

BRENNAN

CENTER

FOR JUSTICE

A CALL TO END
FEDERAL RESTRICTIONS
ON LEGAL AID
FOR THE POOR

Rebekah Diller and Emily Savner

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EXECUTIVE SUMMARY

Created thirty-five years ago under President Nixon, the Legal Services Corporation (“LSC”) helps poor families obtain access to the courts when they face pressing civil legal matters. More than 900,000 people are helped each year by the lawyers in LSC-funded programs across the country. With LSC-funded lawyers at their side, people can obtain protection from abusive spouses, retain custody of their children, fight unlawful employment practices and even save their homes from foreclosure. But a set of federal funding restrictions is severely undercutting this important work, and doing so in the midst of an unprecedented national financial crisis. The time has come to eliminate the most severe of the LSC funding restrictions.

A sign of the program’s success in representing poor people, LSC came under attack in the mid-1990’s as part of the extraordinary conservative backlash that, at one point, led to the shutdown of the federal government. Not only was the federal government’s funding of LSC cut by one-third, but also an onerous set of restrictions was imposed on the independent non-profit organizations that receive LSC funding. The funding cuts, and the funding restrictions, had devastating effects. They left LSC seriously underfunded and sharply circumscribed.

The funding restrictions cut especially deep. Unlike anyone able to hire a private attorney, people relying on a lawyer in an LSC-funded program cannot claim an award of attorneys’ fees even when consumer protection or civil rights laws authorize fee awards for the specific purpose of encouraging enforcement of the law and penalizing wrongdoers. They cannot participate in class action lawsuits even when doing so offers the best and most efficient way to obtain relief from widespread illegal practices, such as predatory lending or foreclosure rescue scams. They cannot lobby for policy reform either – a general ban prohibits their lawyers from reaching out to legislators to offer advice on how to fix federal, state, or local laws.

In short-sighted attacks on prisoners and immigrants, the restrictions banned these individuals from obtaining the representation offered by lawyers in LSC programs. Incarcerated people cannot obtain the LSC-funded help they need to tackle common legal problems – with housing, debt, and familial relations – that threaten their successful reentry into society. Certain groups of lawfully admitted and fully documented immigrants are barred from obtaining LSC-funded help even with concerns unrelated to their immigration status, such as those related to their work conditions, wages, and housing.

In a virtually unprecedented overreach, Congress applied this set of restrictions not just to the funds it appropriates, but to all of the money that an LSC grantee possesses. This poison pill restriction on state, local and private funds annually ties up over \$490 million in non-LSC funding, or 58% of the funds at LSC-recipient organizations. The restriction denies state, local, and private funders control over how their money is spent, deters non-federal spending on legal services, and wastes scarce resources when states are forced to set up duplicative, separate entities to “unrestrict” at least a portion of their funds.

In the thirteen years since they were implemented, the restrictions have effectively denied countless people equal access to justice. They have squandered funds on duplicate costs that could have gone toward serving more in need. They have prevented victims of predatory lending and consumer fraud from obtaining their full measure of justice. And by shutting down legislative

and administrative advocacy, they have prevented elected representatives and government officials from learning about the legitimate policy needs of poor communities.

In light of the harms the restrictions have caused and the unprecedented need for legal services amid the economic crisis, **Congress should take the following, cost-free steps:**

1. Remove the application of the LSC restrictions to state, local, private and other non-LSC funds that legal aid organizations receive.
2. Remove restrictions on LSC funds that interfere with the ability of legal services attorneys to protect their clients' rights, that is, eliminate the restrictions: on seeking attorneys' fee awards; on class actions; on legislative and administrative advocacy, and on solicitation.
3. Remove restrictions that prohibit representation of documented immigrants and people in prison who need help with reentry matters.

Such a solution would leave certain federal restrictions in place while ensuring that legal aid organizations are able to help their clients most efficiently and effectively. In combination with increased funding for legal services, the removal of these select restrictions would expand access to justice at a time of massive need.

