Statement of

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

Good afternoon, Mr. Chair and Members of the Subcommittee. I thank you for inviting me to appear before you today and I applaud your efforts to ascertain the effects this case is having on access to justice.

I am John Vail of Washington, D.C. I have a broad perspective on the federal courts. I practiced for many years in rural America, representing primarily low-income persons. Currently I work for a traditional law firm, the Center for Constitutional Litigation, and have a national practice focused on cases dealing with the right of access to courts and the right to jury trial. Among my clients is Jamie Leigh Jones, whose horrific story of gang-rape in Baghdad at the hands of Halliburton employees has led to proposed changes in the law of mandatory arbitration. Also among my clients is the American Association for Justice (AAJ) on whose behalf I regularly appear before the rulemaking committees of the Judicial Conference of the United States. My firm filed an *amicus curiae* brief on behalf of AAJ in the *Iqbal* case.

I want to emphasize three points in my testimony today:

- You should not view *Iqbal* in isolation. It is not just another incremental limitation on access to courts. It puts improperly broad and additional power into the hands of judges while adversely affecting the authority the Constitution reposes in juries.
- *Iqbal* undermines the idea that no person is above the law. It insulates persons with power from scrutiny they justly should undergo.
- *Iqbal* flouts the rulemaking process that Congress created to deal carefully with questions about federal civil procedure. Reversing *Iqbal* legislatively merely returns to the status quo of fifty years of practice and allows that process to function.

Iqbal: The Context

In 1938, the Federal Rules of Civil Procedure were adopted and the era of litigation by gamesmanship was supposed to end. Pleading, in particular, was supposed to become simple, as illustrated by form pleadings that are appended to the Rules.[1] In earlier practice, pleading had been a nightmare.[2] Lawyers did great battle over the sufficiency of particular statements, filed multiple pleadings to assure that facts ultimately proved conformed to some pleading in the record, wasting large amounts of time and effort. The new rules had and ostensibly have one end: "to secure the just, speedy, and inexpensive determination" of cases. Fed. R. Civ. P. 1.

To secure that end, the rules require little to commence a lawsuit, the primary requirement being "a short, plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2). The rules were designed to implement a fundamental American value: that everyone is entitled to their day in court.[3] To commence a lawsuit, it was enough for a person to say, without much gussying up: this person wronged me in the following ways . . . ; it

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[1] Rule 84 states, "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." It is not at all clear that the forms suffice under *Iqbal*.

[2] *See generally* Charles E. Clark, *The Complaint in Code Pleading*, 35 Yale L.J. 259 (1926). Yale Law School Professor Clark, later a Judge of the Second Circuit, is widely viewed as the guiding force behind adoption of the Federal Rules of Civil Procedure.

[3] The concept of open and accessible courts is an article of American faith, finding expression in the nation's seminal constitutional law decision: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803). The Court soon added:

> As to the words from Magna Charta, . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Bank of Columbia v. Okely, 17 (4 Wheat.) U.S. 235, 244 (1819).

is within your power to redress that wrong; I want redress.[4] It was intentionally easy for an aggrieved person to open the courthouse door. Notice pleading, as the U.S. Supreme Court explained in 1947, "restrict[s] the pleadings to the task of general notice - giving and *invest[s] the deposition - discovery process with a vital role in the preparation for trial*." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (emphasis added). Without the compulsory process that discovery represents, a plaintiff is without means to assert certain facts upon which a lawsuit may turn and must extrapolate or speculate about those facts based on the evidence thus far available. The framers of the 1938 federal rules understood this and did not want the inability to obtain all the facts pre-suit to bar the courthouse door.

Under the 1938 Rules, the courthouse door opened easily, but that didn't mean anyone could hang around the courthouse for long. The rules offered summary disposition if, after a chance for investigation with the benefit of subpoena power, an aggrieved person could not marshal enough facts to warrant summoning a jury.

