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NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Testimony of John Payton

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Before the United States Senate Committee on the Judiciary

Hearing on

"Has the Supreme Court Limited Americans' Access to Courts?"

Dirksen Senate Office Building
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INTRODUCTION

Good morning, Chairman Leahy, Ranking Member Sessions, and Members of the Judiciary Committee. My name is John Payton. I am President and Director-Counsel of the NAACP Legal Defense & Educational Fund, Inc. (LDF). I am pleased to testify today on the important topic raised by today's hearing: *Has the Supreme Court Limited Americans' Access to the Courts?* LDF's Litigation Director, Debo Adegbile, testified last month before the House Subcommittee on the Constitution, Civil Rights and Civil Liberties on the same subject.

The brief answer to the question posed by this hearing is: "Yes." Two of the Supreme Court's recent cases have severely heightened the pleading standard for federal cases and thus substantially impaired Americans' access to justice. We urge Congress to respond immediately to this serious problem and restore that access.

The Legal Defense Fund was founded in 1940—just as the Federal Rules were adopted. We have used those rules to great effect. Relying on the Constitution and laws which Congress began to enact during the civil rights movement, we have brought civil rights and human rights cases on behalf of African Americans, Hispanic Americans, Asian Americans and white Americans, men and women, straight and gay. We have helped create an anti-discrimination principle that applies to employment, public accommodations, education, housing, union representation, police treatment, the vote and economic justice.

The ability to enforce rights created power in the people who were the victims of discrimination. When an aggrieved person—an African American who is denied the low mortgage rate that is offered to a white person, for example—can assert rights in court, it empowers that individual. Those rights can be asserted against the government, from the local to

the federal. Those rights can also be asserted against private parties, from individuals to a large corporation.

For those rights to be real, they must be enforceable. That enforceability requires access to the courts. One of the critical elements of our system of justice is its open access. If that access is curtailed, the power of victims of discrimination to redress wrongdoing is also curtailed.

This fundamental principle of open access is now threatened in very real terms by two recent Supreme Court decisions, *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*.[2] Although *Iqbal* was decided just this year, these decisions already are constricting severely the pursuit of civil rights claims in our nation's federal courts. By suddenly imposing new pleading requirements that are far more stringent than the longstanding standard set forth in the Federal Rules of Civil Procedure, the Supreme Court has erected a significant barrier that operates to deny victims of discrimination their day in court. This is nothing short of an assault on our democratic principles. As United States District Judge Jack Weinstein recently commented about the detrimental impact of this heightened pleading standard, "[A] true 'government for the people' should ensure that 'the people' are able to freely access the courts and have a real opportunity to present their cases."[3]

We believe that Congress should act immediately to prevent the Supreme Court's rulings in *Iqbal* and *Twombly* from further undermining access to courts for victims of discrimination. Given the important policy objectives behind our nation's civil rights laws and the hard-fought

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

[2] __ U.S. __, 129 S. Ct. 1937 (2009).

[3] Judge 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).

battles to secure their passage, Congress has a substantial interest in robust enforcement of civil rights laws. It should treat seriously threats that can, as one court warned, "chill" the pursuit of civil rights claims. Congress should take steps to ensure that persons can enter the courthouse door when seeking protection under civil rights statutes.

Congressional action in this context would be entirely consistent with earlier actions spearheaded by members of this Committee to promote access to the courts for civil rights litigants—for example, through the creation of private rights of action and fee shifting statutes to encourage legal representation. We urge Congress to address this new and dangerous shift in the pleading standard that now threatens to undermine enforcement of our civil rights laws.

NOTICE PLEADING IN THE CIVIL RIGHTS CONTEXT

The Federal Rules of Civil Procedure set forth the liberal pleading standard that shaped litigation for decades. Rule 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." The Federal Rules were designed to ensure that meritorious claims were not foreclosed by procedural obstacles at the commencement of a case.

