

Testimony of Debo P. Adebile

**Director of Litigation of the
NAACP Legal Defense and Educational Fund, Inc.**

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Access to Justice Denied: Hearing on *Ashcroft v. Iqbal*

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Introduction

Good morning Chairman Nadler, Ranking Member Sensenbrenner, and members of the Subcommittee. I am Debo Adebile, Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc. (LDF). I am grateful for the opportunity to testify before the House Subcommittee on the Constitution, Civil Rights and Civil Liberties at this hearing, Access to Justice Denied: Hearing on *Ashcroft v. Iqbal*, regarding the state of the pleading standard following that recent Supreme Court decision.

LDF has been on the front lines of many of the great civil rights battles. LDF's hard-fought victories were possible largely because ordinary individuals had ready access to the courts to litigate vigorously their meritorious but often unpopular claims. Indeed, civil rights litigation has spurred much of our Nation's progress toward the fulfillment of the promises of our Constitution. Some of these courtroom victories were very significant in their own right; others catalyzed legislative change. In our democratic system, civil rights litigation has played a vital role in enforcing the law, ensuring equality, and protecting the powerless.

In *Iqbal*, as well as its predecessor *Bell Atlantic v. Twombly*, the Supreme Court has taken unwarranted and unwelcome steps toward limiting civil rights litigation by restricting ordinary individuals' access to courts. The judicially heightened pleading barriers erected by the Supreme Court in these two cases represent ill-crafted and overbroad encroachments on the role of Congress and other institutional actors. A decisive legislative response is necessary. Time and again, Congress has acted to encourage individuals to serve as private attorneys general and robustly enforce critical constitutional and federal statutory rights. Congressional action is needed now to ensure that *Twombly* and *Iqbal* neither severely undercut civil rights litigants' ability to root out discrimination where it exists, nor create a dangerous type of safe harbor where some may come to consider themselves beyond the reach of enforcement.

The Critical Importance of Liberal Pleading Standards

The Court's sharp break from precedent in *Twombly* and *Iqbal* threatens a dramatic shift away from the liberal pleading standards set forth in the Federal Rules of Civil Procedure. Liberal pleading standards were deliberately established to avoid failed earlier approaches which, in effect, treated pleading as a screen or trap for too many meritorious claims. Notably, under Rule 8(a)(2), a plaintiff's complaint is generally sufficient if it includes nothing but "a short and plain statement of the claim showing that the pleader is entitled to relief." Moreover, and this is key, Rule 8(e) emphasizes that "[p]leadings must be construed so as to do justice."

As United States District Court Judge Jack Weinstein recently explained: "Under the Federal Rule's 'short and plain' general pleading standards, the idea was not to keep litigants out of court but rather to keep them in."¹ Drawing on his experience as a member of the federal bench for over forty years and as a member of the team that assisted LDF's first Director Counsel Thurgood Marshall in litigating *Brown v. Board of Education*, Judge Weinstein distilled the purposes of liberal pleading standards:

[T]hey were optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through. Litigants would have straightforward access to courts, and courts would render judgments based on facts not form. The courthouse door was opened to let the aggrieved take shelter.²

Almost two decades after the Federal Rules were adopted, the Supreme Court recognized in a case called *Conley v. Gibson* that liberal pleading standards were essential to the progress of the emerging civil rights movement.³ *Conley* was part of a larger campaign by civil rights activists, assisted by LDF attorneys, to persuade unions throughout the country to defend equal rights for all workers, regardless of their race. In *Conley*, African American railway employees alleged that their union, the Brotherhood of Railway and Steamship Clerks, had violated its duty of fair representation under the

¹ 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).

² *Id.* (internal citations and quotation marks omitted).

³ 355 U.S. 41 (1957).

Railway Labor Act. The union refused to intervene when the Texas and New Orleans Railroad purported to abolish 45 jobs held by the plaintiffs and other African American employees but instead filled the majority of those jobs with whites.⁴

In a 1957 opinion, the Court unanimously refused to dismiss the African American railroad employees' complaint. The Court affirmed that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim," rejecting the union's argument that the complaint was too "general."⁵ "To the contrary," the Court held, "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."⁶ The Court emphasized that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁷

There is a particularly powerful lesson from *Conley* that deserves emphasis: "The 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."⁸ *Conley* is a dramatic example of a case where the Court rebuffed efforts by a defendant and its counsel to inoculate themselves from a charge of stark racial discrimination through pleading gymnastics.