Iqbal changes that paradigm in an unwarranted way. No longer does a complainant who can say that something wrong occurred have the authority to confront the wrongdoer, with the confrontation carefully controlled by a judge.[5] *Iqbal* clearly condemns *any* use of discovery absent a showing that a claim is "plausible."[6] *Iqbal* follows *Bell Atlantic Corp. v. Twombly*,[7] in this regard. Read together, the two cases leave no doubt that the Supreme Court intended a sea

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[4] *See* Form Complaints.

[5] *Iqbal* explicitly rejects "the careful-case-management approach." *Twombly* similarly rejected a case management approach, but was not wholly clear whether the rejection was for all cases or was specific to the context of antitrust law. *Iqbal* left no doubt.

[6] *Ashcroft v. Iqbal*, 129 S.Ct 1937, 1953-54 (2009) ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.").

[7] 550 U.S. 544 (2007).

change in pleading law, even though the author of *Twombly*, now-retired Justice Souter, dissented in *Iqbal*, rebelling against the further pleading restrictions *Iqbal* effected. A person is now barred even from entering the courthouse, once more hanging around, absent being able to drum up facts that convince a federal judge – someone who breathes fairly rarified air – that her claim is subjectively "plausible."

This tightening of standards for access to courts, and particularly for access to juries, is part of a trend that countermands a more long-term, historical trend in favor of access. For at least twenty years power has been transferred from juries to judges. The "trilogy" of summary judgment opinions in 1986[8] took certain factual questions away from juries[9] and probably is responsible for a quadrupling of the rate of cases disposed of at this stage of litigation.[10] Extensive use of this procedure has had particularly troubling consequences for plaintiffs in civil rights cases.[11]

The Supreme Court has granted greater power to judges to decide what expert evidence jurors might hear,[12] which has further curtailed access to juries.[13]

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[8] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electrical Industries Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[9] *See*, *e.g.*, Marcy J. Levine, Comment, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 Emory L.J. 171, 215 (1988); Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years after the Trilogy*, 63 Wash. & Lee L. Rev. 81, 82, 86-88, 143-44 (2006). *See also Poller v. Columbia Broadcasting Service, Inc*., 368 U.S. 464, 473 (1962) ("Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'").

[10] Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah*?, 1 J. Empirical Legal Stud. 591, 592, 617-18 (Nov. 2004).

[11] Stewart J. Schwab & Kevin J. Clermont, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103 (Winter 2009).

[12] *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

The rate of jury trials has declined and continues to decline.[14] Today, federal judges, on average, try only three civil cases per year.[15] This decline has constitutional dimensions. The First Amendment's Petition Clause grants persons the right to have courts resolve their disputes, and the Seventh Amendment requires that juries, not judges, weigh facts and make inferences about what is "plausible."

The plausibility standard the Court has propounded is highly subjective: "determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense."[16] Here is how the then-chair of the ABA Litigation Section assessed the plausibility standard:

> … *Iqbal* has the potential to shortcircuit the adversary process by shutting the doors of federal courthouses around the nation to large numbers of legitimate claims based on what amounts to a district court judge's effectively irrefutable, subjective assessment of probable success. This is so notwithstanding a complaint containing well-pled factual allegations that, if allowed to proceed to discovery and proved true at trial, would authorize a jury to return a verdict in the plaintiff's favor.

Robert L. Rothman**,** Twombly *and* Iqbal*: A License to Dismiss*, 35 Litigation 1, 2 (Spring 2009). The Constitution, specifically the Seventh Amendment, preserves the common-law authority of juries because juries represent the common sense and experience of the community. We do not rely on judges for that for a reason: judges are generally drawn from the highest reaches of legal

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[13] *See* D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 Alb. L. Rev. 99, 104 (2000).

[14] *See* Judge William G. Young, *An Open Letter to U.S. District Judges*, 50 Federal Lawyer 30 (July 2003).

[15] Based on *2006 Report of the Director: Judicial Business of the United States Courts*, http://www.uscourts.gov/judbus2006/contents.html, Table C-7 (12,612 trials, 2,097 civil jury trials), Table X-1A (674 judgeships).