In 1957, during the early years of the civil rights movement, the Supreme Court recognized that a liberal pleading standard was essential to civil rights litigation. In *Conley v. Gibson*,[4] African-American members of the Brotherhood of Railway and Steamship Clerks sued the union for violating its duty of fair representation under the Railway Labor Act. After they were demoted or discharged and replaced mostly by white employees, the plaintiffs alleged that the union discriminated against them by failing to protect them on the same basis as white

[4] 355 U.S. 41 (1957).

railway employees. The case was part of a larger civil rights strategy, led by Charles Hamilton Houston, to ensure that unions treated all of their members fairly, without regard to race.

The Court allowed the employees' complaint to proceed. It unanimously held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt than the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[5] The Court noted that if the allegations were proven, there was a "manifest breach" of the union's duty "to represent fairly and without hostile discrimination all of the employees in the bargaining unit."[6]

Significantly, the Court addressed and rejected the union's argument that the African-American workers' complaint failed to identify specific facts to support their "general allegations" of discrimination. The *Conley* Court held that the Federal Rules "do not require a claimant to set out in detail the facts upon which he bases his claim," but instead require only "a short and plain statement of the claim" that will afford the defendant fair notice of the claim and the grounds therefore.[7] According to the Court, notice pleading was sufficient because discovery and other pretrial procedures were appropriate mechanisms to reveal the precise nature of claims and narrow the disputed facts and issues prior to trial.[8] As discussed below, under *Twombly* and *Iqbal*, defendants now might succeed in the type of attack on plaintiffs' "generalized pleading" that *Conley* rejected.

Conley affirmed that the purpose of the Federal Rules' liberal pleading standard was to eliminate procedural traps at the beginning of litigation that could prove fatal to a claim: "The

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[5] *Id.* at 45-46.

[6] *Id.* at 46.

[7] *Id.* at 47.

[8] *Id.* at 47-48.

Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits"[9] Placed in the civil rights context—*Conley* was decided in 1957—these liberal pleading standards were a critical prerequisite to ensure that victims of discrimination could take full advantage of the emerging federal substantive law on civil rights. When combined with appropriate discovery and other pretrial procedures, these liberal pleading standards guaranteed that civil rights litigants were afforded the opportunity to adjudicate their claims on the merits. It is not an overstatement to say that the key successes of civil rights litigation in the last half century are due, in part, to the pleading standard set forth in the Federal Rules and reinforced by the Court in its seminal decision in *Conley*.

CONSEQUENCES OF *TWOMBLY* AND *IQBAL* FOR CIVIL RIGHTS CASES

The Supreme Court's decisions in *Twombly* and *Iqbal* drastically altered *Conley*'s pleading requirements, upon which all types of litigants consistently relied for over fifty years. In *Twombly*, the Court held that the no-set-of-facts "notice" pleading standard articulated in *Conley* should not apply to the plaintiff's anti-trust claims. Instead, the Court enunciated a far stricter "plausibility" standard whereby a plaintiff in anti-trust litigation is required to plead "enough facts to state a claim to relief that is plausible on its face."[10] Two years later, the Court in *Iqbal* extended application of that stricter standard to all civil cases.[11] *Iqbal* defined "plausibility" as requiring more than the mere possibility of misconduct."[12] Instead, the plaintiff

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[9] *Id.* at 48.

[10] 550 U.S. at 570.

[11] 129 S. Ct. at 1953.

[12] *Id.* at 1950.

must provide enough "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[13]

Although *Iqbal* was issued only six months ago, its harm is already palpable. Without intervention by Congress to return to the liberal pleading standard under *Conley*, there is a real danger that many more meritorious civil rights cases will be dismissed. The substitution of plausibility pleading for notice pleading has grave consequences for most types of civil rights litigation. Indeed, it is doubtful today that the discrimination complaint in *Conley* itself would have survived a motion to dismiss under the new Supreme Court framework.

