying events, and also to prove the policy or custom of a municipality which must be proved in order to reveal unconstitutional policies, customs and actions of the municipality.

I thought I might discuss with you in this letter some other cases that might be of interest. In 2008, in a neighboring county which is governed by three county commissioners, two from one party and one from another party, two Democrats took control of the county from two Republicans. The Democrats then undertook to terminate huge numbers of Republican employees and a handful of Democratic employees who had politically supported the prior Republican county commissioners. These people were terminated and replaced by Democrats who were typically political supporters of the new county commissioners. This type of action violates the First Amendment, as case law is clear that in non-policy making or confidential positions government cannot terminate employees for their political beliefs, support or non-support. I represented 17 of these plaintiffs in one suit. (I also represented several others in individual suits.) In the main lawsuit, the defendants had the need to depose all 17 plaintiffs. Under the proposed limitations of depositions, the defendants never could have taken that number of depositions. I took approximately 10 depositions. We would not have been able to prove our case as well had we not taken that number of depositions. The case recently settled after an extensive opinion by U.S. District Judge Christopher Conner, and after two days of an intense settlement conference conducted by Judge Thomas Vanaskie of the U.S. Court of Appeals for the Third Circuit, who agreed to help the parties resolve the case. The facts of the case could not have been properly discovered, on both sides, had they not had the freedom to take the appropriate number of depositions and otherwise conduct complete discovery. Incidentally, there were discovery disputes, and the district judge was able to control the litigation and resolve such disputes. I note that such disputes are the exception and not the rule.

Under the proposed rule changes, a district judge would be required in almost every case to be involved in mundane discovery matters in order to determine on a case by case basis whether to permit additional discovery beyond the presumed limits of the proposed rules. This would create a significant undue burden for every district judge in every district. In civil rights litigation, the individual plaintiff is often taking on a government entity. This frequently requires a complex process to sort out the facts and determine the responsible agencies, supervisors and employees, and to discover the government entity's official policies and its unwritten customs which actually reflect how it operates. Judges today have the necessary discretion to handle issues involved in these inquiries, and to prevent overreaching by either side in a lawsuit. Judges' jobs should not be made more difficult by creating presumed limits on discovery, which will then make judges decide on each additional discovery device and whether it is or is not warranted. Instead, the lawyers are

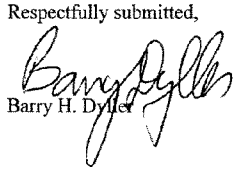
in the best position to know if discovery is warranted, and they can always seek judicial intervention if they believe an opposing lawyer is somehow abusing the discovery process.

Another case which might be of interest was one I litigated concerning a lieutenant in our local prison. An accused murderer had escaped from the prison. My client, a lieutenant in the prison, believed that the prison was extremely poorly run. He and one other lieutenant came forward to the newspapers to discuss a variety of management issues within the prison. Those issues included the reasons that the accused murderer was able to escape, issues concerning drugs and other illegal activity, and various other matters. The county suspended these two lieutenants for a long period of time. The county then constructively discharged my client by demoting him from a lieutenant to a correctional officer trainee. Unable to support himself in that trainee position, my client resigned to seek other work, despite a long and successful career in corrections. The other lieutenant opted to retire instead. The speech that these two lieutenants engaged in was not only protected by the First Amendment, but was extremely important in terms of proper governance and security within the local jail. It was extremely important to the public interest, but the county's action in suspending and terminating these two brave lieutenants sent a chilling message to all county employees to keep their mouths shut in the face of corruption and incompetence. We were able to successfully litigate these cases only because we were permitted to take all of the depositions that were necessary. We took approximately ten depositions in the case in which I represented one lieutenant. I believe there were a similar number of depositions in the companion case which was litigated by a different attorney. (The other case was with a different attorney because in the pre-termination matters, I represented the second lieutenant, and ultimately determined that I might be a witness concerning the threat to her pension; because I was a potential witness, I referred the case to a different attorney.) These cases are just a few examples of the many bad things that happen in government that can be brought to light through appropriate litigation, litigation that can only be successful if the attorneys are permitted ample discovery of the facts.

Incidentally, this particular case in which our brave clients exposed wrongdoing within county government and suffered severe retaliation, could have a profound effect on other governmental matters. I note that the famous "kids for cash" judicial corruption matter occurred in this same county. The kids for cash case was one in which two local judges obtained approximately $2.6 million in bribes in exchange for closing down a county owned juvenile detention center and placing children in a privately owned juvenile detention center. Things like this could not have happened if government employees had confidence that they would not be retaliated against for blowing the whistle on such egregious matters. It is imperative to our society that corruption be exposed. That will only happen if whistleblowers have a full and fair opportunity to protect themselves if they are retaliated against. The proposed changes to the Federal Rules of Civil Procedure will assure that such protections are not afforded to such brave persons who do so much for our society.

I can provide further information on these cases or on anything else that you think might prove helpful. Thank you for your consideration.

Respectfully submitted,



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STATEMENT OF WADE HENDERSON, PRESIDENT & CEO
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

HEARING BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS

ON

"CHANGING THE RULES: WILL LIMITING THE SCOPE OF CIVIL DISCOVERY DIMINISH ACCOUNTABILITY AND LEAVE AMERICANS WITHOUT ACCESS TO JUSTICE?"

TUESDAY, NOVEMBER 5, 2013

Chairman Coons, Ranking Member Sessions, and Members of the Subcommittee:

Thank you for holding today's hearing on the proposed amendments to the Federal Rules of Civil Procedure. On behalf of The Leadership Conference on Civil and Human Rights, I am pleased to provide this written statement for inclusion in the record.

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works to support policies that further the goal of equality under law through legislative advocacy and public education. The Leadership Conference's member organizations represent persons of color, women, children, organized labor, persons with disabilities, the elderly, the lesbian, gay, bisexual, and transgender (LGBT) community, and faith-based organizations.

The Leadership Conference is committed to building an America that is as good as its ideals – an America that affords everyone access to quality education, housing, health care, fairness in the workplace, economic opportunity and financial security. We understand the vitally important role federal protections play in ensuring equality of opportunity and fair treatment under the law. It is with that understanding and history that we express our concerns about the proposed changes to the federal rules, which we believe would place unequal burdens on plaintiffs seeking to have their rights redressed in federal courts. The cumulative impact of the proposed changes to the discovery rules, and specifically the proposed changes to Rules 26(b), 30, 31, 33, 36, and 37(e), will have serious adverse impact on civil rights litigants.

As others have testified, there is no empirical basis for the proposed changes, and the burden that they would impose is heavy. Simply put, the upending of reliable and settled rules will create a continually moving goal post, resulting in additional burdens and barriers for civil rights plaintiffs and their attorneys, often keeping plaintiffs from having their rights protected and enforced.

The Importance of the Private Attorney

For decades, the federal judiciary has served as the place where individuals facing unfair and illegal treatment—in many cases represented by Leadership Conference member organizations—have turned for protection and enforcement of their rights. Virtually all modern civil rights statutes rely heavily on private attorneys general. Thus, if those private litigants are restricted in their ability to bring cases, the system breaks down.