[16] *Iqbal*, 129 S.Ct. at 1940.

experience, one that is apart and different from that of the community.[17] Preferring jurors to judges for this purpose is not merely a reflection of American historical experience. It is also a recognition that the jury is the most diverse public decisionmaking body in America. Juries' decisions are more apt to engender the trust of the populace than decisions made by judges.[18]

The idea that it matters that the public trusts the courts goes to my second major point. The better someone is at keeping their misdeeds private, the more *Iqbal* insulates them from liability: purveyors of secrecy remain above the law. *Twombly* itself, many civil rights cases, and many products liability cases attack actions that the defendants are trying to hide from scrutiny. Ask what facts from the public domain the pleader in *Twombly* reasonably could have been expected to plead: that the conspirators rented a banquet room at a resort for the "How We Can Conspire to Reduce Competition" conference? People don't conspire in public. There was nothing in the public domain about the bad design of Ford Pinto gas tanks. The tobacco industry was not exactly forthright in disclosing its knowledge about the effects of smoking.

The corporate defendants in these kinds of cases have received many benefits from the state: limited liability for investors; perpetual life; the opportunity to grow to gargantuan size. Human plaintiffs need the assistance of the state to keep the playing field level. Subpoena power helps them uncover the facts hidden within the labyrinthine bureaucracies that exist as a result of state indulgence.

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[17] *See, e.g.*, Stephan Landsman, *The Civil Jury In America: Scenes From An Unappreciated History*, 44 Hastings L.J. 579 (1993); Young, *Open Letter*, supra n. 14

[18] *See* Young, *Open Letter*, supra n. 14, at 31 ("The acceptability and moral authority of the justice provided in our courts rests in large part on the presence of the jury. It is through this process, where rules formulated in light of common experience are applied by the jury itself to the facts of each case, that we deliver the very best justice we, as a society, know how to provide.").

The public is not apt to trust a judicial system that rewards opacity and provides only weak tools to make things transparent. If representatives of the public – a jury – could find after being instructed in the law that alleged conduct is condemnable, our courts must accommodate an effort to bring to light the facts that support the claim. That was the standard under *Conley v. Gibson*,[19] that is the standard that the Supreme Court has erased, and that is the standard that Congress should restore, subject to the processes of the Judicial Conference.

Iqbal and *Twombly* are both premised on an idea – not established empirically in either case – that costs of discovery are a troublesome drag on certain litigants and a drag on the economy. That premise has been widely propounded on behalf of organizations that are not only too big to fail, but seem to be too big to be disbelieved.[20] Available empirical information belies the premise,[21] at least for the great bulk of cases. There remain cases, small in number but large in stakes, in which discovery can, indeed, become protracted and costly. But those costs can be and are controlled through case management and do not justify disposing of cases before they even begin. *Iqbal* and *Twombly* are causing such dispositions.

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[19] 355 U.S. 41 (1957).

[20] *See, e.g.*, University of Denver, *Final Report on the Joint Project of the American College of Trial Lawyers (ACTL) Task Force on Discovery and the Institute for the Advancement of the American Legal System* (2009), *available at* http://www.du.edu/legalinstitute/publications2009.html. *See generally* Robert S. Peck & John Vail, *Blame It on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. Sch. L. Rev. 323 (2006-07).

[21] Emery G. Lee, III & Thomas Willging, Federal Judicial Center, *National Case-Based Civil Rules Survey, Preliminary Report to the Federal Judicial Conference Advisory Committee on Civil Rules* (Oct. 2009).

Empirical evidence supports that assertion with regard to *Twombly*.[22] The evidence regarding the more recently decided *Iqbal* is necessarily anecdotal. Despite the large number of cases that cite *Iqbal* – as of last week, 2,692 – discerning how it is affecting cases requires reading each case. I have not read all those cases. But I have at least perused a couple of hundred. I am concerned, and that concern is shared by others. As one district court judge put it, "even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a [civil rights] political discrimination suit without 'smoking gun' evidence."[23] Let me illustrate some problems *Iqbal* is causing.