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I. INTRODUCTION

As the economic crisis pushes growing numbers of people into poverty and homelessness, the need to revitalize our nation's civil legal aid system is more urgent than ever. For families trying to save a home from a predatory lender, recover unpaid wages from an employer, or obtain food for a sick child, civil legal aid can be a lifeline. Studies show that access to a lawyer often provides the critical boost that families need to avoid homelessness, and the key factor that can enable domestic violence survivors to reach safety and obtain financial security.¹

Notwithstanding the clear benefits, the overwhelming majority of people who need legal aid are unable to obtain it, due, in large part, to the limited capacity of the Legal Services Corporation ("LSC"), the cornerstone of the nation's institutional commitment to equal justice.² Every year, one million cases are turned away by LSC-funded offices due to funding shortages.³ Study after study finds that 80 percent of the civil legal needs of low-income people go unmet.⁴ There are 6,861 low-income people for every legal aid attorney funded by LSC and other sources.⁵ In contrast, one private attorney exists for every 525 people in the general population.⁶ This "justice gap" keeps families in poverty and threatens the stability of our court system.

STUDY AFTER STUDY FINDS THAT 80 PERCENT OF THE CIVIL LEGAL NEEDS OF LOW-INCOME PEOPLE GO UNMET.

The justice gap is not solely a product of funding shortages; it is also the result of funding restrictions imposed on legal aid programs by Congress in 1996.⁷ In an attempt to deprive families of full legal representation, Congress restricted the advocacy tools available to them. For individuals whose lawyers work at programs that receive LSC funds, the legal

tools relied on by clients of other attorneys are off limits. Options such as participating in class actions, claiming court-ordered attorneys' fee awards, and conducting advocacy before legislatures and administrative bodies are prohibited.⁸

Additionally, Congress defined some categories of people to be ineligible for legal services representation; all undocumented immigrants, certain categories of lawfully documented immigrants and people in prison, simply cannot qualify.⁹

And, Congress imposed an extraordinarily harsh, poison pill restriction on LSC-funded programs. This restriction on state, local and private funds, or "non-LSC funds restriction," extends the federal funding restrictions to limit all the activities conducted on behalf of clients of LSC programs, even when those activities are financed with the programs' non-LSC funds.¹⁰ As a result, justice planners in many states have had to set up two, inevitably duplicative, legal aid systems in order to ensure that state and other funds are not constrained by the non-LSC funds restriction.¹¹ The result is that scarce funds must be spent on duplicative administrative costs – two rents, two copy machines, two computer networks, two executive directors. In some locations with less state funding for legal aid, there are no non-LSC-funded organizations to perform the restricted work, so this work simply is not done.

In the decade and a half that has passed since the restrictions were pushed through the Congress as an outgrowth of the Gingrich-era Contract with America, the restrictions have denied countless people equal access to justice. This paper surveys the impact that the LSC restrictions are having on the ability of families to obtain justice, particularly in the midst of the national financial crisis. And, it explains why now is the time to fix these restrictions in order to put an end to their worst effects.

II. LSC: COMMITTED TO THE AMERICAN PROMISE OF EQUAL JUSTICE

LSC embodies the federal government's most sustained effort to deliver on the oft-touted American promise of equal justice for all.¹² President Nixon and the Congress created LSC in 1974 to provide high-quality civil legal assistance to people unable to afford to retain private attorneys.¹³ By providing legal assistance in the wake of the riots that occurred in major American cities in the late 1960s and early 1970s, Congress aimed to promote equal access to the justice system, improve economic opportunities for low-income people and reaffirm faith in the legal system.¹⁴

LSC-FUNDED ORGANIZATIONS
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PEOPLE A YEAR.

LSC is structured not as a federal agency but rather as a quasi-private, non-profit corporation, a design that was intended to insulate it from the political winds of any given moment. It is governed by an 11-person, bipartisan board of directors appointed by the President and confirmed by the Senate.¹⁵ LSC operates by providing grants to independent, local non-profit organizations, incorporated under state law, which in turn provide direct legal services within their communities.¹⁶ LSC-funded organizations help nearly one million people a year.¹⁷ Those local non-profits determine their own priorities for service provision, taking into account the particular needs of the client communities they serve.¹⁸ Legal services offices handle cases concerning basic needs: family matters (38%), housing (23%), income maintenance (13%) and consumer issues (12%).¹⁹

LSC is the single greatest source of funding for legal aid in the U.S., but it is just one participant in a three-pronged partnership that also includes state and local governmental institutions, and private donors.²⁰ In 2007, LSC provided more than \$330 million in grants to 138 programs with more than 900 offices.²¹ In the same year, more than \$490 million was received by LSC programs from non-LSC sources: state and local governments, Interest on Lawyers' Trust Accounts ("IOLTA") programs, foundations and private donors and other, non-LSC federal grant programs.²² The proportion of non-LSC funds possessed by LSC-recipient organizations has risen substantially since the federal funding restrictions were put in place, from 40.33 percent in 1996 to 58.1 percent in 2007;²³ however, recent declines in IOLTA funding and state budget shortfalls due to the national economic crisis may reverse that trend.