In *Newman v. Piggie Park Enterprises*, one of the earliest cases considering the Civil Rights Act of 1964, the Supreme Court explained the importance of private litigants in the enforcement of civil rights.

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees -- not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II. [1]

As Professor Pam Karlan of Stanford Law School has observed: "The idea behind the 'private attorney general' can be stated relatively simply: Congress can vindicate important public policy goals by empowering private individuals to bring suit. …[T]he current reliance on private attorneys general … consists essentially of providing a cause of action for individuals who have been injured by the conduct Congress wishes to proscribe, usually with the additional incentive of attorney's fees for a prevailing plaintiff."[2]

Congress has repeatedly recognized the important social benefits that plaintiffs are able to obtain through private rights of action.[3] As Sen. John Tunney stated on the Senate floor, "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers."[4]

Beyond these social benefits, there are pragmatic reasons to promote this structure: "This private enforcement system decentralizes enforcement decisions, allows disenfranchised interests access to

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[1] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (U.S. 1968).
[2] 2003 U. Ill. L. Rev. 183, 186.
[3] 2003 U. Ill. L. Rev. 183, 186-187.
[4] 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney) cited in *Riverside v. Rivera*, 477 U.S. 561 (U.S. 1986).

policymaking, and helps insulate enforcement from capture by established interests. It is also less expensive for taxpayers because it does not place the cost of enforcement solely upon government actors."[5]

More than 150 important statutory policies, including civil rights and environmental protections, provide statutory fees to encourage private litigants to mobilize a private right of action. Private parties bring more than 90 percent of actions under these statutes. In 2005, out of 36,096 civil rights cases brought, the U.S. was the plaintiff in only 534 cases, or 1.5 percent of all civil rights cases brought that year.[6] The rest were brought by private plaintiffs.

The Impact of Recent Supreme Court Decisions

Recent Supreme Court rulings have limited access to the courts for vulnerable Americans, narrowing both procedural and substantive rights for civil rights litigants. The civil pleading standard, which had been well-established, reliable, clear and well understood for more than 50 years,[7] was upended with the Court's *Ashcroft v. Iqbal*[8] and *Bell Atlantic Corp.* v. *Twombly*[9] decisions. In setting up a new, heightened, judicially created standard that pleadings must meet in order to survive a motion to dismiss, the Court created a new practice -- the *de rigeur* immediate filing of a motion to dismiss in many civil rights cases, wasting the court and the parties' time and resources on additional motions practice, often before any information is available to the court.

In the last few terms, the Court has also narrowed substantive protections for older workers,[10] victims of retaliation,[11] and those facing harassment in the workplace.[12] It has expanded the reach of arbitration agreements far beyond their intended purpose,[13] limiting the ability of litigants to vindicate their rights in court, and has caused confusion regarding class action standards.[14]

The danger of these decisions goes far beyond the Supreme Court itself, of course. As these decisions make their way into the lower courts, the impact and damage done is enormous.

The Unintended Consequences of the Proposed Rules

In this context, where the courthouse door has now been shut on so many, a move by this body to further restrict access to justice is ill-advised and antithetical to the pursuit of justice.

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[5] 54 UCLA L. Rev. 1087, 1089-1090.
[6] Admin. Office of the U.S. Courts, 2005 Annual Report of the Director, Judicial Business of the United States Courts 2005, at tbl.C-2, available at http://www.uscourts.gov/judbus2005/ appendices/c2.pdf, cited in 54 UCLA L. Rev. 1087, n14.
[7] *Conley v. Gibson*, 355 U.S. 41, 45-46 ((1957) (a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief.")
[8] 556 U.S. 662 (2009).
[9] 550 U. S. 544 (2007).
[10] *Gross v. FBL Financial Services*, 129 S.Ct. 2343 (2009).
[11] *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).
[12] *Vance v. Ball State University et al*, 133 S. Ct. 2434 (2013).
[13] See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
[14] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Although the goals of the proposed changes to the Federal Rules, such as improving efficiency and decreasing costs in an overburdened system, are laudatory, many of the proposed changes will fail to accomplish those objectives, and will in fact have unintended consequences that are far more damaging than the potential good contemplated by the proposals.

Civil rights litigants will be the ones most burdened by these changes. Specifically, the rules limiting discovery, and in particular, creating the "proportionality" standard under Rule 26(b), will impact plaintiffs such as victims of employment discrimination who already bear the burden of proving their claims in the face of severe imbalances in access to relevant information. Employment discrimination plaintiffs fare particularly poorly in the pretrial motion stage in the current system and would be further injured by these proposed rules. From 1979-2006, employment discrimination plaintiffs won 3.59 percent of their pretrial adjudications, compared to 21.05 percent for other plaintiffs.[15] "[T]he difference in win rates between jobs cases and nonjobs cases shows that pretrial adjudication particularly disfavors employment discrimination plaintiffs."[16]

The information asymmetry faced by employment discrimination litigants requires discovery rules that rectify these imbalances, not exacerbate them. Limiting discovery and creating a proportionality standard will only widen the gap between those who control the information, and those who need access to it to vindicate their rights.

Placing additional procedural barriers in the path of those trying to protect, vindicate, and enforce their rights and the rights of the public, is not only bad policy, it is bad precedent and bad for efficiency. Changes in procedural rules, under the guise of streamlining or limiting costs, operate to impact civil rights litigants by slamming the courthouse door in their faces. As we know, if procedural rules close the courthouse door, victims are deprived of the ability to vindicate their substantive rights. Although the rules may be intended as a solution targeted to one set of litigants, the impact on others, particularly those least able to bear the additional costs and hurdles, must be taken into account.

In short, the proposed rules are a blunt, overbroad sword for circumstances in which a surgeon's scalpel is more appropriate.

The Crisis in the Federal Judiciary

One additional point needs to be underscored: The federal judiciary is in crisis. Addressing this issue will do more to resolve many of the issues this Committee is attempting to resolve than making changes to the discovery rules. We know that judicial resources are limited, and that judges have limited time. Yet that problem should be dealt with through the confirmation of pending judicial nominees, not by changes in the rules that will place additional barriers in the way of the most vulnerable plaintiffs. It is not justifiable to create new Federal Rules simply to get around a limit on judicial resources, when a direct solution to increase judicial resources is available.

For more than two decades, there has been little congressional action to address judicial staffing deficits despite a steadily increasing workload. In its most recent report, the Administrative Office of the United States Courts (AO), the primary source of non-partisan analysis of resource allocation within federal

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[15] Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 Harv.L. & Pol'y Rev 1., 2009 at 31.
[16] *Id.*

courts, which is entrusted to make recommendations on needed federal court resources, acknowledged the increasing work of the courts across the country, and made specific observations and recommendations targeted to areas where there was considerable backlog or high caseloads per active judge.

Most of these circuit and district courts have judicial emergencies. For example, with respect to the second most important court in the nation, the AO reported that "the caseload per active judge on the D.C. Circuit has risen more than 50 percent since 2005." As of December 31, 2012, there were 1,419 pending cases, meaning a caseload of 177.5 cases per active judge. Today, there are three fewer active judges on the D.C. Circuit than there were in 2005 when the case load was just 119 cases per active judge. The growing disparity between the number of judges on the bench and the caseloads that they face is staggering. This is an issue that warrants immediate action.