The plausibility standard created by the Supreme Court allows reliance on a procedural tool to achieve a substantive result. Cases can now be dismissed at first glance, for reasons having to do solely with procedural deficiency and without the benefit of any careful and meaningful fact-finding. Moreover, in a number of civil rights cases, courts have applied *Twombly* and *Iqbal* to dismiss cases with prejudice, thereby foreclosing any opportunity to amend the complaint once more information is acquired.[14] This outcome is fundamentally at odds with Congress's intent to provide effective enforcement of our nation's civil rights laws. Short-circuiting litigation through artificial barriers undermines our national interest in robust and expansive application of these laws.

As several observers have noted, the imposition of a heightened standard at the pleading stage effectively converts a motion to dismiss into one for summary judgment.[15] In determining

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[13] *Id.* at 1949.

[14] *See, e.g., Vallejo v. City of Tuscon*, No. CV-08-500 TUC DCB, 2009 WL 1835155, at *2-4 (D. Ariz. June 26, 2009).

[15] Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS AND CLARK L.REV., __ (forthcoming 2010) (special symposium issue on *Iqbal*),

whether a claim is plausible, a judge must now assume the role of fact-finder. Courts must sift through the complaint, first distinguishing factual allegations from legal conclusions and then assessing the strength of the factual "showing" of each claim in order to determine whether the plaintiff is plausibly entitled to relief.[16] Appraisal of the facts at the pleading stage deprives plaintiffs of the tools later available through pretrial procedures and comes dangerously close to supplanting adjudication on the merits by jury trial.

Most significantly, the heightened pleading standard institutionalizes a disadvantage for plaintiffs when it comes to discovery. Plaintiffs are placed squarely in a no-win situation. Typically, most of the information relevant to a civil rights case is within the exclusive province of the defendant—through its agents, employees, records and/or documents. In order to prosecute claims on the merits, civil rights litigants must necessarily take full advantage of opportunities for discovery permitted by the Federal Rules of Civil Procedure. Prior to the commencement of discovery, it is extremely costly, difficult and often impossible for plaintiffs to conduct extensive factual development. The stricter pleading standard set forth in *Iqbal* and *Twombly* therefore deprives plaintiffs of facts known only to the defendant precisely when they are necessary to respond to a dispositive motion—a potentially fatal blow to plaintiffs when operating under the new standard.

These obstacles to discovery are further compounded in civil rights cases which often turn on questions of intent. In *Iqbal*, the Court rejected the plaintiff's complaint because he did

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1494683; Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH.U.J.L. & POL'Y 61, 66, 98 (2007).

[16] *Iqbal*, 129 S. Ct. at 1949-50.

not plead facts "sufficient to plausibly suggest [the defendants'] discriminatory state of mind."[17] The court considered whether it was more plausible that lawful intent or discriminatory intent motivated the defendants and found the former was more "likely."[18]

In an upcoming article, Professor Robert Bone emphasizes the difficulty of establishing intent in civil rights cases based on limited information available at the pleading stage:

> These problems are likely to be especially serious for civil rights cases, and particularly cases like *Iqbal* involving state-of-mind elements. Because of the difficulty obtaining specific information about mental states, many cases that would have a good chance of winning with evidence uncovered in discovery will be dismissed under a thick screening model that demands specific factual allegations at the pleading stage.[19]

In civil rights cases today, proof of intentional discrimination is often accomplished through various means, including but not limited to reliance on circumstantial evidence. Fortunately, in the twenty-first century, there are relatively fewer instances of overt examples of discrimination—"smoking guns" or statements laced with expressly racist overtones. Discrimination today is more subtle, more sophisticated and therefore not immediately detectable. It is usually difficult to set forth at the pleading stage the complete set of facts and circumstances that may ultimately convince a factfinder that discrimination occurred. The Third Circuit has noted this dilemma:

> Anti-discrimination laws and lawsuits have "educated" would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an

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[17] *Iqbal*, 129 S. Ct. at 1952.

[18] *Id.* at 1951-2.

[19] Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. ___ (forthcoming 2010), draft of Sept. 3, 2009, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1467799, at 33.

> individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial "smoking gun" behind. As one court has recognized, "[d]efendants of even minimal sophistication will neither admit discriminatory animus or leave a paper trail demonstrating it."[20]

Even disparate impact claims, where proof of intentional discrimination is not required, are substantially more difficult under *Iqbal* and *Twombly* because they often turn on analysis of data and other information that usually is under the exclusive control of defendants.

Moreover, *Iqbal* added another even more pernicious factor to the equation. Under *Iqbal*, the assessment of whether facts plausibly suggest a discriminatory state of mind is a "context-specific task," in which a court must "draw on its judicial experience and common sense."[21] This framework represents a further departure from the historical standard in which legal sufficiency was determined within the four corners of the complaint. It reinforces the highly subjective nature of the Court's newly fashioned plausibility analysis; and it potentially injects bias and inconsistency into the process because judges are instructed to draw on their own personal experience, as well as on common sense, which defies legal definition. Significantly, these judgments are virtually unreviewable because trial courts are granted wide discretion under *Iqbal* and *Twombly* to conclude that a claim is implausible and thus dismiss a complaint without permitting critical factual development of discrimination allegations.

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[20] *Aman v. Cort Furniture Rental Corp*., 85 F.3d 1074, 1081-82 (3d Cir. 1996) (quoting *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir.1987)).

[21] *Iqbal*, 129 S. Ct. at 1950.

Given the great risk of dismissing potentially meritorious claims, the Court's newly heightened pleading standard is simply not the proper vehicle for eliminating frivolous or unfounded claims from our federal court system. The Federal Rules of Civil Procedure provide other ample opportunities to dispose of insufficient claims at various stages of litigation. For instance, Rule 11 requires certain representations, subject to sanction, about the legitimacy of claims and the likely evidentiary support which will follow from discovery. Rule 12(e) provides defendants an opportunity to file a motion for a more definite statement when a plaintiff's complaint is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Federal judges have also developed extensive case management tools such as "phased discovery" and multiple status conferences to monitor the pretrial process and establish a framework for settlement discussions. And of course, Rule 56 remains available to parties who wish to seek dismissal of a case prior to expending the resources and costs associated with taking a case to trial. Litigants have successfully employed these devices for decades. Congress should be loath to allow an end-run around these established procedures, particularly one that jeopardizes its longstanding legislative goal of robust enforcement of civil rights laws.

IMPACT OF *TWOMBLY* AND *IQBAL* ON SPECIFIC CIVIL RIGHTS CLAIMS

In the months since *Iqbal* was decided, federal courts around the country have relied on *Iqbal* and *Twombly* to dismiss claims arising under several civil rights statutes as well as the Constitution itself.[22] In some of these cases, courts acknowledged that the complaint could have survived a motion to dismiss under *Conley*, but nonetheless determined that the heightened

[22] *See, e.g.*, Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014 (2009) (demonstrating that, even before *Iqbal*, *Twombly* prompted a surge of dismissals of employment discrimination claims).

pleading standard under *Iqbal* and *Twombly* required dismissal. One court even referred to the "chilling effect" of the new heightened pleading standard on civil rights enforcement.[23] The message emanating from these cases, which will undoubtedly grow in volume, is that no substantive area of civil rights is beyond the reach of *Iqbal* and *Twombly*. As a result, plaintiffs with potentially meritorious cases are being and will be denied their day in court, absent prompt intervention from Congress.

Voting Rights: In *Vallejo v. City of Tucson*, a court dismissed a complaint by a Latino voter who raised a claim under the Voting Rights Act. The plaintiff had attempted to vote in a city election, but he was turned away for lack of sufficient identification and not provided with a provisional ballot as required. The plaintiff alleged in the complaint that a city official had informed him that he was wrongfully denied his right to vote and that he should have been afforded a provisional ballot. Nevertheless, the court dismissed the complaint in reliance on *Twombly*. The court concluded the allegations were insufficient to show that the electoral process was not equally open to participation by racial minorities in violation of the Voting Rights Act. Thus, at the earliest stage of the case and without the benefit of any discovery, the court summarily resolved a contested factual issue and concluded that the failure to issue a provisional ballot "was an isolated incident and in no way affected the standard, practice, or procedure of the election."[24]

Housing Discrimination: In Avenue *6E Investments v. City of Yuma*, one of the nation's most prominent fair housing attorneys filed a classic zoning discrimination complaint. The complaint challenged a Arizona municipality's denial of a zoning application to use undeveloped

[23] *See* Ocasio-*Hernandez v. Fortuno-Burset*, 639 F.Supp.2d 217, 226 n.4 (D. Puerto Rico 2009).