Antitrust is an area of particular concern, as we rely heavily on private parties to police competition. In *Tam Travel, Inc. v. Delta Airlines, Inc.* (*In re Travel Agent Comm'n Antitrust Litig.*),[24] the Sixth Circuit dismissed an antitrust claim of conscious parallelism. In dissent, Judge Merritt suggested that *Iqbal* and *Twombly* did not actually change pleading standards radically – an assertion with which I do not concur – but made clear that the cases were changing results: "district court judges across the country have dismissed a large majority of Sherman Act claims on the pleadings[,] misinterpreting the standards from *Twombly* and *Iqbal*, thereby slowly eviscerating antitrust enforcement under the Sherman Act." *Id.* (Merritt, J., dissenting).[25]

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[22] Joseph A. Seiner, *The Trouble With* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011, 1013-14 (2009) (finding Title VII cases dismissed at a higher rate under *Twombly*); Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study On the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 Notre Dame L. Rev. 1811, 1815 (2008) (same).

[23] *Ocasio-Hernandez v. Fortuno-Burset*, No. 09-1299, 2009 WL 2393457, *6, n.4 (D. Puerto Rico 2009).

[24] --- F.3d ----, No. 07-4464, 2009 WL 3151315 (6th Cir. Oct. 2, 2009).

[25] As examples, Judge Merritt cited *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, No. 08-md-1972 TSZ, 2009 WL 2581510 (W.D. Wash. Aug. 18, 2009) (dismissing antitrust conspiracy claim, despite four individual guilty pleas to conspiracy, because the pleas involved a different trade lane and "plaintiffs offer no particulars concerning the locations or dates of any meetings"); *Bailey Lumber &*

Civil rights cases have been impacted by *Iqbal*. *Ocasio-Hernandez v. Fortuno-Burset*, is a good example.[26] We should pause at a pleading standard that makes it difficult, even with experienced counsel, to get into court to complain of discrimination based on political affiliation. The same is true of cases of racial discrimination. In *Fletcher v. Phillip Morris USA, Inc.*,[27] an African American middle manager who had worked for Phillip Morris for 17 years had his complaint dismissed without leave to amend. His allegations of discrimination were detailed, including "eight incidents of alleged discrimination or disparate treatment by employees at Philip Morris."[28] He alleged that never in seventeen years had there been another instance like his, when a Vice-President was involved in an evaluation.[29] These allegations supported factually his assertion that "'similarly situated whites, females and non-black males' were treated differently than Plaintiff," an allegation the court dubbed, fatally, "conclusive."[30] The court said, "this is precisely the type of inference – one drawn from conclusory allegations unsupported by

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Supply Co. v. Ga.-Pac. Corp., No. 1:08CV1394LG-JMR, 2009 WL 2872307 (S.D. Miss. Aug. 10, 2009) (finding an alleged conspiracy among competitors to share pricing information freely with one another at any time to be implausible because pricing information also was published twice weekly); and *Burtch v. Milberg Factors, Inc.*, No. 07-556-JJF-LPS, 2009 WL 1529861 (D. Del. May 31, 2009) (rejecting a plaintiffs' argument that *Twombly* and *Iqbal* permit a complaint to survive when it appears from the pleading that unlawful conduct is "just as likely" as lawful conduct). *See also*, e.g., *Hinds County, Mississippi v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499 (S.D.N.Y. 2009) (dismissing claims against Bank of America's competitors for failure to allege specifics of their involvement in conspiracy even though Bank of America had entered the Department of Justice amnesty program and had admitted to conspiracy with competitors).

[26] See also *Argeropoulos v. Exide Technologies*, in which the court posited that the hostile work environment claim before it might have survived under old standards, but did not under *Iqbal*. No. 08-cv-3760, 2009 WL 2132443, *6 (E.D.N.Y. 2009).

[27] No. 3:09CV284, 2009 WL 2067807 (E.D. Va. July 14, 2009).

[28] *Id*. at *6.

[29] *Id*.

[30] *Id*.

any facts – prohibited by *Twombly* and *Iqbal*."[31] It is hard to see how a factual allegation that the treatment of one black male was unique does not support an inference that the treatment was different from that accorded whites, females, and non-black males.