Conclusion

Although I am confident it was not the intent of the Judicial Conference's Advisory Committee on Civil Rules, the result of many of the proposed changes will be to impose the greatest cost on those least able to bear that burden. Those most vulnerable, with fewest resources and least access to information should be protected, rather than harmed. Thank you for giving me the opportunity to share our views.

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October 30, 2013

The Honorable Christopher A. Coons
Chairman
Subcommittee on Bankruptcy and the Courts
Committee on the Judiciary
United States Senate
Washington D.C. 20510

Dear Chairman Coons:

I am writing on behalf of the Delaware Trial Lawyers Association (DTLA) in opposition to certain proposed changes to the Federal Rules of Civil Procedure being considered by the Judicial Conference of the United States. DTLA is an association of attorneys dedicated to preserving the constitutional right to trial by jury, furthering the rule of law and the civil justice system, and leading the cause of those who deserve remedy for injury to person or property. DTLA's members practice in a wide variety of disciplines, including complex litigation, medical negligence, products liability, insurance law, employment and civil rights law, and toxic torts.

The proposed changes to the Federal Rules of Civil Procedure, meant to control discovery costs, would actually increase costs, create inefficiencies, impose delay and expense, and encourage gamesmanship. They do not take into account the difficulties that plaintiffs, who bear the burden of proof, face when trying to obtain facts necessary to substantiate their claims. These changes would not only impede access to justice at the federal level but also impact states as well, as states tend to implement similar rules of civil procedure. DTLA is concerned primarily with the following proposed changes:

Proposed Change to Rule 26(b)

The proposed change to Rule 26(b) would alter the scope of discovery from a relevancy standard to a proportionality standard, taking into account five factors: (1) the amount in controversy; (2) the importance of the issues; (3) the parties' resources; (4) the importance of the discovery in resolving the issue; and, most importantly, (5) whether the burden or expense of the proposed discovery outweighs its likely benefit.

The fundamental problem with the proposed change is that a primary assessment of "proportionality" would shift the discovery process from one that

is intended to give injured parties access to justice to one that would allow defendants to avoid producing critical, relevant, information that plaintiffs need to develop their case. It would fundamentally alter the rules of discovery in a way that would only benefit defendants seeking to evade accountability for wrongdoing.

As a result, plaintiffs would be less able to get the information needed to meet the burden of proof. This could be especially detrimental in civil rights and discrimination cases in which information is asymmetrical, meaning that one side—the defendant or defendants—has all the information. Parties would litigate each of the five factors for every piece of information they seek to discover. These cases are highly fact-specific, so courts would be required to weigh in on every factor to determine what is proportionate. Because plaintiffs would be less able to meet their burden, they would use limited time and resources on unnecessary motions and appeals. This would not only tax the overburdened court system but also undermine the goals of discovery.

As cases become increasingly complex, parties must be able to conduct accurate, reliable discovery. This proposed change would only make it harder for an injured party to discover the facts necessary to prove his or her case, thereby denying access to the justice system.

Proposed Changes to Rules 30 and 31

The proposed change to Rule 30 would reduce the presumptive limit of oral depositions from ten to five and limit the presumptive number of hours for those depositions from seven to six. The proposed change to Rule 31 would reduce the presumptive limit of written depositions from ten to five. Plainly stated, these changes would harm the ability of plaintiffs to get critical information to meet their burden of proof. The presumptive limit of five is completely inadequate to develop the requisite burden of proof, the limits apply regardless of the number of parties in the case. Many cases involve five or more defendants, so a plaintiff would need to depose more than five witnesses to develop his or her case. In asbestos cases, for example, plaintiffs must often depose many individuals, from current and former corporate officers to subject matter experts on toxicology and cancer. In one Delaware case[1], for instance, the plaintiff needed additional discovery to even identify the supplier of the product that made people sick. Only after deposing more than five fact witnesses was the plaintiff able to depose a fact witness who could identify one particular supplier. In order to develop their cases, these plaintiffs would undoubtedly require more than five depositions. Under the proposed change, courts would spend more resources hearing plaintiffs' requests for leave to conduct additional depositions under Rule 30(a)(2).

[1] *In re: Asbestos Litig. (Hartgrave)*, C.A. No. 09C-07-303 ASB (Del. Super. Ct., Jul. 30, 2009).

A 2012 Delaware case illustrates this problem. The plaintiff, a high school student and officer of the local 4-H Chapter, was sexually abused by her high school principal and brought suit against the school district for gross negligence in hiring.[2] Her attorney took 20 depositions in order from most to least likely to be helpful. Of the 20 depositions, only the seventh witness admitted a critical fact that the student needed to bring the case to trial. If she had been limited to five depositions she would not have been able to get past summary judgment.

In a 2006 Delaware employment discrimination and retaliation case, the plaintiff, a French teacher who had been with the employer for 20 years, had to show that the employer had a "pretextual" reason for taking an adverse action against an employee, who claimed discrimination based on National Origin and Age, as well as retaliation. This case required eight depositions to find a witness with sufficient evidence of pretext.[3] Had the plaintiff been limited to five depositions, his case would not have had a chance to survive summary judgment and would have been prohibited from getting justice.

In one particularly egregious Delaware case, a woman sought justice for repeated sexual assaults over several years when she was a teenager by a teacher, who was also entrusted to care for her in his home.[4] Due to limited discovery, she was forced to guess which witnesses – most long-retired former school employees – would have evidence or be forthcoming with information that would help her case. Judges have discretion now to limit discovery to address specific cases; additional limitations would not result in justice for those injured by heinous crimes seeking justice under the Child Victim's Act, which provides a civil remedy for sexual abuse of a minor that had previously been barred by the statute of limitations.[5] This case and others like it would be made even more difficult by the proposed rules changes.

Proposed Changes to Rules 33 and 36

The proposed changes to Rules 33 and 36 would also result in increased judicial intervention in basic discovery disputes, tying up limited court resources with issues that can currently be resolved without judicial intervention in most cases. The proposed Rule 33 change would reduce interrogatories from 25 to 15. Interrogatories allow parties to identify critical evidence, so if they were limited to so few interrogatories they would be forced to write their questions as broadly as possible in order to obtain the critical evidence. The parties would engage in additional litigation to determine whether the interrogatories were proper.

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[2] *Jane Doe No. 7 v. Indian River School Dist.*, A.3d 2012 WL 2044347 (2012).
[3] *Termonia v. Brandywine School District*, Case No. 1:06-cv-00294-SLR (2006).
[4] *Hecksher v. Fairwinds*, 09C-06-236 FSS (Del. Super. Ct., Feb. 28, 2013).
[5] 10 Del. C. § 8145 (2009).

The proposed Rule 36 change would impose, for the first time, a presumptive limit on requests for admission to 25. Imposing a narrow limit of 25 requests for admission would encourage parties to make requests broader to fit the requests for needed information into a mere 25 requests, leading to unintended collateral fights over what counts towards the new limit. The ability to request that the defendant admit basic facts is vital to smaller plaintiffs who must establish certain critical information. Currently, when plaintiffs request admissions, defendants simply deny the request. If plaintiffs were forced to make their requests for admissions broader, defendants would more successfully deny the requests due to their broad nature. The proposed Rule 36 will also increase litigation costs for plaintiffs who would have to spend time and resources establishing information that could have been easily resolved by a request for admission.