Many federal legislators become familiar with LSC because of the substantial role performed

by LSC grantees in responding to the otherwise unmet needs of their constituents. Legislative staff routinely refer families to the legal aid programs in their home districts to obtain relief for a broad range of civil legal problems.

III. THE LSC RESTRICTION REGIME

At the inception of LSC, Congress placed some restrictions on the activities of LSC-funded lawyers, but struck a balance that enabled individuals to get essential legal work done.²⁴ For

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example, while some limits were imposed on tools of advocacy – class actions, for example, could only be undertaken with the approval of a program director – they were not completely barred.²⁵ Congress also banned participation in certain types of cases that reflected particular controversies of the time, including litigation related to military registration, desegregation, and attempts to procure a “non-therapeutic abortion.”²⁶ However, LSC-recipient programs could still represent clients in such cases if a state or local government funder wished to finance the effort.²⁷

For the most part, Congress held true to its declaration that “attorneys providing legal assistance must have full freedom to protect the best interests of their clients.”²⁸

A. 1996 Restrictions Sharply Curtail Advocacy Available to Poor Clients.

The restrictions imposed in 1996 marked a clear departure from this balance by sharply curtailing advocacy on behalf of legal services clients. The 1996 restrictions were the culmination of attacks on legal services for the poor that began soon after LSC’s formation. At the time, the hostility came in large part from agribusiness interests in farm states, which were angered by the work of legal services lawyers who helped farmworkers pursue owed wages and improved working conditions.²⁹ President Reagan’s election in 1980 provided an eager ally in the White House. The Heritage Foundation’s conservative agenda, published on the eve of President Reagan’s first term, *Mandate for Leadership*, detailed steps to eliminate LSC or, at least, to reduce its effectiveness.³⁰ Declaring LSC “so basically flawed that it is beyond reform sufficient to justify its continuation,” the plan called for the wholesale destruction of LSC.³¹ If complete elimination proved infeasible, the Heritage Foundation urged steep budget cuts and broad restrictions (to be imposed through LSC appropriations riders) as a second-best alternative.³²

LSC survived the attempts to eliminate it under the Reagan Administration, though with less funding.³³ However, the blueprint for hobbling LSC ultimately was put in place during the 104th Congress, when Republicans took control of both houses for the first time in decades and, through the “Contract with America,” renewed the call for elimination of LSC.³⁴ The House of Representatives, led by Newt Gingrich, adopted an initial budget that would have cut LSC funding by one-third for FY 1996, a second third

for FY 1997, and then eliminated all federal funding in the subsequent year.³⁵ Through a compromise brokered by then-Senator Pete Domenici (R-NM) and others, the plan to entirely de-fund LSC was averted.³⁶ Instead, Congress cut LSC funding by one-third in the 1996 appropriation and imposed the set of funding restrictions that severely limit the work of LSC-funded programs, including the work done with the money received from non-LSC sources.³⁷

Under the 1996 appropriations rider, which has been carried forward in subsequent years with only slight modification, non-profit organizations receiving LSC funds are barred from using the following tools of advocacy for their clients, even though such tools are available to individuals who are represented by privately funded attorneys:

- class action litigation;
- claims for court-ordered attorneys' fee awards, authorized by underlying law;
- policy advocacy for legislative and administrative reforms (with certain exceptions); and
- educating potential clients about their rights and then offering to represent them.

The restrictions also effectively prevent certain individuals from qualifying for LSC-funded services, including:

- incarcerated people;
- undocumented immigrants, and certain documented immigrants; and
- individuals facing eviction from public housing projects who are charged with a drug offense.

