**STATEMENT OF**

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By way of introduction, I am a University Professor at New York University; before that I was the Bruce Bromley Professor of Law at Harvard Law School for over 35 years. I have taught the first year civil procedure course and advanced courses in complex litigation for more than fifty years. Beginning in the late 1970s, I served as the Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States and then as a member of the Committee (by appointment of Chief Justice Burger and reappointment by Chief Justice Rehnquist) and some years later I was the Reporter for the American Law Institute's Project on Complex Litigation. I have argued cases involving issues of federal procedure in every United States Court of Appeals, numerous district courts, and in the United States Supreme Court on several occasions and I have been co-author of the multivolume treatise *Federal Practice and Procedure* for almost fifty years.

When the Federal Rules of Civil Procedure were promulgated in 1938, they reflected a policy favoring citizen access to the federal courts and sought to promote the resolution of civil disputes on their merits rather than on the basis of the technicalities that plagued earlier procedural systems. Federal judges applied that philosophy for many, many years. However, the last quarter century has seen a dramatic shift in the way the courts, especially the United States Supreme Court, have interpreted and applied the Federal Rules, as well as a number of other procedural matters, and the same is reflected in the character of many of the proposals advanced during that period by the Advisory Committee on Civil Rules. This shift has led to the increasingly early termination of cases prior to trial, often without any real consideration of the merits. This has been the result of the erection of a series of procedural stop signs that now dot the pretrial process. These have contributed to the fact that civil trials, especially jury trials, are

now very few and far between. Not surprisingly, one of today's clichés refers to "The Vanishing (Jury) Trial," partially reflecting this early termination phenomenon. The ability of a citizen to get a meaningful day in federal court is now being questioned by many within and without the legal profession.

The shift in judicial attitude can be traced back to three summary judgment decisions by the Supreme Court in 1986 that have been applied promote the use of this pretrial dispositive motion.[1] Additional procedural stop signs that impede the pathway to a resolution of the merits—often justified in the name of judicial gatekeeping—and that have increased pretrial litigation transaction costs and delays include (1) the increased screening of expert testimony,[2] (2) the establishment of several obstacles to securing class action certification,[3] (3) the enforcement of arbitration clauses in an extraordinary array of consumer and other contracts entered into by average Americans (many adhesive in character), most of them effectively prohibiting aggregate arbitration, thereby rendering the arbitration option economically unviable,[4] (4) the Supreme Court's abandonment of notice or simplified pleading and its substitution of "plausibility" pleading (which, in effect, is a return to the burdensome code fact pleading of the Nineteenth Century),[5] (5) the promulgation of a number of limitations on pretrial discovery that have resulted from Rule amendments during the last twenty-five years,[6] and (6) the opinion of four Supreme Court Justices that would narrow the reach of in personam jurisdiction in a way that will prevent citizens from bringing suit in a convenient forum.[7] In addition there has been an increased judicial receptivity to various threshold matters such as standing, pre-emption,

1 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986); *See generally* Arthur R. Miller, *From Conley to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

2 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

3 *Wal-Mart Stores Inc. v. Dukes*, 131 S.Ct. 2541 (2011). *See also Ortiz v. Fireboard Corp*., 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (detailing the recent disturbing trends in class action jurisprudence and urging a more balanced approach to Rule 23)..

4 *See, e.g., American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *Compucredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). There has been an extraordinary expansion of the Federal Arbitration Act's application far beyond its original scope, by the Supreme Court.

5 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). One should ask why JP Morgan is willing to settle with the government for thirteen billion dollars for its conduct relating to the mortgage crisis but many lawsuits for compensation by the actual victims of that conduct (and comparably conduct by other institutions) have been dismissed without ever reaching trial, often on basis of the complaint alone?

6 *See* the discussion below at notes 13-28, *infra*.

