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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
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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

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[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

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[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.