STATEMENT OF

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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.