The factual assertions were thinner in *McTernan v. City of York*,[32] but *Iqbal* still played a role in throwing the plaintiff abortion protestors out of court. The plaintiffs, whose religious beliefs compelled their actions,[33] alleged that the defendants' precluded them from protesting on an access ramp that encroached on a public sidewalk and that defendants "'intended to chill, restrict, and inhibit" plaintiffs from freely exercising their religious beliefs. The court, applying *Iqbal*, faulted the plaintiffs for not alleging "that they are treated differently than others." Given the unlikelihood that non-religious protestors had demanded access to a ramp to a Planned Parenthood clinic for purposes of protesting, how were the plaintiffs to plead disparate treatment?

McTernan and *Fletcher* illustrate the difficulty *Iqbal* creates for pleading state of mind. In *Iqbal* the plaintiff had pleaded that defendants "'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'"[34] The Court condemned these "bare assertions . . . [that] amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[35] Compare these "bare assertions" of state of mind with those contained in the form pleadings appended to

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[31] *Id*. at *7.

[32] 577 F.3d 521 (3d Cir. 2009).

[33] *Id*. at 524.

[34] *Iqbal* at 1951 (elisions in original).

[35] *Id*.

the Rules, and established by Rule 84 to suffice under the Rules. Here is the state of mind provision from Civil Form 21, Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b):

> 4. On <Date>, defendant <Name> conveyed all defendant's real and personal property <if less than all, describe it fully> to defendant <Name> *for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.*

That is not much different from the "conclusory" allegations in *McTernan*, *Fletcher*, or *Iqbal*.

One of the reasons we adopted the Federal Rules was to rid ourselves of endless and irresolvable debates about whether statements were properly classified as facts, ultimate facts, mixed assertions of law and fact, or legal conclusions. *Iqbal* returns us to the kind of legal practice Dickens condemned in *Bleak House* and we had the good sense to put to rest.

A final decision in *Tooley v. Napolitano*[36] may provide insights about how *Iqbal* has further changed old standards renounced in *Twombly*. The government's request to the D.C. Circuit to re-hear the case illustrates much of what we have to fear from *Iqbal*. The court granted the government's request, after *Iqbal* was decided, to re-hear the court's decision that the plaintiff's complaint sufficed under *Twombly*. The case was re-argued on October 8th, and a decision is pending.

Mr. Tooley's problems began when, after booking airline tickets for a family trip to Nebraska, he responded to an airline representative's request for comment. He urged that the airline rigorously screen all passengers to keep them safe from "the potential that those who wish to harm American citizens could put a bomb on a plane." The representative responded with

[36] 556 F.3d 836 (D.C. Cir. 2009), rehearing granted, judgment vacated, and rehearing en banc dismissed July 1, 2009, oral argument October 8, 2009, decision pending.

alarm, declaring, "you said the 'b' word, you said the 'b' word." Mr. Tooley tried to explain the representative's misapprehension, but she put him on hold and after twenty minutes he hung up.

Mr. Tooley asserts that, after his incident with the airline, he has been stopped for additional security screening each time he flies; he has noticed clicking noises in his telephone lines, consistent with wiretaps; he has found tracking devices on his car; and that for a two week period coinciding with a visit of the President to Mr. Tooley's home town, an officer in a Ford Crown Victoria sat outside Mr. Tooley's home for six hours a day.[37]

We do not know what the court, ultimately, will do with Mr. Tooley's complaint. It already noted that the timing of events made it difficult to infer that they were related to Mr. Tooley's phone conversation, but that the inference permissibly could be made by a jury. I want to focus on the government's response to Mr. Tooley's allegations, which illustrates the mischief that *Iqbal's* plausibility standard invites and the kind of problems plaintiffs will experience in trying to hold miscreants responsible for misdeeds.

The government notes that "an allegation of clicking sounds on a phone line, standing alone, is not a credible allegation of wiretapping."[38] It says that the court cannot accept the "conclusory allegation" that just because Mr. Tooley is stopped every time he flies, "those searches are extraordinary."[39] With regard to the individual in the Crown Victoria, it says that "nothing supports an inference that the unidentified individual was directed by" the federal

[37] Facts as related in Supplemental Brief for the Appellees.

[38] *Id*. at 5.