The rider also includes other restrictions, such as a ban on all abortion-related litigation and on redistricting cases.³⁸

B. Extraordinary, Poison Pill Restriction is Out of Step with Private Public Partnership Model.

In a somewhat unprecedented power grab, Congress prohibited LSC-funded programs from engaging in these restricted activities or representing restricted clients not just with LSC funds, but with any funds, no matter the source.³⁹ Once an organization receives its first dollar of LSC funding, all of its funds from state and local governments, other federal programs, and private foundations and donors are restricted.⁴⁰ Not only did this extension of federal power shift policy dramatically away from the balance struck in the LSC Act, which permitted recipients to use funds from other government sources for the purposes for which they were intended,⁴¹ but the 1996 law also marked a stark departure from the usual model for federal grant-making. It is fairly common for the federal government to restrict the activities it funds; however, it is extremely rare and raises grave constitutional concerns when Congress restricts the activities that grantees choose to finance with their own, non-federal funds.

The 1996 restrictions prompted almost immediate challenges in court on First Amendment grounds. A federal district court in Hawaii ruled that the restriction on non-LSC funds violated the First Amendment because it did not afford a recipient non-profit any avenue

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through which to use its non-LSC funds to engage in constitutionally protected speech and advocacy on behalf of its low-income clients.⁴² A federal district court in New York was also entertaining a separate First Amendment challenge to the restriction on non-LSC funds, as part of a comprehensive First Amendment challenge to the full set of funding restrictions.⁴³

In the wake of the Hawaii court's ruling, and in anticipation of briefing in support of the New York plaintiffs' motion seeking to enjoin LSC from enforcing the restriction on non-LSC funds, LSC attempted to salvage the constitutionality of the non LSC-funds restriction by issuing a so-called "program integrity regulation."⁴⁴ Acknowledging that the non-LSC funds restriction had overreached, LSC claimed that its regulation was intended to provide recipients with the opportunity to use their own non-LSC resources to finance the restricted activities.⁴⁵

Yet, it is clear from the operation of the regulation that its real intent is to make it as difficult as possible for a recipient to use private funds to engage in restricted representation. To spend their own non-LSC funds on restricted work, grantees must operate a new organization out of a physically separate office, with separate staff and equipment.⁴⁶ In practice, LSC's program integrity regulation imposes conditions so onerous that almost no program in the country has been able to rely on it successfully to create a separate affiliate under its control through which to conduct privately financed, restricted activities.

IV. THE LSC RESTRICTIONS OBSTRUCT JUSTICE FOR LOW-INCOME INDIVIDUALS AND WASTE SCARCE FUNDS

Over a decade of experience with the legal services restrictions has shown that they prevent people with pressing needs from obtaining full access to the justice system. They deny low-income people the legal tools available to those who can afford to pay for a lawyer. The restrictions constrict the choices available to state and local governments, as well as private foundations and individual donors, who wish to be partners in innovative efforts to expand access to justice. Finally, they squander precious funds that could go toward representing more underserved clients.

A. Limits on Advocacy Tools Available to Low-Income Clients Obstruct Equal Justice.

Notwithstanding the restrictions, legal services offices continue to provide high-quality representation and assist client communities in addressing legal problems. However, clients face many types of legal problems that could be addressed more effectively and efficiently were they to have access to the legal tools available to all other litigants. This section describes the impact of particular advocacy restrictions – those prohibiting attorneys’ fee awards, class actions, and legislative and administrative advocacy – and includes examples of specific cases that the Brennan Center has gathered from legal services offices around the country.

Many of the examples involve efforts to combat predatory lending and other consumer scams that are tied to the mortgage meltdown and foreclosure crisis. In the midst of the national financial crisis, legal aid providers are being inundated with requests for help by people about to lose their homes.⁴⁷ The need is tremendous and the resources available are limited. When legal aid offices are able to take cases in which consumer fraud was involved,⁴⁸ the restrictions – particularly the class action and attorneys’ fee restrictions – limit the ability of LSC recipients to perform their private attorney general role in the consumer protection enforcement scheme and enable wrongdoers to write off individual cases as a mere cost of doing business.⁴⁹ Moreover, the restrictions on legislative advocacy have gagged legal aid attorneys from performing their critical role in alerting legislatures to the problems of low-income communities, including those that led to the subprime lending crisis.⁵⁰

1. Attorneys’ Fee Award Restriction Prolongs Litigation and Undercuts State and Federal Regulatory Schemes.

For cases in which legal services organizations represent clients, attorneys’ fee awards serve three related, and equally important, functions. First, fee awards provide a reason, within an ongoing case, to encourage a party to agree to a settlement; second, they act as a deterrent to