Overturing Well-Established Precedent: *Twombly* and *Iqbal*

For five decades, the Court repeatedly affirmed *Conley*'s "fair notice" approach that sought to prevent excessive wrangling and delay at the pleading stage in order to facilitate adjudication of civil rights claims and other litigation on the merits.⁹ During

⁴ *Id.* at 42-43.

⁵ *Id.* at 47.

⁶ *Id.* (quoting Fed. R. Civ. P. 8(a)(2)) (internal citation omitted).

⁷ *Id.* at 45-46.

⁸ *Id.* at 48.

⁹ See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

those five decades, no “Member of this Court” ever “express[ed] *any* doubt” about the “adequacy” of *Conley*’s interpretation of Rule 8.¹⁰

The first cracks in the *Conley* framework emerged two years ago in *Twombly*. The 7-2 majority opinion, authored by now-retired Justice David Souter, insisted that *Conley*’s no-set-of-facts language should not apply to the antitrust claims raised by the plaintiff’s complaint. Instead, *Twombly* promulgated a new and stricter standard, ruling that a plaintiff can survive a motion to dismiss only if he or she pleads “enough facts to state a claim to relief that is plausible on its face.”¹¹

Although the *Twombly* Court was clear that this new plausibility standard applied to the antitrust context, it left open whether it broadly applied to all civil cases. In *Ashcroft v. Iqbal*, the Court made clear that it did.¹² *Iqbal* also went much further than *Twombly* in its deviation from the *Conley* framework. Whereas *Twombly* endorsed *Conley*’s dictate that a complaint need do no more than give “fair notice” of the plaintiff’s claims and grounds for relief,¹³ *Iqbal* declined even to cite this well-established principle, and the decision substantially undermined it in practice.

In *Iqbal*, a Muslim Pakistani citizen—arrested days after September 11, 2001, and detained in federal custody—alleged that he was subjected to an unconstitutional policy of “harsh conditions of confinement” on account of his race, religion, and national origin.¹⁴ The complaint named former United States Attorney General John Ashcroft as the “principal architect” of the policy and identified FBI Director Robert Mueller as “instrumental in [its] adoption, promulgation, and implementation.”¹⁵

A sharply divided Court, with Justice Anthony Kennedy writing for the five-justice majority, held that *Iqbal*’s claims against Ashcroft and Mueller should be

¹⁰ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 578 (2007) (Stevens, J., joined by Ginsburg, J., dissenting) (emphasis in original).

¹¹ *Id.* at 570.

¹² 129 S. Ct. 1937, 1953 (2009) (quotation marks omitted).

¹³ *Twombly*, 550 U.S. at 555.

¹⁴ *Iqbal*, 129 S. Ct. at 1942.

¹⁵ *Id.* at 1944 (alteration in original).

dismissed because *Iqbal*'s complaint did not plead facts "sufficient to plausibly suggest [their] discriminatory state of mind." The Court ruled that civil litigants must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and that in making that determination a court is to "draw on its judicial experience and common sense." Applying this standard, the Court considered whether it was more plausible that lawful intent or discriminatory intent motivated Ashcroft and Mueller and found the former was more "likely."¹⁶

In a scathing dissent, Justice Souter, who was *Twombly*'s author, and three other dissenters, criticized the majority for "misapplying" *Twombly*'s pleading standard and insisted that "the complaint as a whole" complied with Rule 8 because it gave Ashcroft and Mueller "fair notice" of *Iqbal*'s claims and the grounds upon which they rested.¹⁷

Documenting the Harm to Civil Rights

The historical frame described above provides critical context to understand the extent to which *Iqbal* and *Twombly* have changed the rules of the game for civil litigants. Returning again to Judge Weinstein's observations, he criticized the Supreme Court's new plausibility pleading rule for "deviat[ing] from the notice pleading standard of the Federal Rules and violat[ing] their spirit. 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."¹⁸

Twombly and *Iqbal* have transformed the role that a complaint plays in litigation. In contrast to *Conley*'s "fair notice" requirement, the stricter plausibility pleading standard in *Iqbal* and *Twombly* compels plaintiffs to provide more of an evidentiary foundation to substantiate their claims in order to withstand a defendant's motion to dismiss. Yet, because plaintiffs typically can obtain discovery only if they survive a

¹⁶ *Id.* at 1949-52.

¹⁷ *Id.* at 1955, 1961 (Souter, J., dissenting).

¹⁸ Weinstein, *supra* note 1, at 108.

motion to dismiss, many will be denied the very tools needed to support meritorious claims, and thus wrongdoers will escape accountability.