Proposed Change to Rule 4

Under the proposed Rule 4 change, the Time Limit for Service would be reduced from 120 days to 60 days. This would effectively eliminate the ability to serve via mail and unnecessarily increase litigation costs. Defendants are often adept at eluding service, and may be difficult to locate. While Admiralty litigation is often cited as a type of case where 60 days for service of process may be insufficient, especially for larger vessels traveling on the high seas, the type of case that is more relevant in Delaware is trucking. In the heavily traveled I-95 corridor, trucks traveling through the state cause accidents that injure Delaware residents. When these trucks are owned and operated by independent contractors, the Delaware residents must track down the truck's driver to serve process. In admiralty litigation, for example, plaintiffs often must reach a ship to effectuate service, in which case 60 days would likely be inadequate. Parties would clog the courts and use limited judicial resources to seek extensions of time to effect service. Plaintiffs, who already have the burden of proof, would then have to meet yet another burden by going to court to argue that there was good cause for failure to serve within the newly restricted time frame. This would increase the cost to the plaintiff while rewarding the defendant for evading service. The current 120 day time period usually allows enough time for service so that plaintiffs do not have to use judicial resources to argue for an extension of time.

Thank you for holding this important hearing today. DTLA looks forward to working with you to ensure all Americans have access to justice.

Sincerely,

Lawrance Spiller Kimmel
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Written Statement of

Jennifer Klar

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Submitted to the
Subcommittee on Bankruptcy and the Courts of the United States Senate

Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans without Access to Justice?

Submitted November 12, 2013

Introduction

Mr. Chairman and Members of the Subcommittee, thank you for accepting my written comments concerning the proposed amendments to the Federal Rules of Civil Procedure. I am grateful for the Subcommittee's careful attention to the dramatic amendments now under consideration.

Relman, Dane & Colfax, PLLC is a civil rights firm that litigates fair housing, fair lending, and employment discrimination cases around the country. In many of the cases handled by our firm, we represent individual plaintiffs who have suffered discrimination by a corporate or government employer, a housing provider, or a lender. In many of these cases the great majority of the evidence on which our clients' claims depend is within the control of the defendant. The rules governing discovery are thus crucially important to our ability to vindicate the civil rights of our clients. For this reason, my firm and our colleagues throughout the civil rights community are deeply concerned about the dramatic restrictions on discovery contemplated in the current proposed amendments.

Our reservations about many of these amendments are well expressed by the thoughtful testimony and written comments submitted by Sherrilyn Ifill on behalf of the NAACP Legal Defense Fund. The comments below focus on the proposed Rule 37(e), which would dramatically restrict a court's power to issue sanctions or remedial evidentiary remedies when a party spoliates evidence—that is, when a party destroys documents or other evidence that the party was under a duty to preserve.

I have four principal concerns about the proposed rule: first, that it will impede the search for truth; second, that it goes beyond the proper scope of the Federal Rules of Civil Procedure to change the substantive law of multiple circuits; third, that it will disproportionately hurt civil rights plaintiffs; and fourth, that it appears to extend beyond the context of electronically stored information ("ESI"), the costs of which are provided as the primary justification for the change.

1. The proposed rule wrongly focuses on protecting parties who destroy evidence rather than safeguarding the integrity of the judicial search for truth

The value and purpose of the discovery process is to bring to light the evidence and arguments that will assist the factfinder in the search for truth and the just resolution of the case. In civil rights cases, the truth-seeking function of litigation also serves a broader social purpose of uncovering discriminatory behavior and vindicating society's interest in securing equal treatment on the basis of race, religion, gender, disability, and other protected classes. Spoliation sanctions are an important tool courts use to safeguard their truth-seeking mandate. The threat of sanctions deters the destruction of documents a party knows to be relevant to pending or likely litigation. If the party unreasonably allows the documents to be destroyed, spoliation sanctions allow courts to remedy the damage done to the requesting party's case.

The proposed rule fails to account for a court's need for effective tools to safeguard the search for truth, and focuses instead on protecting parties whose conduct, while negligent or even reckless, does not rise to the level of willful or in bad faith. These are the wrong priorities, and, I fear, will have the effect of impeding the search for truth.

This is not only my perspective as a civil rights attorney. The D.C. Circuit has repeatedly held—as have at least three other Circuits—that the evidentiary harm from spoliation requires that a court be able to remedy that harm upon a showing of negligence.[1] As the D.C. Circuit explained earlier this year, where the evidence that has been destroyed "is relevant to a material issue, the need arises for an inference to remedy the damage spoliation has inflicted on a party's capacity to pursue a claim whether or not the spoliator acted in bad faith." *Grosdidier v. Broadcasting Bd. of Governors,* 709 F.3d 19, 28 (D.C. Cir. 2013).

For a related reason, I believe that the proposed rule improperly includes adverse inference instructions within the definition of "sanctions." The D.C. Circuit has held that issue-related remedial

[1] *Buckley v. Mukasey*, 538 F.3d 306, 322-23 (5th Cir. 2008); *Byrnie v. Town of Cromwell, B.d of Educ.*, 243 F.3d 93, 109 (2nd Cir. 2001); *Adkins v. Wolever*, 692 F.3d 499 (6th Cir. 2012).

measures, like adverse inference instructions, are "fundamentally remedial rather than punitive," and are properly imposed when the destruction of evidence has "tainted the evidentiary resolution of the issue." *Shepherd v. American Broadcasting Companies*, 62 F.3d 1469, 1478 (D.C. Cir. 1995). The proposed amendment loses sight of the remedial purpose of sanctions and lesser remedial measures like adverse inferences, focusing only on "protecting" spoliating parties, rather than safeguarding the ability of the requesting party to prove his or her claim or defense.

The Advisory Committee's comments to the proposed amendment state that it is intended to protect "potential litigants who make reasonable efforts to satisfy their preservation responsibilities." A negligence standard, or gross negligence standard, is a more appropriate means of accomplishing this goal.

A willfulness or bad faith standard is not necessary to protect those "who make reasonable efforts." Parties "who make reasonable efforts" are, of course, not negligent or grossly negligent. Under a negligence standard, the destruction of evidence will only lead to a sanction or an adverse inference if it is unreasonable—and only if the party was on notice that the documents may be relevant to litigation. Additionally, the current version of Rule 37(e) already accounts for concerns particular to ESI evidence by preventing sanctions where evidence is lost "as a result of the routine, good-faith operation of an electronic information system." All that is required of a party under current law—in any Circuit—is to take reasonable steps to preserve relevant documents once the party is on notice that the documents may be needed in litigation.

The proposed amendment, however, would tie courts' hands to remedy unreasonable and even reckless conduct that has led to the destruction of evidence needed to determine the truth of a matter in issue. Because the bad faith and willfulness standards are so difficult to prove, the proposed amendment will ensure that the destruction of evidence will often go unchecked. With the threat of sanctions removed, negligence will become perversely advantageous. Additionally, it is necessary to recognize that there are some unscrupulous litigants who intentionally destroy evidence. Where the opposing party is

unable to prove, to the satisfaction of a court, that the destruction was intentional and for the purpose of hiding adverse evidence, those unscrupulous litigants will be rewarded for their misconduct.