ATTORNEYS’ FEE AWARDS ACT AS A DETERRENT TO DISCOURAGE PEOPLE FROM VIOLATING LAWS THAT ARE DESIGNED TO PROTECT THE PUBLIC.

discourage people from violating laws that are designed to protect the public; and third, they enable legal aid programs to bring in additional revenue from non-LSC sources in order to do more work to protect poor clients and poor communities.⁵¹

Fee awards play an especially critical role in consumer protection and mortgage fraud cases. In all but five states, consumer protection statutes that prohibit deceptive practices permit prevailing plaintiffs to recover attorneys’ fees from defendants who have been found to have violated the law.⁵² On the federal level, the Fair Housing Amendments Act (“FHAA”), a tool for combating racially discriminatory bias in predatory lending, also provides for attorneys’ fee awards when a plaintiff has prevailed.⁵³ The Real Estate Settlement Procedures Act (“RESPA”), which prohibits kickbacks to mortgage brokers, authorizes prevailing parties to obtain attorneys’ fees.⁵⁴ In addition, fees are authorized under the Truth in Lending Act (“TILA”),⁵⁵ which mandates certain disclosures in home equity lending, and the Home Ownership and Equity Protection Act,⁵⁶ an amendment to TILA that mandates additional disclosures for high cost home loans and

prohibits certain loan terms such as negative amortization and balloon payments.

The possibility of having to pay attorneys' fees provides critical leverage to ensure that a better funded legal adversary does not drag out proceedings in an attempt to exhaust the poor client's resources and those of the legal aid lawyer. As the New York Court of Appeals has stated, the availability of attorneys' fees is "an incentive to resolve disputes quickly and without undue expense" on the part of the court and litigants.⁵⁷ In predatory lending cases, for example, where the underlying loan to the homeowner may be a product of deceptive or overreaching strategies on the part of the lender, the unfairness inherent in the original agreement may be compounded if the lender has no incentive to conduct the litigation responsibly. Without the ability to level the litigation playing field, low-income families are placed at a disadvantage, both in the litigation and in settlement negotiations.

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LSC-funded South Brooklyn Legal Services ("SBLs") has one of the nation's leading predatory lending practices. It reports that the inability to seek fee awards frequently results in predatory lenders dragging out cases that might otherwise settle if fees were available to serve as an incentive to resolve the cases before the investment of substantial attorney time.⁵⁸ In one case against Ameriquest Mortgage Co., one of the nation's largest subprime mortgage lenders, SBLs represented an elderly African-American widow who they allege had been conned into an unaffordable mortgage when she needed to make repairs to her home of over 25 years.⁵⁹ After meeting with Ameriquest representatives, this client received a 2/28 mortgage (a 30-year mortgage with two years at a fixed rate and 28 years at an adjustable rate) with initial monthly payments of \$2,300, nearly three times her monthly income.⁶⁰ To make it appear as if she could afford the loan, Ameriquest allegedly created a fake set of financial documents to include in her loan file, including a 401(k) document, employment statement, lease agreement and tax returns.⁶¹ With SBLs's assistance, she brought a case alleging Fair Housing Act, Truth in Lending Act, Real Estate Settlement Procedures Act, New York deceptive practices act and other violations.⁶²

In an attempt to prove that the company engaged in a pattern of extending unaffordable loans to borrowers, SBLs sought the lender's loan files for other borrowers around New York.⁶³ Ameriquest initially refused to turn over the documents and the company was able to draw out a lengthy court battle due to the severe mismatch in negotiating stances.⁶⁴ Eventually, Ameriquest produced 50,000 pages of documents, which took two attorneys hundreds of hours to review and was an enormous drain on SBLs resources.⁶⁵ The case eventually settled.⁶⁶ Had SBLs been permitted to seek attorneys' fees, Ameriquest might have had an incentive to limit the amount of time the plaintiffs' attorneys had to spend on the case, thus, speeding up the litigation process. In addition, the possibility of a fee award could have given the SBLs client more leverage in settlement negotiations.

The award of attorneys' fees also serves a deterrent purpose. For example, it ensures that wrongdoers suffer some additional financial penalty for violating a consumer protection or

civil rights statute and cannot merely write off the costs incurred in the litigation as a cost of doing business. When low-income victims of such violations cannot seek fee awards, however, that purpose is frustrated. As new “foreclosure consultant” scams – in which unsavory “consultants” make money by falsely promising to help distressed homeowners refinance or otherwise reduce their mortgage debt – pop up with alarming regularity around the country, the fee restriction hampers efforts to shut them down.