[24] No. CV-08-500 TUC DCB, 2009 WL 1835155, at *3 (D. Ariz. June 26, 2009).

land to build homes for low to moderate income families in a predominately white high-income neighborhood. The application was submitted by a developer with a history of building affordable housing primarily for Hispanic purchasers. Relying on *Twombly* and *Iqbal*, the federal district court dismissed the developer's Fair Housing Act claims. The court held that the developer did not plausibly allege discriminatory intent on the part of the city, even though the complaint asserted that, based on the developer's distinctive reputation for serving Hispanic clients, the city treated the developer's rezoning application differently than those it had approved for several surrounding properties. The complaint further alleged that the city council members had overruled the municipality's planning commission and denied the zoning application to further the interests of surrounding landowners who favored racial segregation. The court also dismissed the developer's disparate impact claim based on the dubious reasoning that the city had approved other projects' requests for high-density use rezoning, even though those projects were undertaken by developers that did not have the same track record of providing affordable housing to minorities.[25]

Age Discrimination in Employment:[26] In *Adams v. Lafayette College*, a fifty-one-year-old man claimed under the Age Discrimination in Employment Act that he was disciplined differently from younger employees and treated differently from younger employees with respect to promotions, training, and job assignments. In response to the defendant's motion to dismiss, the plaintiff argued that dismissal would "improperly limit a plaintiff's ability to raise a

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[25] No. 2:09-cv00297 JWS, (D. Ariz. July 2, 2009).

[26] In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Supreme Court rejected a heightened pleading standard for employment discrimination cases. Although this decision remains good law and was expressly affirmed in *Twombly*, 550 U.S. at 569-70, some courts have held that *Twombly* and *Iqbal* have overruled *Swierkiewicz. See, e.g., Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009).

discrimination claim by requiring the plaintiff to muster the crucial evidence, which is most often in the defendant's hands."[27] Nevertheless, the court effectively resolved a factual issue by summarily concluding that the disciplinary action in question was just as easily explained by non-discrimination. The court noted that "[t]the absence of factual allegations indicating a closer, causal link between the suspension decision and [the plaintiff's] age as opposed to an employer's general disciplinary concerns leave the claim at the conceivable stage."[28]

Discrimination on the Basis of Disability: In *Logan v. Sectek*, a security officer was injured on the job. After he was cleared to return to duty, he applied for a similar position with the company that had assumed his employer's contract for the security job. In his complaint, the plaintiff alleged that the new employer refused to hire him, despite his qualification for the job, because it perceived him to be disabled. The complaint stated that a managerial employee informed the plaintiff that he would not be hired because he had been out of work due to injury. Nevertheless, the court dismissed the complaint under *Iqbal*, finding the allegations insufficient to take the claim from "the realm of possibility to plausibility."[29] Specifically, the court found that the manager's statement did not indicate whether he perceived the injury to substantially limit the plaintiff's ability to work.[30]

Racially Segregated Prison Conditions: In *Kyle v. Holinka*, an African-American prisoner challenged racial segregation in cell assignments. The plaintiff alleged numerous statements by federal prison officials acknowledging a segregation policy, including one by a

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[27] No. 09-3008, 2009 WL 2777312, at *4 (E.D. Pa. Aug. 31, 2009).

[28] *Id.* at *3.

[29] 632 F. Supp. 2d 179, 184 (D. Conn. 2009).