The result is a revival of precisely the sort of pleading gamesmanship that the Federal Rules were designed to avoid. As Professor Robert Bone explains in a forthcoming article:

Strict pleading can produce screening benefits for some cases, but it does so in a relatively crude way and at an uncertain and potentially high cost. The most serious cost involves screening meritorious suits. In cases like *Iqbal*, where the defendant has critical private information, the plaintiff will not get past the pleading stage if she cannot ferret out enough facts before filing to get over the merits threshold for each of the elements of her claim. As a result, strict pleading will screen some meritorious suits, even ones with a high probability of trial success but a probability that is not evident at the pleading stage before access to discovery.¹⁹

These obstacles are particularly onerous for civil rights plaintiffs. Challenges to discriminatory policies and practices often turn on proof of subjective intent.²⁰ As Professor Bone further posits, it is difficult to establish intent based on information available to a plaintiff at the pleading stage before he or she can access evidence in the possession of the defendant through discovery:

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. Moreover, screening deserving civil rights cases is particularly troubling from a social point of view. If constitutional rights protect important moral interests, then the harm from failing to vindicate a valid constitutional claim must be measured in moral terms too. This means

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.

²⁰ Even disparate-impact claims turn upon the analysis of data and other information that are usually under the exclusive control of defendants.

that the cost side of the policy balance includes moral harms, and moral harms must be accorded great weight.²¹

The danger that *Iqbal* and *Twombly* will frustrate efforts to redress civil rights violations is concerning insofar as discovery is a particularly valuable and necessary tool in uncovering the subtle and sophisticated forms of discrimination that have become more commonplace than the more overt examples that once permeated our society. As the Third Circuit has noted:

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 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.”²²

Because these more subtle forms of discrimination are designed not to be immediately detectable, a stricter pleading standard risks depriving civil rights litigants of the ability to vindicate their rights.

These concerns are not merely hypothetical. Courts around the country are using *Iqbal* and *Twombly* to dismiss pending civil rights and other cases far more frequently than they had dismissed similar cases under *Conley*.²³ For example, in *Vallejo v. City of Tucson*, city officials conceded that they wrongfully denied a provisional ballot to Frank

²¹ *Id.*

²² *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)).

²³ For empirical studies 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; Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009).

Vallejo, a Mexican American disabled veteran. Nevertheless, a district court granted dismissal of Vallejo's claim under the Voting Rights Act. The court deemed the factual allegations in Vallejo's complaint insufficient to demonstrate that the city's electoral process was not equally open to participation by racial minorities. In so doing, the court summarily disregarded what appears to have been a contested factual issue at the pleading stage without the benefit of evidence: "The Court finds the failure to issue Mr. Vallejo a provisional ballot was an isolated incident and in no way affected the standard, practice, or procedure of the election."²⁴ Similarly, a district court in Georgia held that a plaintiff's allegation that his supervisor made "numerous" racially discriminatory remarks was insufficient to establish a hostile work environment claim under the Supreme Court's new stricter pleading standard because he "has not provided allegations about the frequency of the [racially discriminatory] remarks or even the content of the remarks."²⁵

Courts have also expressly determined that *Iqbal* and *Twombly* require granting motions to dismiss in cases that would have proceeded to discovery under *Conley*'s more liberal pleading standards. For example, in *Ocasio-Hernandez v. Fortuno-Burset*, a district court dismissed a political discrimination claim under 42 U.S.C. § 1983. The plaintiffs, former maintenance and domestic employees at the Puerto Rico governor's mansion, alleged that they had been impermissibly fired less than sixty days after the governing party assumed office, and replaced by individuals belonging to the governing party.²⁶ Dismissing these claims as too "generic" and "conclusory," the court lamented the changed landscape for pleading discrimination claims in the aftermath of *Iqbal*:

[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 evidence needed to sustain the First Amendment

²⁴ No. CV 08-500 TUC DCB, 2009 WL 1835115, at *3 (D. Ariz. June 26, 2009).

²⁵ *Dorsey v. Georgia Dep't of State Road and Tollway Auth.*, No. 1:09-CV-1182-TWT, 2009 WL 2477565, at **6-7 (N.D. Ga. Aug. 10, 2009).