LSC-funded Legal Aid Foundation of Los Angeles (“LAFLA”) estimates that as many as 30 to 40 percent of homeowners contacting its office last year for foreclosure-related assistance had either already paid a foreclosure consultant or had been contacted by one.⁶⁷ To protect homeowners and ensure

that they are informed of their rights, California law regulates the practices of these foreclosure consultants.⁶⁸ Even with this law on the books, LAFLA reports that some consultants illegally provide little or no services and divert the homeowner from seeking legitimate assistance. In many cases against deceitful foreclosure consultants, actual damages would be in the range of \$1,500 to \$2,500, but this small amount limits the effectiveness and feasibility of litigation.⁶⁹ Despite the statutory provision for attorneys’ fees in the California law, there are inadequate resources available among those entities that could pursue fees, including the private bar and criminal prosecutors, to fight these predatory consultants. If LAFLA could seek fees in these cases, it could raise the consultants’ costs of continuing these illegal practices, perhaps high enough to put them out of business.

Attorneys’ fees also deter wrongful conduct by individuals who flout court orders. In one aspect of LSC-funded Legal Aid of West Virginia’s practice, staff attorneys and volunteer private attorneys represent victims of domestic violence who seek protective orders.⁷⁰ However,

PRIOR TO THE RESTRICTION’S ENACTMENT, LSC-FUNDED ORGANIZATIONS IN CALIFORNIA RECOVERED APPROXIMATELY \$1.75 MILLION ANNUALLY IN ATTORNEYS’ FEES, A REVENUE SOURCE THAT IS NO LONGER AVAILABLE TO THEM.

when an abuser repeatedly flouts court orders, the victim cannot seek attorneys’ fees to deter such flagrant and dangerous violation of the law.

Finally, the attorneys’ fee restriction cuts off a key mechanism that, while promoting enforcement of the law, has the added benefit of enabling programs to bring in additional funds to enable more clients to protect their rights. The California Legal Services Commission has observed

that in addition to impeding successful case resolutions, the attorneys’ fee award restriction creates serious funding problems for LSC grantees.⁷¹ Prior to the restriction’s enactment, LSC-funded organizations in California recovered approximately \$1.75 million annually in attorneys’ fees, a revenue source that is no longer available to them.⁷²

WHEN AN ABUSER REPEATEDLY FLOUTS COURT ORDERS, THE VICTIM CANNOT SEEK ATTORNEYS’ FEES TO DETER SUCH FLAGRANT AND DANGEROUS VIOLATION OF THE LAW.

2. Class Action Restriction Prevents Use of Rare But Necessary Device for Effective Representation.

Class actions provide courts and litigants with an efficient mechanism for adjudicating the similar claims of individuals who comprise a group and to ensure that all similarly situated persons obtain relief when a defendant violates the law. They also provide access to the courts for individuals who might not have the resources to bring an individual claim. In some cases, the availability of a class action ensures that broad discovery can take place as to a defendant's unlawful actions.

For poor people in particular, the availability of the class action option is critical for obtaining relief from widespread, illegal practices.⁷³ Historically, class actions by legal services programs ensured that poor children obtained medical coverage,⁷⁴ forced the Social Security Administration to abide by court rulings,⁷⁵ and challenged consumer fraud.⁷⁶ Access to justice and legal services commissions in Georgia, Hawaii, Missouri, New Hampshire, and North Carolina have concluded that the inability to use the class action mechanism hinders legal services offices from providing the best possible services to their clients.⁷⁷ As the North Carolina Legal Services Planning Council has concluded, challenging some “illegal but widespread practices” without a class action lawsuit is “impossible.”⁷⁸

CHALLENGING
“ILLEGAL BUT WIDESPREAD
PRACTICES” WITHOUT A
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“IMPOSSIBLE.”