[39] *Id*. at 8.

government.[40] With regard to tracking devices, it condemns Mr. Tooley for not pleading "information that plausibly ties defendants to the tracking devices."[41]

I have no idea whether Mr. Tooley can prove his claims. And I am no security expert. But I am pretty sure that Department of Homeland Security tracking devices do not have little tags attached that say, "Property of Department of Homeland Security; if found please return to … ." And I am pretty sure that if I got up the nerve to ask the guy in the Crown Victoria what he was doing in front of my house, he wouldn't tell me. And I am pretty sure that if I were stopped for additional security every time I flew, I would want to know why. And, while there could be things other than a wiretap that caused clicking on my phone line, if I started hearing clicking in these circumstances, I would figure that something was rotten in the state of Denmark, or at least in these United States. And I would expect the court system to allow me to ask a few questions of the people who might be causing the stink.

Applying *Twombly*, the D.C. Circuit, in its now-vacated decision, had held that Tooley's allegations, "when taken in combination," plausibly allege an injury in fact caused by the defendants.[42] *Iqbal*, however, invites judges to look at pleadings in isolation, not in combination. Under *Iqbal*, and particularly under an understanding of *Iqbal* advanced by the government in *Tooley*, a single pleading defect can be fatal. *Hamlet* has some defects, but the whole story remains compelling.

I believe there is a compelling need for Congress to reverse *Iqbal* and *Twombly* before they do more harm. It is changing results in at least some cases. It has introduced unwarranted

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[40] *Id.* at 7.

[41] *Id.*

[42] *Id*. at 840.

uncertainty into an area of law that has been well settled and understood. It again makes pleading a nightmare, and it does so across all cases when any legitimate concerns it might address arise in only a tiny fraction of the cases presented to the federal courts.

Congressional action could be subject to criticism for usurping the rulemaking role of the Judicial Conference of the United States under the Rules Enabling Act. I do not believe such criticism would be just. That process is too slow to grant necessary relief, and Congressional action would not usurp the role of the Conference.

Typically, it takes about three years from the time a rule is proposed in one of the advisory committees until it becomes effective. In the interim, text is carefully vetted by a large number of people who are very good at what they do and who take their work very seriously. To the extent new empirical information might inform the rulemaking process, the Federal Judicial Center is commissioned to generate and analyze it. This deliberate process helps avoid unintended consequences.

Twombly and *Iqbal* have usurped this process. The Supreme Court stood fifty years of well-understood pleading law on its head, motivated primarily by concerns about costs of discovery. The court did not establish that discovery is broadly abused, which the best evidence available strongly suggests is not true.[43] It did not establish that case management is an ineffective tool for managing potentially abusive discovery, but it *barred* use of that tool. It gave no hint why judges should be entitled to weigh evidence to determine "plausibility," when the

[43] FJC, *Preliminary Results, supra* n. 21, at 2. Reporting the preliminary results of a survey of closed federal civil cases, the FJC found that median costs, *including attorney fees*, were $15,000 for plaintiffs and $20,000 for defendants. In only 5 percent of cases do these costs reach about $300,000 per party, and in those cases the stakes were estimated at $4-5 million. Even in the highest value cases, total costs, including attorney fees, averaged well less than 10 percent of what was at stake.

Seventh Amendment assigns the role of weighing evidence to juries.[44] I concur with Justice Ginsburg, who told a conference of federal judges, "In my view, the Court's majority messed up the federal rules governing civil litigation."[45]

Congressional action to reverse *Twombly* and *Iqbal* would merely restore a fifty year status quo. If there is need to depart from the status quo, the processes of the Judicial Conference are well-adapted to make the slow, careful study of the need and to craft a careful solution to the problem identified. And, in the mean time, litigants would be free of uncertainty, the opportunity for plaintiffs to enter the courthouse would be undiminished, and defendants and judges would have undiminished access to existing tools for managing cases and making sure that undeserving plaintiffs don't hang around the courthouse too long.

I thank you for inviting me to speak to you and I am happy to respond to questions you might have.

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[44] *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986): "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."

[45] *Reported in* Adam Liptak, *From Case About 9/11, Broad Shift on Civil Suits*, N.Y. Times, July 21, 2009, at A11.