²⁶ No. 09-1299, 2009 WL 2393457 (D.P.R. Aug. 4, 2009).

allegations. . . . Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983.²⁷

In another case, a Wisconsin district court initially permitted a prisoner to proceed on his claim alleging that officials in the Federal Bureau of Prisons were responsible for an unwritten policy requiring racially segregated prison living quarters. After *Iqbal*, however, the court reconsidered its holding and granted the officials' motion to dismiss, concluding that the Supreme Court had "implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion."²⁸ And in *Coleman v. Tulsa County Board of County Commissioners*, a district court in Oklahoma dismissed a plaintiff's claim that, as the sole female employee in a recreational department, she had to endure "offensive and insulting" comments about her gender, as well as retaliatory disciplinary action.²⁹ The court acknowledged that the plaintiff's complaint "may have survived under *Conley*," but under the new pleading standard, it did not.³⁰

It is notable that federal courts' willingness to dismiss cases under the new pleading standard extends well beyond the civil rights context. 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."³¹ This is a fact pattern that, as any first-year law student well knows, calls for at least limited discovery because the plaintiff typically has no other means of uncovering most of this information. Nevertheless, such discovery was denied by the district court in reliance upon *Iqbal*.

²⁷ *Id.* at *6, n.4.

²⁸ *Kyle v. Holinka*, No. 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009).

²⁹ No. 08-CV-0081-CVE-FHM, 2009 WL 2513520, at *1 (N.D. Okla. Aug. 11, 2009).

³⁰ *Id.* at *3.

³¹ *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at *2 (W.D. Va. Aug. 24, 2009).

In sum, the detrimental impact of *Twombly*, and especially *Iqbal*, is increasingly apparent both in civil rights cases and more generally. For five decades, when reviewing a complaint for sufficiency, courts had been directed to view allegations in the complaint in the light most favorable to the plaintiff and draw all reasonable inferences in her favor. Under *Iqbal* and *Twombly*, the plausibility pleading standard undermines these presumptions and effectively gives the benefit of the doubt to the defendant.

Substantial Uncertainty About Access to Justice in *Iqbal*'s Wake

Iqbal and *Twombly* have also created significant uncertainty in the federal courts. First, lower courts are having difficulty reconciling *Iqbal* and *Twombly* with the Supreme Court's prior case law. The confusion has made it challenging for plaintiffs bringing routine civil rights claims to plead their cases and has created doctrinal inconsistency among the federal courts.

For example, some court decisions have evidenced confusion about the impact of *Iqbal* on *Swierkiewicz v. Sorema N.A.* In this 2002 decision, the Supreme Court unanimously and expressly rejected a heightened pleading standard in employment discrimination cases.³² For several reasons, *Swierkiewicz* remains good law. *Iqbal* did not even cite *Swierkiewicz*, and the Supreme Court has repeatedly insisted that it “does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.”³³ Moreover, *Iqbal* relied heavily on *Twombly*, in which the Court explicitly distinguished *Swierkiewicz* and affirmed its continuing vitality.³⁴ While some courts have adopted this position,³⁵ others—including the U.S. Court of Appeals for the Third Circuit—have held that *Twombly* and *Iqbal* have overruled *Swierkiewicz*.³⁶ This erroneous conclusion has resulted in unwarranted dismissals of employment discrimination claims at the pleading

³² 534 U.S. 506, 512 (2002).

³³ *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

³⁴ *Twombly*, 550 U.S. at 569-70.

³⁵ See, e.g., *Gillman v. Inner City Broad. Corp.*, No. 08 Civ. 8909 (LAP), 2009 WL 3003244 (S.D.N.Y. Sept. 18, 2009).

³⁶ See, e.g., *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009).

stage thus denying plaintiffs the opportunity to obtain discovery to support their allegations.³⁷ For instance, a federal district court in Florida dismissed a Title VII claim on the ground that the plaintiff did not include in his complaint a description of the employer's alleged non-discriminatory reason for why he was fired—even though the requirement to come forth with such a non-discriminatory reason has always rested squarely on the shoulders of the employer.³⁸

Second, *Iqbal* has provided little guidance as to what factors courts should use to determine “plausibility”—apart from a vague instruction to rely on “judicial experience and common sense.”³⁹ For instance, in *Iqbal*, the Second Circuit and the four dissenting Justices concluded that the crisis triggered by the events of September 11, 2001 made it “plausible” that top government officials had condoned a discriminatory policy. By contrast, the same crisis, in the view of the Supreme Court majority, made legitimate law enforcement purposes for the policy more “likely,” thus rendering purposeful discrimination implausible.