As with the attorneys' fee restriction, the class action limitation has a particularly harmful effect on efforts to combat consumer fraud that targets low-income communities. In predatory lending cases, for example, legal services programs must litigate against unscrupulous players piecemeal, helping one homeowner at a time instead of a broad class of victims. A recent suit by eight first-time homebuyers against United Homes, LLC, a self-titled “one-stop shop” of real estate companies, lenders, appraisers, and lawyers, illustrates the inability of the courts to fully enforce consumer protection laws without the option of a class action.⁷⁹

Represented by South Brooklyn Legal Services, the eight African-American homebuyers allege that United Homes conspired with appraisers, lenders, and attorneys to sell “overvalued, defective homes financed with predatory loans.”⁸⁰ In seeking to vacate the underlying mortgage obligations, they allege that United Homes failed to disclose their properties' histories, inflated the homes' values with inaccurate appraisals, overstated the buyers' assets and incomes on loan applications, concealed information about loan terms, sold the homes in uninhabitable conditions and refused to make agreed-upon repairs.⁸¹ The homebuyers also allege that “United Homes exploited the racially segregated housing market to engage in ‘reverse redlining,’ the practice of intentionally extending credit to members of minority communities on unfair terms.”⁸² The bulk of the plaintiffs' claims have survived a motion to dismiss and the case continues.⁸³ Given the alleged nature of this “one-stop shop,” it is hard to imagine that these eight individual plaintiffs are the only people in Brooklyn who

fell victim to the defendant's practices. However, unable to file a class action against United Homes, SBLS cannot seek more widespread relief for other homebuyers potentially taken advantage of by United Homes.

3. Legislative and Administrative Advocacy Restriction Strips the Poor of a Powerful Voice.

Low-income people are at a distinct disadvantage in raising their concerns before legislative and administrative bodies. They lack the lobbyists, trade associations and donation money that provide corporate and other well-resourced interests access to the political process. At the same time, their daily lives are often inextricably linked with the operations of government and law.⁸⁴

Legal aid attorneys who see the legal problems faced by low-income communities on a daily basis can potentially play a critical role in alerting legislatures and other government bodies to gaps in regulation and problems in the implementation of laws. The silencing of legal aid attorneys has had dire consequences in the current mortgage crisis.⁸⁵ Attorneys at Maryland Legal Aid Bureau ("LAB"), for example, have witnessed many of the lending abuses that have occurred over the last 10 years, but restrictions on legislative and administrative advocacy have prevented them from actively pursuing reforms.⁸⁶ Under the restrictions, the only way that a legal aid office can participate in lobbying is in response to a written request from a lawmaker.⁸⁷ Because lawmakers are often unaware of this limitation and of the need to make an extra effort to invite the participation of legal services lawyers in legislative discussions, this highly unusual requirement can shut down communication entirely.⁸⁸

In contrast, when LAB has been able to educate lawmakers about the problems faced by its clients – at a lawmaker's invitation, as required by the restrictions – it has lent a critical, non-mortgage-industry voice to the process. In 2008, the Maryland Legislature dramatically overhauled state laws regarding credit and lending processes.⁸⁹ Because of a lawmaker's invitation, a LAB attorney was able to participate in a state Senate Finance Committee workgroup on revising consumer protection safeguards that was otherwise composed of representatives from the lending, mortgage and banking industries.⁹⁰ The LAB attorney was the only person in the workgroup positioned to represent the interests of borrowers.⁹¹ Input from this attorney ensured that the proposed consumer protections were not unduly limited to the most extreme types of loan products, as the industry representatives had proposed, and resulted in a more wide-ranging consumer protection bill being passed by the Legislature.

LEGAL AID ATTORNEYS WHO SEE THE LEGAL PROBLEMS FACED BY LOW-INCOME COMMUNITIES ON A DAILY BASIS CAN POTENTIALLY PLAY A CRITICAL ROLE IN ALERTING LEGISLATURES AND OTHER GOVERNMENT BODIES TO GAPS IN REGULATION AND PROBLEMS IN THE IMPLEMENTATION OF LAWS.

B. Restrictions on Unpopular Clients Render Courts Off-Limits for the Most Vulnerable.

Reflecting the extraordinary political winds of the time, the 1996 restrictions prohibited legal services attorneys from representing many categories of immigrants and all prisoners.⁹² These exclusions further marginalize those with the least access to the civil justice system.⁹³

1. Immigrant Representation Restriction Bars Assistance to Lawfully Present Documented Workers.

For certain categories of immigrants, including many who are lawfully in the United States, the restriction places legal representation out of reach even when the stakes are high. In many parts of the country, there are no non-LSC-funded legal aid offices that can serve excluded immigrants.⁹⁴ As a result, they have no place to turn when they face unlawful eviction, consumer fraud or an employer who has cheated them out of wages.