[30] *Id.* at 183.

manager who stated, "This is the way we do it here."[31] The court first allowed the plaintiff's claims against regional and national prison officials, but it subsequently reversed its ruling in light of *Iqbal*, which, according to the court, "implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion."[32] At the same time, the court also dismissed the claim against the prison warden on the ground that the plaintiff failed to allege any facts showing the warden implemented a discriminatory policy.[33]

Discrimination Based on Political Affiliation: In *Ocasio-Hernandez v. Fortuno-Burset*, employees of the Puerto Rico governor's mansion claimed they were terminated due to their political affiliation two months after the governing party assumed office and replaced them with employees of that party. The court dismissed the claims on the ground that the plaintiffs had not alleged sufficient facts showing that defendants knew of their political affiliation or that a casual connection existed between their affiliation and their termination.[34] The court wrote that its ruling was mandated by *Iqbal*, "although draconianly harsh to say the least." It noted that defense counsel, who was experienced in political discrimination litigation, had not filed a motion to dismiss under the pre-*Iqbal* standard and that the case had been fast-tracked for trial before *Iqbal* was decided. The court lamented:

> [E]ven highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without "smoking gun" evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery, obtain the direct and/or circumstantial

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[31] No. 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009).

[32] *Id*.

[33] *Id.* at *2.

[34] 639 F. Supp. 2d 217 (D. Puerto Rico 2009).

> evidence needed to sustain the First Amendment allegations. … Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983.[35]

Civil rights cases are not the only cases in danger of unwarranted dismissal under the heightened pleading standard. The *Iqbal* Court's expansion of *Twombly* to all civil cases places in jeopardy innumerable personal injury and consumer cases, most of which require full development of the facts before facing a dispositive motion.[36] For example, even in a straightforward slip-and-fall case, a district court recently dismissed a complaint as insufficient, holding that "the Plaintiff has failed to allege any facts that show how the liquid came to be on the floor, whether the Defendant knew or should have known of the presence of the liquid, or how the Plaintiff's accident occurred."[37] As would be plainly evident to even a non-lawyer, a plaintiff typically has no means of uncovering most of this information absent at least limited discovery—which *Iqbal* effectively denies.

As litigators, we understand only too well how effective use of discovery and other pretrial procedures can make all the difference in the adjudication of the merits of a case. A powerful example comes from one of LDF's seminal school desegregation cases, *Swann v. Charlotte-Mecklenburg Board of Education*. In a rather remarkable passage, the district court judge acknowledged how the litigation process had changed his understanding of the discrimination experienced by the African-American students:

> The case was difficult. The first and greatest hurdle was the district court. The judge, who was raised on a cotton farm which had been tended by slave labor in his grandfather's time, started the case with the uninformed assumption that no

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[35] *Id.* at 226 n. 4.

[36] For an empirical study documenting these trends, see Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, draft of Oct. 12, 2009, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1487764.

[37] *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at *2 (W.D. Va. Aug. 24, 2009).

> active segregation was being practiced in the Charlotte-Mecklenburg schools, that the aims of the suit were extreme and unreasonable, and that a little bit of push was all that the Constitution required of the court. The plaintiffs, making extensive use of [discovery], demonstrated that segregation in Charlotte was no accident and that it was still the systemic practice of the school administration and the community at large. These and other facts … produced a reversal in the original attitude of the district court.[38]

The danger of *Iqbal* is that it will deny victims of discrimination the opportunity to challenge the preconceptions of judges and the broader public by exposing entrenched and pernicious impediments to justice and equal opportunity.

CONCLUSION

At the core of our democratic principles is the ability to participate equally in our civic institutions. Equal access to our system of justice has to be a top priority. The decisions in *Twombly* and *Iqbal* now threaten that access by effectively barring litigants from the courthouse through a procedural ruse that had previously been rejected by courts, including the Supreme Court over fifty years ago. We are hopeful that Congress will recognize the manifest unfairness rendered by these opinions and take immediate steps to reaffirm in the clearest terms that, as Rule 8(e) emphasizes, "[p]leadings must be construed so as to do justice."

[38] 60 F.R.D. 483, 484-85 (W.D.N.C. 1975).