The Federal Rules of Civil Procedure should be a vehicle for protecting the integrity of civil litigation and advancing the search for truth. The proposed amendment to Rule 37(e), unfortunately, runs contrary to that purpose.

2. The proposed amendment exceeds the proper scope of the federal rules by effecting a substantive rather than procedural change in the law

Proposed Rule 37(e) is not a modest change to the Federal Rules of Civil Procedure. The Advisory Committee itself recognizes in its comments that the duty to preserve evidence relevant to anticipated or pending litigation was not created by the Federal Rules. Yet the amendment nonetheless takes on the task of regulating how that duty is to be enforced – overturning in its wake the settled and considered precedent of multiple federal circuits. Further, the comments to the amendment expressly stated that the amendment "forecloses reliance on inherent authority or state law to impose litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B)." This should not be the role of the Federal Rules of Civil Procedure.

The restriction improperly intrudes on the role of judges who must be given adequate tools and sufficiently broad discretion to manage the litigation before them. As the D.C. Circuit has explained, "the inherent power enables courts to protect their institutional integrity and to guard against abuses of the judicial process." *Shepherd*, 62 F.3d at 1472. Rule 37(e) would dramatically restrict courts' discretion to use address spoliation, foreclosing reliance on inherent authority altogether. Such dramatic intrusion on the trial court's role in protecting the integrity of the process should not be undertaken lightly.

Additionally, proposed Rule 37(e) would undermine substantive federal regulations. The EEOC has promulgated regulations requiring employers to preserve certain personnel documents that are routinely used in employment discrimination cases. *See, e.g.*, 29 C.F.R. § 1602.14. Numerous circuits have recognized that violation of such a regulation can support an inference of spoliation and

corresponding remedial measures by a court.[2] Rule 37(e) would prevent courts from enforcing employers' regulatory obligations where willfulness or bad faith could not be proven. A proposed rule of procedure should not be enacted if it would so directly limit the enforcement of federal regulation.

3. The proposed rule raises grave fairness concerns, especially for civil rights plaintiffs

In civil rights cases, the documents that can substantiate discrimination are largely in the control of the defendant rather than the plaintiff. In an employment discrimination case, for example, hiring and personnel documents, or the files containing information about comparable candidates, are controlled by the employer. If the employer destroys that evidence, the plaintiff, court, and jury will be unable to determine the truth of what Congress has recognized to be a vitally important social issue: does the employer treat employees and applicants equally on the basis of race, gender, religion, and disability? In the words of Judge Lamberth, former Chief Judge of the D.C. District Court, "plaintiffs alleging discrimination should not be forced to prove their cases based on the defendants' choice of files and records" due to spoliation. *Webb v. District of Columbia*, 189 F.R.D. 180, 187 (D.D.C. 1999).

Fairness requires that the party who has been injured by the destruction of evidence should not also bear a heavy burden of proof to demonstrate that content of the destroyed documents and that the documents were destroyed in bad faith. The proposed rule sets a standard that will be hard for civil rights plaintiffs—or any requesting party—to meet.

The proposed rule appears to place the burden on the requesting party to show both (1) substantial prejudice to the case and (2) the bad faith or willfulness of the spoliating party. As to the first, it is difficult to demonstrate prejudice, much less substantial prejudice, without evidence of what information or comments the destroyed records contained. For this reason, many courts require a less onerous showing that the documents would have been relevant to a contested issue. Even then, courts have warned against requiring "too specific a level of proof" of relevance, because "in the absence of the

[2] *Talavera v. Shah*, 638 F.3d 303, 311-12 (D.C. Cir. 2011); *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 108-09 (2nd Cir. 2001); *Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir. 1994); *Hick v. Gates Rubber Co.*, 833 F.2d 1406, 1419 (10th Cir. 1987).

destroyed evidence, a court can only venture guesses with varying degrees of confidence as to what the missing evidence would have revealed." *Gerlich v. U.S. Dept. of Justice*, 711 F.3d 161 (D.C. Cir. 2013). *See also Kronisch v. United States*, 150 F.3d 112, 127-28) (2nd Cir. 1998); *Ritchie v. United States*, 451 F.3d 1019, 1025 (9th Cir. 2006). Similarly, showing the *mens rea* of the spoliating party is difficult because the party who requested documents has no direct knowledge of what was or was not done to preserve documents, and any evidence of the reasons for the destruction is likewise in the hands of the spoliating party.

Although the proposed rule provides an exception to the bad faith or willfulness requirement where the spoliation has "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation," this exception is too narrow to be of any comfort. *See* Proposed Rule 37(e)(1)(B)(ii). It is almost impossible to prove that a party would have had a successful case but for the destruction of documents. The Advisory Committee comments, moreover, acknowledge that this exception will apply only in "narrowly limited circumstances" and suggest application where tangible evidence, like an allegedly damaged vehicle, is lost. *See* Advisory Committee note, *discussing Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001). If the provision is applied in that manner, it will reach only a tiny portion of cases in which spoliation has dramatically prejudiced the requesting party.

4. The proposed rule should not apply to paper documents

While I oppose the rule change altogether, I strongly suggest that if adopted, it should apply only to ESI. The concerns about the burden of preservation expressed by the committee relate only to the cost of storing ESI. *See* Advisory Committee note to Proposed Rule 37(e). Similarly, the testimony of Andrew Pincus before this Subcommittee rationalized this rule as a means of addressing the increasing costs associated with data storage. These concerns do not apply equally to the preservation of hard copy documents.

The Advisory Committee further argues "[b]ecause digital data often duplicate other data, substitute evidence is often available" to replace any evidence that may be destroyed. *See* Advisory

Committee note to Proposed Rule 37(e). Paper documents, however, are often both irreplaceable and important to proving discrimination. For example handwritten interview notes, meeting notes, application forms, or comments on applications can be crucial to proving a host of issues that arise in employment discrimination cases, such as the employer's assessment of the plaintiff and other candidates, the decision points in hiring and promotions, and – ultimately – discriminatory intent. *See, e.g., Talavera*, 638 F.3d at 312 (a strong spoliation inference was warranted because the destroyed interview notes "represented Talavera's best chance to present direct evidence that Streufert's proffered reason for the selection was pretextual").

Where the destroyed documents are irreplaceable, allowing more discovery or shifting attorneys' fees is simply not a solution. Once the documents have been destroyed, additional discovery many times over will not be able to recreate evidence which no longer exists. Likewise, shifting fees cannot undo the harm to the requesting party's ability to prove its case.

* * *

In sum, I strongly believe that the proposed Rule 37(e) should not be adopted and spoliation law should be left as it has been decided by our able federal courts. If some version of the amendment is adopted, it should reflect a negligence standard or a gross negligence standard rather than bad faith or willfulness, and the rule should be restricted to ESI.

Statement of

LAWYERS FOR CIVIL JUSTICE

Before the

SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS

Hearing on

"Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"

November 5, 2013

I. Introduction and Summary

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Subcommittee on Bankruptcy and the Courts concerning the Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure ("proposed amendments") currently pending before the Advisory Committee on Civil Rules ("Advisory Committee" or "Committee").