7 *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011)(a plurality of four Justices departed from sixty-five years of personal jurisdiction jurisprudence in a way that would contract that jurisdiction and might well force plaintiffs to litigate in a distant forum – possibly foreign countries – or abandon their claims)(two-Justices concurred in result; three Justices dissented).

exhaustion of remedies, statutes of limitation and repose, and immunity. I have written about these matters at length.[8]

All of these stop signs with their attendant costs and delays often restrict the ability of plaintiffs to obtain a determination of the merits of their claims, which has resulted in a narrowing of citizen access to a meaningful day in court, jeopardizing our procedural gold standard, trial and when appropriate jury trial. Beyond that, but certainly of equal, if not greater, importance, these restrictive procedural developments work against the effectiveness of private litigation to assist in the enforcement of various significant public policies and Congressional enactments involving such matters as civil rights, antitrust, employment discrimination, consumer protection, defective products, pension protection, and securities regulation. Cases involving several of these subjects are dismissed at an alarming rate by some federal courts leading to the under-enforcement of important statutes and judicial doctrines. The current proposals limiting the availability of discovery are the latest impediment to meaningful merit adjudication in our federal courts.

Throughout the past twenty-five years claims of abusive and frivolous litigation, extortionate settlements, and the high cost of today's large-scale lawsuits have been asserted by defense interests and repeated in a number of judicial opinions to justify the erection of these procedural stop signs.[9] I have heard these arguments throughout my professional life. But these voices rarely acknowledge other systemic values, and their claims are speculative, not empirically justified, and overstated. They simply reflect the self-interest of various groups that seek to terminate claims against them or their clients as early as possible to avoid both discovery and a trial. They are undocumented assertions that have been refuted by several studies and other sources[10] and properly characterized as "myth."[11] Some of these themes are being sounded again by proponents of the proposed Rule changes.

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8 Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013 ); Arthur R. Miller, *From Conley to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

9 *See, e.g.*, the opinion for the Court by Justice Souter in *Twombly*, 550 U.S. 544 (2007),.

10 Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765 (2010); EMERY G. LEE III & THOMAS E. WILLGING, NATIONAL CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 27–33 (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf (median costs, including attorney's fees are between 1.6% and 3.3% of defendants' reported stakes).

11 Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C.L.REV. 603 (1998). *See generally* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1116–23 (2012)(a comprehensive critique of repeated complaints about discovery).

Yet, important hard questions about these assertions that bear on whether there is a need for several of the proposed rule changes as well as a number of the other procedural changes made in the recent past have not been studied with the requisite intensity. For example: What are the sources of litigation costs and who is causing them? To what extent is it defendants, who generate motion practice and resist discovery, who are the source of cost and delay? What would a true cost-benefit analysis of these, and earlier amendments, show given the transaction costs that may well accompany them? Why haven't alternative mechanisms for cost and delay containment been considered by the courts and studied in depth by the rulemakers rather than simply using the blunt instruments of erecting procedural stop signs and constricting discovery?[12] What legislative changes might be requested of Congress to ameliorate the proposed concerns should careful analysis show they are significant? Even if one acknowledges that federal substantive law and litigation have changed dramatically in recent decades, there remains a serious question as to why the procedural changes during this period have operated to impair or impede the ability of claimants to reach the merits. Some restoration of the earlier philosophy of the Federal Rules seems necessary if we are to preserve the procedural principles that should underlie our civil justice system, avoid the under-or non-compensation of citizens with legitimate claims, and maintain the viability of private litigation as an adjunct to government regulation for the enforcement of important societal policies and values.

For the reasons advanced below, I urge the Committee to reevaluate several of their proposed Rule changes in light of the background of what has happened in the past quarter of a century and the negative effect they may have on access to a meaningful merit adjudication in our federal courts.

Several of the current proposals to amend the discovery rules continue the pattern I have described. They reflect the significant turning away from the vision of the original Federal Rules of a relatively unfettered and self-executing discovery regime—a true commitment to "equal access to all relevant data" so critical to the effective resolution of disputes. They also extend the series of periodic amendments to the Rules in recent years that supposedly were motivated by a desire to reduce the density and cost of discovery. That objective seems unobjectionable—the same also may be said to describe the current proposals. But that statement of justification is

12 The materials cited in notes 10 and 11 cast doubt on the claim that discovery costs represent the lion share of litigation costs. Clearly, litigation costs reflect a variety of economic, tactical, and human factors other than discovery costs. *See* Charles Silver, *Does Civil Justice Cost too Much*?, 80 TEXAS L. REV. 2073 (2002).

deceptive; the past and proposed changes are not benign, let alone neutral. They also appear to have been motivated, at least in part, by the ongoing concern of defense interests that broad discovery allows plaintiffs to look behind their clients' curtains, thereby providing access to otherwise unobtainable oral and documentary information that may well cut too close to the substantive bone and endanger the defense because it may well reveal a claim's merits, thereby increasing the risk of liability and enhancing the case's settlement value. Vulnerability to discovery, after all, always has been a *bête noire* of both business and government defendants.

