



January 26, 2010

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
United States Senate
Washington, DC 20510

Re: Reduced access to federal courts

Dear Senator Leahy:

I am an attorney with the Alliance Defense Fund, a legal alliance of Christian attorneys and like-minded organizations that defends religious freedom. Since our founding in 1993, ADF has funded litigation and directly litigated hundreds of civil rights cases in defense of religious freedom, the right to life, and the natural family. Unlike many firms that focus on civil rights work, we represent both private plaintiffs and governmental defendants in these issue areas.

As civil rights litigators, we rely heavily upon the Federal Rules of Civil Procedure. We have found that when those rules are interpreted to provide clear, unambiguous standards, our justice system works well. On the other hand, when interpretations go awry, then the gears of justice can turn to mush.

Unfortunately, the simple rule for filing a lawsuit seems to have gone astray. For over fifty years, the settled standard for a person filing a federal lawsuit has been quite simple: the person need only file a short and plain statement to explain the nature of the claim and the grounds for it, so that the defendant is on notice of the lawsuit. Courts used a clear, unambiguous standard to determine when a case should be dismissed on such grounds:

[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.¹

While this standard was deferential to the complainant, it was intentionally so: it was meant to resolve earlier, severe problems with a pleading system that required very complex, highly nuanced complaints to be filed. Put simply, before the *Conley* rule was established, far too many lawsuits were dismissed “on legal technicalities” having little to do with the merits of the claim. The *Conley* rule stopped that, while still allowing courts to dismiss lawsuits based only in speculation or unsupported conclusions very early in the process.

¹ *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Unfortunately, the *Conley* rule was recently superseded by the combined effect of two U.S. Supreme Court decisions: *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The resulting rule is a “flexible plausibility standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.”²

Simply comparing the *Conley* and *Twombly* rules side by side shows that *Twombly* is rife with flaccid guidelines: it is expressly “flexible,” instructs the pleader to “amplify” with “some” allegations but only “where . . . needed” to make the claim “plausible.” *Twombly*’s language injects layer upon layer of discretion and uncertainty into the initial evaluation of the case, in contrast to the clear “any facts” *Conley* standard.

Our concern with this is not that the *Twombly* rule makes our plaintiffs work more difficult, or our defense work easier. Rather, our concern is that vague, malleable rules are bad news when it comes to orderly, reasoned processes. Already, the *Twombly* standard has unnecessarily complicated the early stages of litigation by encouraging “defensive lawyering.” Plaintiffs’ lawyers are now motivated to increase the complexity, length, and detail of their complaints, anticipating that their case will be one that needs “amplification” to become “plausible.” In turn, defense lawyers now have to respond to these expansive “toss in the kitchen sink” pleadings, *and* are motivated to litigate motions to dismiss that they never would have invested in under the clear *Conley* standard. This is not speculation, but based on direct experience with *Twombly* in our cases.³

Worse, the virtually unbounded discretion built into the *Twombly* standard may encourage some overworked, harried judges to dismiss cases based upon their subjective notation of what is “plausible,” and leave it to the appellate courts to sort out. The result, again, is further strain on judicial resources, and litigating matters that would not have been at issue under *Conley*.

I would suggest that we have a fairly objective view of the matter. We are a nonprofit organization that provides all of our legal services *pro bono*, so we clearly have an interest in efficient litigation rules—and no profit motive to indulge in unnecessary procedural complexities. And we both sue and defend clients, so we have seen how this plays out from the defendant’s as well as the plaintiff’s perspectives. In sum, we see the vagueness of the *Twombly* rule as adversely impacting the federal litigation process across the board. And we think it prudent that the federal courts return to the *Conley* standard, whether that is effected by the Court or by Congress.⁴

² *Iqbal*, 129 S. Ct. at 1944 (citation and internal quotation marks omitted).

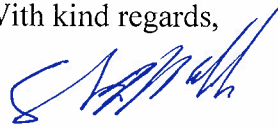
³ See, e.g., *Freedom from Religion Foundation, Inc. v. Obama*, 617 F. Supp. 2d 808 (W.D. Wis. 2009) (ADF representing intervener-defendant); *Boardley v. U.S. Dep’t of Interior*, 605 F. Supp. 2d 8 (D.D.C. 2009) (ADF representing individual plaintiff); *Creed v. Family Express Corp.*, 101 Fair Empl. Prac. Cas. (BNA) 609 (N.D. Ind. 2007) (ADF representing employer in Title VII action).

⁴ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (Congress has the authority to regulate federal court procedures).

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Should you have questions about the impact of *Twombly* on the defense of civil rights in federal courts, we would be pleased to provide additional information.

With kind regards,



Gary S. McCaleb
Senior Counsel

cc: Sen. Jeff Sessions, Ranking Member