The proposed amendments are a significant step towards a national, uniform spoliation sanction approach and a fair and practical revised scope of discovery. Fundamental discovery reform is necessary because the costs and burdens associated with discovery, especially electronic discovery, have put our civil justice system in "serious need of repair."[2] In a significant fraction of cases, discovery rather than the underlying merits drives the outcome of legal disputes.

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[1] Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 25 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] AM. COLLEGE OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., FINAL REPORT 2 (2009), *available at* http://iaals.du.edu/library/publications/final-report-on-the-joint-project-of-the-actl-task-force-on-discovery-and-i.

There is widespread agreement that discovery costs are affecting the outcome of cases. A survey of the Association of Corporate Counsel administered by the Institute for the Advancement of the American Legal System[3] found that 80 percent of chief legal officers or general counsels disagree with the statement that "outcomes are driven more by the merits of the case than by litigation costs." That survey also found that over 70 percent of chief legal officers or general counsels believed that parties "overuse permitted discovery procedures" by going beyond what is necessary or appropriate for the particular case, and 97 percent believe that litigation is too expensive.

Corporate defense counsel are not alone in perceiving a serious problem. The American College of Trial Lawyers data[4] and that of the American Bar Association,[5] both representative of views from plaintiffs' and defense bar, show a widespread opinion that discovery is too expensive; that costs, rather than the merits, forces settlements; and that e-discovery is abused. Put simply, there is solid agreement among a diverse spectrum of stakeholders that the high costs and burdens of discovery are skewing the civil justice system.

It is no wonder that more and more litigants are fleeing American courts for other forms of dispute resolution or, if unable to do so, settling cases early and without regard to the merits in an effort to avoid the expense and unpredictability of litigation—meanwhile, serious discussion about the vanishing jury trial and what it means for civil justice continues.

Because of the Advisory Committee's decision to move forward with the proposed amendments discussed herein, there is now an opportunity to have a real impact on the costs and burdens of discovery—a goal that many before have attempted but failed to achieve. LCJ supports this effort while strongly urging the Advisory Committee to make important additions and modifications to the proposed rules that will enable the Advisory Committee to achieve its goal of improving our civil justice system.

II. Preservation and Sanctions: Proposed Rule 37(e)

A. A New Preservation Rule is Urgently Needed.

Preservation of electronically stored information (ESI) has developed into one of the major cost drivers in litigation. The electronic information explosion is not the problem. The unfettered scope of discovery and the lack of a uniform, national preservation standard have created an environment in which ancillary litigation about preservation thrives.

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[3] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL (2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Civil_Litigation_Survey2010.pdf .

[4] Rebecca Love Kourlis, Jordan M. Singer, & Paul C. Saunders, *Survey of experienced litigators finds serious cracks in U.S. civil justice system,* 92 JUDICATURE 78 (Sept. -Oct. 2008), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Survey_Experienced_Litigators_Finds_Serious_Cracks_In_US_CJS2008.pdf .

[5] AMERICAN BAR ASSOC. SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT (Dec. 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf.

Preservation issues are currently decided on a case-by-case basis by courts that have created their own *ad hoc* "litigation hold" procedures. Without clearly defined preservation rules, parties struggle to draw the line on the scope of preservation—especially in the period prior to commencement of litigation—and are often forced to incur extraordinary expenses in an attempt to meet the most stringent requirements. Organizations must divert resources to "defensive preservation" and individual litigants are faced with costly spoliation/sanctions battles that they simply do not have the economic resources to fight.[6] There has been a dramatic escalation in reported decisions on the topic, indicating the tip of an iceberg of motion practice and unfairness.[7]

The only alternative to costly over-preservation is to risk severe and embarrassing sanctions for failing to preserve what might be pertinent ESI. Many courts impose severe sanctions, such as an adverse-inference jury instruction, on the basis of a party's unintentional failure to meet *ad hoc* requirements that do not exist in any rule and may vary from jurisdiction to jurisdiction.

In other words, the lack of a clear preservation rule forces a Hobson's Choice: Preserve too much, incurring high storage costs, significant burdens on custodians, and the resulting challenges of analysis and production of huge volumes of information, or preserve too little, and face the risk of second-guessing with spoliation allegations that can result in a case-altering jury instruction that a party was a "bad actor" (even without a finding of bad faith), which inevitably causes an adverse judgment.

Often lost in this discussion is that fact that most of the information subject to preservation has almost no direct relevance to the claims or defenses at issue. For example, Microsoft Corporation reported in 2011 that that "[f]or every 2.3 MB of data that are actually used in litigation, Microsoft preserves 787.5 GB of data—a ratio of 340,000 to 1."[8] In terms of numbers of pages, Microsoft reported that in its average case, 48,431,250 pages are preserved, but only 142 are actually used.[9] Microsoft indicates that these ratios are even more pronounced in 2012 and 2013.

The fear of sanctions and the inability to navigate the conflicting standards has bred an alarming increase in ancillary satellite litigation. Allegations of spoliation are easy to make because, in the absence of clearly defined limits on preservation, something "more" almost always could have been done to preserve digital information.

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[6] *Bozic v. City of Washington*, 912 F. Supp. 2d 257, 260, n. 2 (W.D. Pa. 2012) ("Neither state of affairs is a good one.").

[7] There has been a dramatic escalation in spoliation motions and rulings since the already elevated levels reported to the 2010 Duke Litigation Conference. *See* Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L. J. 789, 791 (2010) ("an all-time high").

[8] Letter from the Microsoft Corporation to Honorable David G. Campbell, Chair, Advisory Committee on Civil Rules (August 31, 2011).

[9] *Id.*

Proposed Rule 37(e)(1)(B) is a significant improvement over the current rule, but as explained in LCJ's Public Comment,[10] the proposal will meet its potential only if the rule is confined to a clear and simple standard without the current unpredictable and unmanageable exceptions.

III. Scope and Proportionality: Rules 26(b)(1) and 26(c)

A. The Proposed Amendments' Focus on Claims, Defenses and Proportionality Is a Much-Needed Reform.

The broad scope of discovery as interpreted under current Rule 26(b)(1) is a fundamental cause of the discovery problems addressed above and in LCJ's prior comments.[11] The ill-defined boundaries of modern discovery result in the preservation and production of staggering volumes of data which ultimately contribute little to the resolution of the case. A survey of "major" companies revealed that, although the average number of pages produced in discovery in major cases that went to trial was 4,980,441, the average number of exhibit pages totaled just 4,772—a mere 0.10% of the total production.[12] Such statistics, together with the costs and burdens of producing documents make it unsurprising that e-discovery has been described as a "morass"[13] that "is crushing"[14] or "could ruin"[15] the civil justice system.

LCJ strongly supports the Advisory Committee's proposal to amend Rule 26(b)(1). These modest edits would produce an important reduction in abusive discovery practices without depriving anyone of necessary information. No longer would parties be left to divine the amorphous boundaries of discovery based on the ill-defined and troublesome standard of what is "relevant to the subject matter involved in the action." Instead, the claims and defenses pled by any party would provide a clear anchor to which any discovery must be attached.