The changes in the discovery regime I am referring to began in 1983, during my service as Advisory Committee Reporter, when Rule 26 was amended to eliminate a sentence that stated: "Unless the court orders otherwise . . . , the frequency of use of these [discovery] methods is not limited."[13] The deletion of that sentence was designed to eliminate any lingering notion that discovery was limitless.[14] As the Advisory Committee's Note accompanying the amendment makes clear, the deletion was only a signal that "excessive" and "needless" discovery was to be curtailed.[15] That message was reinforced by the simultaneous addition of the language now found in Rule 26(b)(2)(C) directing district judges to avoid discovery that is unreasonably cumulative, duplicative, or obtainable from some other source, as well as discovery that is unduly burdensome or expensive given the needs of the particular case. Thus, it has been said, was born the concept of "proportionality" in discovery.[16] The amendment also emphasized the importance of judicial involvement in the discovery process and was intended to work in tandem with the simultaneous revision of Federal Rule 16, which validated and promoted judicial management as a method of improving litigation efficiency and economy. Many believe that greater and more effective judicial management—rather than limiting discovery—is the key to cost and delay containment.[17]

In describing the 1983 amendments at that time, I remarked on several occasions that the changes represented a "180-degree shift" in thinking about discovery.[18] On occasion I would

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13 FED. R. CIV. P. 26(a) advisory committee's note, *reprinted in* 97 F.R.D. 165, 216 (1983). *See generally* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2003.1 (discussing the 1983 amendments).

14 *See, e.g., In re Convergent Techs. Secs. Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985).

15 97 F.R.D. at 216.

16 *See* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2008.1 (discussing the meaning and application of the principle of proportionality in discovery). The Advisory Committee Note also urged judges to be more "aggressive" in "discouraging discovery overuse." 97 F.R.D. at 216.

17 That note was sounded, for example, by several participants and the 2010 Duke Conference on the Federal Rules. *See, e.g.,* John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 542 (2010)(noting substantial agreement at the Conference of the need for active judicial management)

18 ARTHUR R. MILLER, THE AUGUST 1883 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE

give the following example: "In a $10,000 damage case, spending $50,000 on discovery is disproportionate."[19] I must confess, from my Reporter's vantage point I did perceive the need for imposing some restraint on cumulative and excessive discovery. Discovery's cost seemed to be rising (which at least in part appeared to be a product of it having become a "profit-center" for many law firms billing on an hourly-fee basis, especially in the large-scale cases that had emerged in that period), the overuse and high cost of experts was becoming apparent, and discovery activity was thought by some to be causing occasional marginal, unnecessary, and even unethical lawyer behavior,[20] the latter was dealt with simultaneously in Rule 26(g).[21] But the 1983 provision was designed to have limited application, as my example indicates. Rule 26(b)(2)(C) was viewed as a modest exception to the basic and fundamental principle that all parties should have access to anything relevant to the "subject matter" of the action (now the parties' claims or defenses). It was not intended to and did not undermine the basic scope-of-discovery provision. Nor was it expected to raise an issue in more than a small number of cases. Nonetheless, it was a discovery limitation—the first in a series of such amendments.

In retrospect, the Committee's and my collective judgment was impressionistic, not empirical.[22] The practice of invoking the aid of the Federal Judicial Center to study and report on matters being considered by the Advisory Committee and the development of sophisticated research techniques were to come later. Also the stimulus for the 1983 changes may have reflected too narrow a range of cases and a number of undocumented assumptions about discovery practice. In my judgment, time has cast doubt on some of the assertions that were voiced at the time of the 1983 amendments to Rule 26.[23] Those doubts continue to be applicable to the comparable assertions one hears today.

The Committee and I may have failed to put enough weight on the fact that in the vast array of lawsuits discovery did not (and do not) pose any particular difficulty. But certainly we did not intend to limit let alone impair the ability of parties whose access to relevant data is essential to

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MANAGEMENT AND LAWYER RESPONSIBILITY 32-33 (1984).

19 Ibid.

20 *See* Am. Bar Ass'n, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 141–42 (1980) ("Discovery . . . is too easily abused . . . ."). The Special Committee's First Report is reprinted as an appendix to the Second Report. *Id*. at 149. *See generally* David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979).