Because this new plausibility standard appears dangerously subjective, it could have a potentially devastating effect in civil rights cases that come before judges who may, based on the nature of their personal experiences, fail to recognize situations in which discrimination or other constitutional wrongs require redress. But these judgments are virtually unreviewable because *Iqbal* gives judges wide discretion to find a claim implausible. Moreover, it is often difficult to determine whether allegations in a complaint are plausible without the benefit of a full review of evidence that likely will not be available at the pleading stage before a plaintiff has the opportunity to obtain discovery.

The dangers of this plausibility standard are apparent when we recall that a deeper examination of the facts has often altered judges' initial preconceptions. For example, in

³⁷ See, e.g., *Wilson v. Pallman*, No. 09-0787, 2009 WL 2448577 (E.D. Pa. Aug. 7, 2009).

³⁸ *Ansley v. Florida, Dep't of Revenue*, No. 4:09cv161-RH/WCS, 2009 WL 1973548, at *2 (N.D. Fla. Jul. 8, 2009).

³⁹ 129 S. Ct. at 1950.

Swann v. Charlotte-Mecklenburg Board of Education, a landmark school desegregation case litigated by LDF, the district court judge recognized that it was only through litigation that he had come to appreciate fully the gravity of the discrimination that African American school children experienced:

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 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.

Yet, after the plaintiffs presented reams of evidence to support their claims, "they produced a reversal in the original attitude of the district court."⁴⁰

Of course, the benefits of close scrutiny of the facts are not limited to the courthouse. In one well-documented legislative example, Representative Henry Hyde commented that his initial views changed during the 1982 reauthorization of the Voting Rights Act. In an opinion piece, he wrote:

As the ranking Republican member of the House Judiciary Committee's subcommittee on civil and constitutional rights, I came to this issue with the expressed conviction that, indeed 17 years was enough Then came the hearings. Witness after witness testified to continuing and pervasive denials of the electoral process for blacks. As I listened to testimony before the subcommittee I was appalled by what I heard. . . . As long as the majestic pledge our nation made in 1870 by ratifying the 15th Amendment remains unredeemed, then its redemption must come first.⁴¹

Representative Hyde's candid comments attest to the powerful ways in which a full evidentiary record can challenge assumptions and change minds. Yet, *Twombly* and *Iqbal* place excessive emphasis on a form of pleading-stage proof and therefore deny plaintiffs—and by extension society as a whole—precisely this opportunity to focus on determining whether, in fact, discrimination and other civil rights violations persist. The point here is simple. While experience can inform a judge's assessment of a case, it is

⁴⁰ 66 F.R.D. 483, 484-85 (W.D.N.C. 1975).

⁴¹ Representative Henry J. Hyde, Op-Ed, *Why I Changed My Mind on the Voting Rights Act*, Wash. Post, July 26, 1981, at D7.

precisely because judges come to the bench with differing life experiences that rules promoting greater objectivity and reliance upon the introduction of facts are preferred.

LDF is also concerned about the portion of the Supreme Court’s ruling in *Iqbal* that substantially limits the ability of plaintiffs to bring lawsuits against federal officials in their capacity as supervisors—an issue that was not even briefed by the parties. As Justice Souter pointedly noted in his dissent, the Court severely restricted liability against high-level government officials.⁴² *Iqbal* effectively requires that plaintiffs plead with particularity that high-level government officials themselves acted with a discriminatory purpose. But the occasions will be extremely rare where a plaintiff can access information about a high-level official’s intent prior to discovery. Moreover, judges may be particularly resistant, without such evidence, to assume that invidious discrimination on the part of their counterparts in the executive branch is plausible.

Conclusion

In light of the problems created by *Twombly* and *Iqbal*, LDF urges Congress to act decisively to restore access to the courts, a fundamental pillar of our democracy and a key reason why our nation has made so much progress in the civil rights arena. LDF does not discount concerns about discovery abuse that led the Supreme Court in *Twombly* and *Iqbal* to tighten the pleading standard for plaintiffs. Yet, as Justice John Paul Stevens correctly noted in his dissent in *Twombly*, “[t]he potential for ‘sprawling, costly, and hugely time-consuming’ discovery is no reason to throw the baby out with the bathwater.”⁴³ But that is precisely what many courts have done in adopting the new plausibility pleading standard without limitation.

Simply put, the costs are too great if Congress does nothing. With each passing day, courts are turning away potentially meritorious claims—without the benefit of any fact-finding.

⁴² 129 S. Ct. at 1957 (Souter, J., dissenting).

⁴³ 550 U.S. at 595 n.13 (Stevens, J., dissenting) (quoting the majority opinion).