Thus, a single question becomes the measurement by which to proceed in discovery: "How is this information relevant to a claim or defense asserted by any party?" While the "relevance" of particular evidence may remain open to some interpretation, to be sure, the ability to articulate the clear tie between any potentially discoverable information and a claim or defense plead by any party would provide a meaningful and useful standard upon which to base discovery decisions.

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[10] LAWYERS FOR CIVIL JUSTICE, PUBLIC COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES (August 30, 2013) *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267.

[11] LAWYERS FOR CIVIL JUSTICE ET AL., RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE (May 2, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=40.

[12] LAWYERS FOR CIVIL JUSTICE ET AL., STATEMENT ON LITIGATION COST SURVEY OF MAJOR COMPANIES, App. 1 at 16 (2010) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

[13] AM. COLLEGE OF TRIAL LAWYERS & INST. FOR ADVANCEMENT OF THE AM. LEGAL SYST., INTERIM REPORT B-1 (Aug. 1, 2008) *available at* http://www.actl.com/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=3650.

[14] *Id.* at B-4.

[15] *Id.* at B-3.

By reducing the amount of information subject to discovery in any case—as the proposed amendment is intended to do—the costs of discovery will necessarily also go down. Moreover, to the extent parties will nonetheless be obligated to expend time and resources on their discovery efforts, the information at issue will have greater potential actually to affect their case.

Rule 26(b)(1) would also benefit *greatly* from the emphasis on inclusion of the considerations that bear on proportionality, currently in Rule 26(b)(2)(C)(iii). The concept of proportionality has been present in the rules for many years, but is routinely ignored in favor of notions of broad and liberal discovery. Despite this, recent jurisprudence has made clear that considerations of proportionality have an important place in discovery and should be seriously considered by all parties.[16] Explicitly referencing proportionality in Rule 26(b)(1) will encourage its early application and thus reduce the likelihood that ultimately unhelpful information is nonetheless caught up in a party's discovery efforts.

B. Adding a Materiality Standard Would Further the Goal of Encouraging Proportional Discovery.

Despite our strong support for the proposed amendments to Rule 26(b)(1), LCJ remains concerned that historically broad notions of discovery and relevance could prevent the amendment from fulfilling its potential unless the Advisory Committee adds a materiality requirement to Rule 26(b)(1). Such a materiality standard would be added as follows:

> "Parties may obtain discovery regarding any non-privileged matter that is relevant **[and material]** to any party's claim or defense . . ."

This small but impactful addition to the rule would promote the proper purpose of discovery, namely "the gathering of material information,"[17] and ensure proportionality in both preservation and production by clearly signaling the end to expansive interpretations of scope and relevance. Prior efforts to reign in the scope of discovery, when matched against such notions, have unfortunately fallen short. Indeed, the effects of the 2000 amendment to Rule 26(b)(1) (which bifurcated discovery into two tiers: attorney-managed and court-managed), is an instructive example. That amendment was unsuccessful in its goal to focus discovery on the claims and defenses involved in the action.[18] Instead, it has been widely reported that the amendment was generally ignored.[19]

A materiality standard has proven successful in other jurisdictions. In England, for example, Rule 31.6, which defines what must be disclosed in a party's "standard disclosure," has been

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[16] *See, e.g., Rimkus Consulting Group, Inc. v. Cammarata,* 688 F. Supp. 2d 598 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to the case and consistent with clearly established applicable standards.").

[17] An E-Discovery Model Order, Introduction 2 (Fed. Cir. 2011) *available here*: http://www.cafc.uscourts.gov/2011/model-e-discovery-order-adopted-by-the-federal-circuit-advisory-counsel.html.

[18] FED. R. CIV. P. 26 advisory committee's note (2000) ("The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action.").

[19] *See* LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE CIVIL RULES ADVISORY COMMITTEE, A PRESCRIPTION FOR STRONGER MEDICINE: NARROW THE SCOPE OF DISCOVERY, 7-9 (Sept. 2010) *available at* http://www.lfcj.com/articles.cfm?articleid=1 .

interpreted to require production of only those documents upon which a party relies in support of their contentions in the proceedings and those documents which "*to a material extent* adversely affect a party's own case or support another party's case."[20] After 15 years, this model of disclosure remains in effect and has reportedly resulted in significant curtailment of excess discovery. Adoption of such a proposal would serve to align discovery more closely with the needs of individual cases—a positive result that would comport well with the Committee's articulated goal to "adopt effective controls on discovery while preserving the core values that have been enshrined in the Civil Rules from the beginning in 1938."[21]

C. Incorporating Cost Allocation into Rule 26(c) is a Positive Step.

We also support adoption of the proposed amendment to Rule 26(c) adding an express recognition that protective orders may allocate expenses for discovery. LCJ has long supported changes to the current cost allocation models in the American civil justice system and in particular to the default "rule" that a producing party must pay for the costs of responding to an opposing party's discovery requests.[22] Although a small step toward our larger vision of reform, express recognition of the court's authority to allocate discovery expenses is an important first step. Such express recognition of this authority, in addition to emboldening the courts to address more effectively the rampant problems of disproportional discovery, will place requesting parties on notice that they may be required to bear the costs of responding to their requests, and thus encourage more careful deliberation regarding the true needs of the case.

IV. Presumptive Numerical Limits: Rules 30, 31, 33 and 36

LCJ supports adoption of the presumptive numerical limits to discovery *as part of a larger amendments package*. We believe that lower limits will be useful in encouraging parties to reflect on the true needs of each case[23] (proportionality) and will result in an adjustment of expectations concerning the proper amount of discovery in civil litigation.[24] This adjustment in

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[20] 1 WHITE BOOK SERVICE, at 909 (The Right Honourable Lord Justice Jackson ed., 2012) (emphasis added).

[21] Committee on Rules of Practice and Procedure, *Agenda Materials, Cambridge, MA, January 3-4, 2013*, at 227, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf.

[22] A requester-pays rule would encourage parties to focus discovery requests on evidence that is important to proving or defending against the claims, and would significantly reduce if not eliminate any tactical reason to engage in overbroad discovery. *See* LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE CIVIL RULES ADVISORY COMMITTEE & DISCOVERY SUBCOMMITTEE, THE UN-AMERICAN RULE: HOW THE CURRENT "PRODUCER PAYS" DEFAULT RULE INCENTIVIZES INEFFICIENT DISCOVERY, INVITES ABUSIVE LITIGATION CONDUCT AND IMPEDES MERIT-BASED RESOLUTIONS OF DISPUTES (April 1, 2013) *available at* http://www.lfcj.com/articles.cfm?articleid=169; LAWYERS FOR CIVIL JUSTICE ET AL., RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE (May 2, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=40 .

[23] *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, at 268 (discussing proposed numerical limitations on depositions and explaining that the "*lower limit can be useful in inducing reflection on the need for depositions*, in prompting discussions among the parties and - when those avenues fail - in securing court supervision.") (emphasis added)), *available at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.*

[24] *Preliminary Draft of Proposed Amendments, supra* note 24, at 268 (discussing proposed numerical limitations on depositions and explaining: "Hopefully, the change will result in an adjustment of expectations concerning the appropriate amount of civil discovery.").

expectations is particularly vital in light of the recent explosion of electronic information and its problematic effects on modern discovery.