21 The Advisory Committee Note to Rule 26(g) clearly shows the amendment was designed to counteract discovery abuse taking the forms of "excessive discovery *and* evasion." (Italics added.) *See generally* 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2052.

22 The one discovery study relied on by the Committee and cited in its Note did not indicate that anything was fundamentally wrong with the discovery system. PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 35 (1978).

23 Advisory Committee composition also may have contributed to its willingness to accept the representations concerning discovery hyperactivity and cost.

establishing the bona fides of their claims to employ the discovery regime fully. That remained a fundamental philosophical principle. In particular, we recognized the very serious problem of parties having asymmetrical access to relevant data. In many litigation contexts critical information is in the defendant's possession and is unavailable to the plaintiff. That problem is even greater today because it is a natural aspect of the complexity of contemporary litigation and because the Supreme Court has increased the plaintiffs' pleading burden, which requires access to facts to establish "plausibility", and barred discovery until the almost inevitable motion to dismiss is denied and the complaint upheld. Some of the proposed amendments will exacerbate this problem.[24]

The attack on discovery has continued over the years. In 1993, Rule 30 was amended to limit the number and duration of depositions that can be taken without judicial authorization,[25] and Rule 33 was amended to create a presumptive limitation on the number of interrogatories that can be propounded.[26] (I have often wondered why these changes were necessary.) Then, in 2000, Rule 26(b)(1) was modified to limit the scope of discovery to material "relevant to any party's claim or defense" rather than to the more open-ended "subject matter" of the action as it had been since 1938.[27] I think this change, which is a textual limitation on the scope of discovery, sends an unfortunate restrictive signal despite the uncertain purpose of that "signal." This sequence of amendments was promulgated even though there is considerable reason to believe that in the vast majority of cases discovery usually works well, is quite limited (indeed, it is nonexistent in many cases), and its burdensomeness poses problems in a relatively thin band of complex and "big" cases.[28] Yet the past discovery amendments and the current proposals indiscriminately apply to all cases.

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24 See the citations in notes 5-8, *supra*.

25 *Compare* FED. R. CIV. P. 30 (1992) (requiring leave of the court to take more than thirty depositions), *with* FED. R. CIV. P. 30 (1993) (requiring leave of the court to take more than ten depositions). *See* 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE §§ 2104, 2113 (discussing this change).

26 *Compare* FED. R. CIV. P. 33 (1992) (permitting service of interrogatories by each party without limitation), *with* FED. R. CIV. P. 33 (1993) (permitting service of up to twenty-five interrogatories by each party).

27 *See* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2008 (explaining the 2000 amendment and its impact); Carl Tobias, *The 2000 Federal Civil Rules Revisions*, 38 SAN DIEGO L. REV. 875 (2001) (analyzing the amendment); *see also* Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13 (2001) (warning that the 2000 amendment will increase procedural barriers to relief without curbing litigation costs). The shift in orientation of the Advisory Committee and other participants in the rulemaking process is evidenced by the fact that in 1978 a virtually identical proposal was rejected. *See* Memorandum from Walter R. Mansfield, Chairman of the Advisory Comm. on Civil Rules to the Comm. on Rules of Practice and Procedure 6–8 (June 14, 1979). Rule 26(b)(1) currently does provide that on a showing of "good cause," the court may expand discovery to cover "any matter relevant to the subject matter" of the action. As discussed below, the Committee is now proposing to eliminate this useful safety valve.

28 *See* Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684–86 (1998) (reviewing studies showing that one-third to one-half of all litigations involve no discovery). *But cf.* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (arguing that discovery is "dysfunctional, with litigants utilizing discovery excessively and abusively").

Although one might argue that these amendments (and some might say even the current proposals) do not represent a fundamental undermining of federal discovery, they clearly depart from the philosophy of the original rules and their cumulative effect is significant. All of the enumerated rule alterations were designed to and do limit discovery.[29] The Committee's present proposals would magnify these limitations. It must be remembered that discovery restrictions can negatively impact a citizen's meaningful access to civil justice, exacerbate problems of information asymmetry, and impair the enforcement of many important public policies embedded in federal statutes. Rule amendments should be undertaken only with great caution, respond to a demonstrated need, and be adopted only the absence of less Draconian solutions.[30] Broad access to discovery is a necessity because in many substantive contexts we are quite dependent on private litigation to augment governmental enforcement of federal normative standards. Recent events in the financial, real estate, pharmaceutical, and other markets, for example, have laid bare the consequences of the under-enforcement of federal regulatory policies.