We are aware that the lowering of the numerical limitations has engendered opposition from plaintiffs' counsel, and in particular those involved in employment litigation. Comments seem particularly focused on the potential difficulty of obtaining relevant information if the proposed amendments are adopted. Such fears are unfounded, however, in light of the presumptive nature of the proposed limitations, which is made clear in the text of the affected rules. If amended, for example, Rule 30 would specifically state that "the court must grant leave" to take additional depositions "to the extent consistent with Rule 26(b)(1) and (2)." Similar language is also present in the other affected rules. Thus, the proposed amendments merely seek to encourage more careful contemplation of the true needs of each case and the best way to accommodate them. This is specifically confirmed in the language of the proposed Committee Note to Rule 33, which explains that "[a]s with the reduction in the presumptive number of depositions under Rules 30 and 31, the purpose is to encourage the parties to think carefully about the most efficient and least burdensome use of discovery devices."

In response to arguments that lower presumptive limitations will result in increased motions practice, we echo the words of the Advisory Committee which, when addressing the proposed presumptive limitations to the number of allowed depositions, acknowledged that some cases will require more and noted that "*parties can be expected to agree, and should manage to agree, in most of these cases.*"[25] Moreover, motions practice regarding current limitations is relatively uncommon, and there is little reason to think parties will be less able to cooperate on these issues as a result of the proposed amendments.

In short, the proposed presumptive numerical limitations would serve to address the problems of modern discovery by both limiting the volume of information subject to discovery in most cases and by encouraging proportionality, even in cases where the presumptive limitations may need adjustment.

V. Conclusion

The American civil justice system is in crisis. Litigants are fleeing American courts for other forms of dispute resolution or, if unable to do so, are settling cases early and without regard to the merits. This is due to what an overwhelming percentage of legal practitioners observe in their daily experience: the costs and burdens of discovery are too high and discovery, particularly e-discovery, is being abused. The proposed amendments are a commendable, and in some cases, essential antidote for many of the ills affecting the American system of civil justice. LCJ supports the Advisory Committee's work in developing the proposed rules, which hold the promise of rescuing the system. But we strongly urge the Committee to make the necessary changes discussed in our Public Comment[26] in order to ensure that the Committee's efforts—unlike so many that have failed before—result, this time, in meaningful reform.

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[25] *Preliminary Draft of Proposed Amendments, supra* note 24, at 268 (emphasis added).

[26] LAWYERS FOR CIVIL JUSTICE, PUBLIC COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES (August 30, 2013) *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267.

November 4, 2013

U.S. Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Proposed amendments to Federal Rules of Civil Procedure 26, 30, 31, 33 & 36

Dear Chairman and Subcommittee members:

Alliance Defending Freedom writes to oppose some of the proposed changes to Federal Rules of Civil Procedure 26, 30, 31, 33 & 36. Specifically, Alliance Defending Freedom opposes the changes limiting discovery because they will greatly hinder the ability of litigants to hold governmental entities and officials accountable for infringements of civil liberties.

Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for freedom – primarily regarding First Amendment rights. Thus, Alliance Defending Freedom regularly represents individuals and organizations in complex, federal civil rights lawsuits against local, state, and federal government entities that violate their constitutional and statutory rights. *See, e.g., Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013) (challenging Affordable Care Act requirement that employers provide insurance coverage for contraceptives and abortifacients); *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99 (3d Cir. 2013) (enjoining school district policy restricting elementary student's religious expression). In light of its unique experience, Alliance Defending Freedom wishes to offer its expertise to explain how the proposed rule changes will impede litigants' ability to hold governmental actors accountable for violations of civil liberties.

Alliance Defending Freedom is opposed to the following proposed changes to the Federal Rules of Civil Procedure:

- Limiting discovery to be "proportional to the needs of the case";
- Limiting the number of requests for admission to 25;
- Lowering the presumptive number of interrogatories from 25 to 15;
- Lowering the presumptive number of depositions from 10 to 5;
- Lowering the presumptive deposition time from 7 hours to 6.

These proposed changes threaten the ability of litigants to protect civil liberties in two ways. First, making discovery "proportional" to "the needs of the case" is an extremely vague standard. Seizing on this vagueness, governmental defendants may try to limit discovery in religious liberty cases by portraying constitutional freedoms as insignificant because of the small damage awards usually at stake in these cases. Indeed, governmental defendants regularly downplay the significance of

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plaintiffs' freedoms to justify censorship of them. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012) (rejecting argument of EEOC that religious organizations had no basis for a special rule grounded in the Religion Clauses to seek a ministerial exemption from Title VII). And defendants may also use this same logic to try to limit discovery and make it more "proportional" to their mistaken valuation of constitutional freedoms. Moreover, civil liberty litigants usually cannot point to large damage awards to prove the importance of their case since they usually can obtain only nominal damages for stand-alone constitutional violations. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (noting that plaintiffs are entitled to recover "nominal damages not to exceed one dollar…" for the violation of constitutional rights without other injury). Government defendants often point to this small damage award to argue that civil liberty cases are insignificant. *See, e.g., Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 764 (8th Cir. 2008) (rejecting school district's argument that student's nominal damage award on First Amendment claim was "merely technical or de minimis."). So in light of this general mindset downplaying the significance of civil liberties and civil liberty litigation, Alliance Defending Freedom is concerned that the "proportionality" limitation will be disproportionately applied to civil liberty litigants and harm their efforts to conduct discovery about important, albeit nonmonetizable, freedoms.

Second, the changes limiting the amount of discovery will prevent civil liberty litigants from uncovering and proving constitutional and statutory violations. In civil liberty cases, the burden usually rests on plaintiffs to identify a government policy that caused the alleged violation and to prove that a particular government official was personally involved in and, in some instances, acted with a requisite level of intent to commit the alleged violation. But government wrongdoers often hide their actions and purpose behind a morass of administrative bureaucracy and paperwork. *See, e.g., OSU Student Alliance v. Ray*, 699 F.3d 1053, 1063-79 (9th Cir. 2012) (holding university officials accountable for enforcing unwritten policy despite officials' argument that they never enforced this policy). Thus, more so than most other litigants, civil liberty litigants need extensive discovery to cut through this large governmental bureaucracy so that they can find that key piece of evidence revealing the government's improper purpose and improper policy. In this respect, by uniformly limiting discovery across the board, the proposed discovery limits stack the deck against litigants attempting to hold large governmental entities accountable. As a result, the proposed discovery limits disproportionally hinder civil liberty litigants in their efforts to uncover wrongdoing and to incentivize government entities to respect every citizen's civil liberties.

These are just some of the reasons Alliance Defending Freedom encourages the subcommittee to reject the discovery limits proposed for Federal Rules of Civil Procedure 26, 30, 31, 33 & 36. These rules as presently written strike the proper balance between efficiency and truth-seeking and still allow courts to curtail unnecessary discovery in appropriate cases. Changing this balance will only threaten the ability of litigants to protect civil liberties and to hold governmental actors accountable for wrongdoing on a systematic scale.

Sincerely,

Jonathan Scruggs
Legal Counsel