It seems inappropriate, therefore, to be limiting the availability of an important procedure for effectuating national as well as state policies and providing people with a meaningful day in court. Discovery is often the key that opens the door to information critical to the remediation of violations of important constitutional, statutory, and common law principles as well as providing compensation for injuries sustained by citizens because of those violations. Effective discovery is the lifeblood for proving one's case or defense. As the Supreme Court said in its seminal decision in *Hickman v. Taylor*:[31] "Mutual knowledge of all the relevant facts by both parties is essential to proper litigation." Without it, even meritorious cases may fail or not even be instituted. Therefore it is imperative that limitations on the availability discovery, such as those imposed by the Supreme Court in the pleading cases (*Twombly* and *Iqbal*) and on the scope of discovery (the Rule amendments)—particularly those that are inconsistent with the underpinnings of the 1938 Rules—be shown to be justified and carefully balanced against the importance of preserving the enforcement, compensation, and deterrence roles performed by civil litigation. Moreover, any restrictions on access to discovery or its scope must be limited to take account of the negative effects that they may have and the significant differences in the

29 The discovery rules were amended on several other occasions during the period under discussion in ways that are not presently relevant.
30 *See generally* Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 818 (1981) (explaining that discovery is essential to "the evolution of substantive law").
31 329 U.S. 495, 507 (1947).

needs presented in various substantive contexts.[32]

To be specific about several of the current proposals. Some of them lack any empiric support and the justification for them has not been made. Moving present Rule 26(b)(2)(C), which is now under the caption "Limitations on Frequency and Extent," to Rule 26(b)(1), which is the critical scope of discovery provision, ostensively to give it greater prominence, is not merely a neutral or benign relocation as some proponents suggest. It effectively converts the provision into an independent limitation on the scope of discovery as the proposed Advisory Committee Note explicitly acknowledges. The Bench and Bar know of the existing provision and the public discussion of the proposal accentuates that. Greater attention to Rule 26(b)(2)(C) could be achieved by a revised Advisory Committee Note or by including a reference to it in Rule 16, thereby making it an aspect of judicial management. The proposed amendment to Rule 26(b)(1) represents a potential threat to the jugular of the discovery regime as we have known it. It would replace the longstanding—since 1938— single principle that the scope of discovery embraces anything that is relevant to a claim or defense ("subject matter" of the action until 2000) with dual requirements that the material sought be both relevant and proportionate according to five criteria that are both highly subjective and fact dependent. That is made clear by the use of the conjunctive "and" in the proposal. The Advisory Committee Note also makes it clear that the proponent of discovery must show the request's relevance and proportionality. This is a dangerous potential reduction in the existing scope of discovery. It may well produce a wave of defense motions to restrict discovery on the ground that one or more of the five proposed proportionality criteria is absent, generating litigation costs and delays that offset any efficiency and economic values the proposals are thought to have. Concepts such as "the needs of the case", "the importance of the issues at stake," "the parties' resources," "the importance of the issues," whether the proposed discovery's "burden or expense" "outweighs" its "benefit" are quite likely to generate factually detailed briefing and argumentation with unpredictable results. Moreover, it is difficult to understand how a district judge is to evaluate the proportionality factors when the challenge comes before the discovery itself. Given their subjective character and the abstractness of the inquiry, the proposed amendment is fertile ground for increased costs and delays.

Although Rule 26(b) retains the same scope of discovery language as it has had since 2000, it eliminates the provision enabling the court—for good cause shown—to expand discovery to

[32] The Honorable Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 751-52 (2010).

include "any matter relevant to the subject matter involved in the action"—the 1938 to 2000 discovery standard. The Advisry Committee Note fails to justify this deletion of language that effectively has been in the Rule for over 75 years and has not been shown to produce deleterious effects; it simply asserts that relevant proportional discovery "suffices." The effect of the proposal is to eliminate an important source of judicial discretion that could prove useful in particular cases.[33]

Because this safety valve has existed, the determination of what "is relevant" has not been onerous because the judge always could employ the "subject matter" provision to embrace the challenged matter. That no longer will be an option, and defendants will be motivated to contest relevance much more aggressively, obliging judges to decide that question, often at an early stage of the case when relatively little is known about the legal and factual issues in the case. Moreover, the amendment will create incentives for defendants to resist discovery; the result will be to impose delays and added costs, even if the court eventually finds the challenged material to be relevant and proportional. In short, the proposals may prove self-defeating.[34]

The proposals that would once again reduce the number of as of right depositions and interrogatories also seem quite unnecessary. As some of the witnesses before the Committee in its first hearing on these proposals testified, many if not most, plaintiffs, at least, only take those depositions they deem important and have learned to function within the current presumptive limit of ten. But they expressed the view that five was arbitrarily too restrictive. It is no answer to say, that the court may allow more. That simply generates motion practice with inevitable cost and delay as well as the possibility of inconsistent application. Why should that be promoted? Also these two proposals send a restrictive message regarding discovery to the Bench that will be heard and exploited by resource consumptive and dilatory conduct by counsel, thereby favoring the economic advantages of defense litigants.

The reduction of presumptive Interrogatories from 25 to 15 is particularly questionable. Interrogatories usually are not burdensome and are an inexpensive means of obtaining limited, but specific items of information that are useful for building a claim or defense. There are very few cases, if any, in which interrogatories are the source of discovery abuse. That was true even before there were any numerical limits on their use. And if an interrogatory seems too onerous, a

33 Also eliminated without any clear justification are the time-honored words "reasonably calculated to lead to the discovery of admissible evidence." That deletion also is portrayed by the Advisory Committee Note as a limitation on the scope of discovery. What is the purpose of this change?

34 Nothing is cited in the Committee Note that provides any empiric justification for any of the proposed limitations on discovery.

party can reply as best he or she can after a reasonable search, and allow the judge to decide whether anything else should be required.[35]

It is difficult to understand the utility of this type of tinkering with the Rules.[36] The discovery proposals are not paper cuts, and when they are added to the 2000, 1993, 1983 amendments, and the restrictive pleading, summary judgment, class action, expert testimony, and arbitration decisions by the Supreme Court, one has to be concerned that meaningful access to enable citizens to present their grievances is being seriously compromised.

In the aggregate, I fear that the proposed amendments could produce increased motion practice costs, delays, consumption of judicial time better spent in other ways, fact-dependent hearings, possible inconsistent application, and potential restrictions on access to information needed to decide cases on their merits. These effects will fall most heavily on important areas of public policy—discrimination, consumer protection, and employment, for example. If promulgated these changes may well deter the institution of potentially meritorious claims for the violation of statutes enacted by Congress or state legislatures or established by the courts. In short, the current proposals represent yet another procedural stop sign, and like the earlier discovery amendments there is considerable doubt they will have any constructive effect on the alleged discovery deficiencies that supposedly motivate them.

Debates about the positives and negatives of wide-angle discovery have gone on for decades—often with great intensity—and they undoubtedly will continue; discovery always has been an attractive target for defense interests. The focal point of contention occasionally changes: Sometimes it is the scope of discovery, or the number or length of depositions, or alleged excessive or intrusive document discovery. At present, discovery relating to electronically stored information is raising issues that some think may dwarf all that has come before; it already is dramatically altering today's discovery debate and certainly will impact future discussions. It has become the 800 pound gorilla in the debate in an attempt to justify the latest discovery limitations that have been put forth by the Advisory Committee. Once again one hears Chicken Little crying that the sky is falling. It is not.

35 As an aside, I note that the amended Rule 36 allows 25 Requests for Admission (exclusive of requests relating to the authentication of documents). Assuming that there is a basis for placing a limit on requests under Rule 36, there is no reason for that limit to be different for discovery sought under Rule 33.

36 When I became the Reporter to the Committee, the late Professor Charles Alan Wright, with whom I worked for 45 years on *the Federal Practice and Procedure* treatise, and a veteran of the rulemaking process, advised me "do not tinker, it destabilizes, and confuses, and creates procedural traps." Regretfully, I believe certain of the other current proposals fall into that category. E.g., Rule 1.

The burdens and challenges of e-discovery are being confronted by various groups including the Advisory Committee on Civil Rules, several forward looking district judges, and the Sedona Conference. In 2006, for example, Rules 26(f), 33(d), 34, and 37(f) were amended to deal with certain aspects of electronic information.[37] Rulemaking and other e-discovery efforts continue, and a second generation of Federal Rule amendments seems contain. Some relief from the rigors and expense of electronic discovery as well as greater accuracy of retrieval apparently can be achieved, ironically, by the growing availability of sophisticated digital search techniques.[38]

There is every reason to believe that information retrieval science and the technology itself will prove to reduce costs, accelerate the e-discovery process, and enhance the accuracy of retrieval. Recent experience in a number of cases has shown that a combination of statistics, linguistics, and computer science can produce these desirable results through the development of customized discovery protocols that can employ sampling and iterative search strategies.

One hopes that the current, almost crisis environment concerning e-discovery and its cost and other issues will abate. The subject actually may prove to be a relatively short-term matter that calls for a bit of patience and retooling of discovery methodology by the profession. To be sure, this will require considerable patience and cooperation and education of the Bench and Bar. But that process, aided by a burgeoning investment by various companies in sophisticated information retrieval science is well underway. That seems to be a far preferable pathway than premature rulemaking that may completely miss the mark.

Another indication of what some see as the non-neutrality of the current proposals is the suggested elimination of Rule 84 and the forms. It is true that they are out of date, but eliminating the forms, including those showing the intended simplicity of pleading under the Federal Rules, will be construed as the rulemakers' acceptance—or implicit codification—of plausibility pleading under *Twombly* and *Iqbal* when in reality there has not been any fundamental re-examination of the possible deleterious effects of those cases' return to fact pleading, or any comprehensive or penetrating empiric research on the subject, or an exploration

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37 *See generally* 8, 8A & 8B WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE §§ 2003.1, 2051.1, 2178, 2218–19, 2284.1 (explaining the process and impact of the amendments).

38 *See Moore v. Publicis Groupe*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 607412, at *1 (S.D.N.Y. Feb. 24, 2012), *adopted sub nom. Moore v. Publicis Groupe SA*, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) (holding that computer-assisted document review can be appropriate in large-data-volume cases). *See generally* Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11 (2011), http://jolt.richmond.edu/v17i3/article11.pdf (analyzing and comparing automated and manual document review techniques).

of other possible Rule amendments to meet the concerns defense interests have voiced over the years but which have not been established. There really is no reason to take this action at this time; it is premature.

The increased pretrial termination of cases and the limitations on discovery in recent years has downgraded our commitment to the day-in-court principle, diminished the status of the jury trial right, and substituted accelerated decision-making by judges—or arbitrators—for adversarial trials of a dispute's merits. It should be obvious that procedural stop signs primarily favor defendants particularly those who are repeat players in the system—large businesses and governmental entities. And I do not think it unfair to say that creating more of them plays into the hands of those who wish to limit litigation by burdening it, which negatively impacts citizen access and works against those in our lower and middle classes seeking entre to the system.

I do not think the current focus on gatekeeping, early termination, and posting procedural stop signs befits the American civil justice system. To me this is a myopic field of vision that completely fails to undertake a full and sophisticated exploration of other possibilities for dealing with assertions of "cost," "abuse," and "extortion"; unfortunately the current proposals have been presented without making an in depth evaluation of how real these charges are, which one would have assumed would precede proposing rule amendments. The Committee should focus more on how to make civil justice available to promote our public policies—by deterring those who would violate them and by providing efficient procedures to compensate those who have been damaged by their violation.

I urge the Advisory Committee to see the current discovery and Rule 84 proposals against the background of the last twenty-five years, to recognize that our civil justice system has lost some of its moorings, and to see that the proposed diminutions on discovery lack any demonstrated justification. There are a myriad of possibilities other than the blunt instrument of erecting stop signs to curtail truly unnecessary discovery other than the blunt instrument of erecting stop signs that have the potential of impairing effective access to our courts. I believe much can be achieved, for example, through more extensive and sophisticated judicial management as seems to be favored by many members of the profession and by promoting cooperation between and among counsel. The rulemakers should fully explore other options to deal with the relatively small band—at least in terms of numbers—of complex cases that need

special treatment by our federal judges. This might well include the possibility of asking for Congress' help regarding the current text of the Rules Enabling Act.[39]

39 Consideration might be given to the desirability of eliminating the concept of "general" rules now found in the Rules Enabling Act, 28 U.S.C. § 2072, so that special approaches might be formulated to deal with different categories of cases, perhaps in terms of dimension or complexity or substantive area. It simply may be time to recognize that one set of procedural rules no longer fits all cases.