One of the groups hardest hit by the immigrant restriction are those migrant workers here in the U.S. at their employer's invitation on H-2B visas, a visa category for unskilled, non-agricultural workers performing seasonal or temporary jobs. H-2B visa holders were excluded from legal aid eligibility in 1996.⁹⁵ Last year, Congress eased the restriction slightly and made those H-2B visa holders working in the forestry industry eligible for legal aid.⁹⁶ However, those H-2B workers employed in other industries, such as construction, canning and tourism, remain ineligible.⁹⁷

H-2B workers often perform tasks that risk physical harm and frequently are mistreated by employers.⁹⁸ Many do not speak English and work in geographically isolated areas.⁹⁹ Without access to legal services, they are virtually without recourse when their rights are violated. Employers often take advantage of this fact by misclassifying agricultural workers, who should fall under the relatively more stringent protections of the H-2A visa program, as H-2Bs.¹⁰⁰

H-2B workers in need of assistance have to be turned away by LSC-funded programs.¹⁰¹ LSC-funded Texas RioGrande Legal Aid describes one case that involved an "illegal guest-worker importation scheme" in which a grower and two farm labor contractors used over 400 H-2B workers to harvest and pack onions and watermelons from 2001 to 2007 in south and west Texas to circumvent the protections and benefits of the H-2A program, including access to LSC-funded representation.¹⁰² TRLA was unable to represent any of the H-2B visa holders even though there was reason to believe that they had been abused at the hands of their employer and should have been issued visas that would have allowed them LSC representation.¹⁰³

2. Prisoner Representation Restriction Unnecessarily Delays Reentry Services.

Legal services organizations are prohibited from representing anyone in prison in litigation.¹⁰⁴ This restriction has hampered efforts to resolve civil legal issues, such as those related to debt and child custody, that can help persons in prison prepare for re-entry into their communities. In some parts of the country, the restriction has left those in prison with virtually no access to civil legal representation.¹⁰⁵

IN SOME PARTS OF THE COUNTRY, THE RESTRICTION HAS LEFT THOSE IN PRISON WITH VIRTUALLY NO ACCESS TO CIVIL LEGAL REPRESENTATION.

Michigan, for example, has a bold and innovative Prisoner Reentry Initiative that aims to help incarcerated people as they prepare to reenter society.¹⁰⁶ A team of community groups, faith-based organizations, and legal services providers stands ready to provide essential services.¹⁰⁷ An important component of this project is “in-reach” – going into prisons and jails to address the problems confronting these men and women prior to release.¹⁰⁸ But, even though this Michigan initiative is primarily funded with state and private money, legal services programs, such as the Reentry Law Project of LSC-funded Legal Aid of Western Michigan – a key legal player on the team – is barred from providing its services to anyone in a prison.¹⁰⁹ The Reentry Law Project can only assist individuals once released, even though many of the problems facing prisoners would be better addressed during incarceration, so that citizens can move immediately into employment and housing upon release.¹¹⁰ For example, many prisoners face the loss of custody of their children while incarcerated and would benefit greatly from the help of an attorney as they struggle to maintain family relationships.¹¹¹

In states that lack other funding or organizations designed to assist those in prison, the restriction has meant that legal representation is effectively out of reach. For example, in Hawaii, where the incarcerated population grew 138 percent from 1990 to 2006, the ACLU of Hawaii is the “only legal service agency with the potential to assist the inmate population; however, due to their limited resources they only accept cases which would result in a larger impact on the overall corrections system.”¹¹²

C. The Restriction on Non-LSC Funds Wastes Precious Funds and Unfairly Burdens State and Local Efforts to Expand Access to Justice.

The most draconian aspect of the LSC funding restrictions is the application of this entire set of limitations to all of the state, local, private and other non-LSC funds possessed by LSC recipients. This punitive measure subjects legal services offices to a more stringent regime than almost any other federal grantee. It has interfered with efforts at the state level to leverage resources for the efficient and effective provision of legal aid. Finally, in a field notoriously under-resourced, the restriction on non-LSC funds has wasted precious dollars and driven away private funding opportunities.

1. Non-LSC Funds Restriction is Out of Step With the Government's Approach to Public-Private Partnerships.

The restriction on non-LSC funds, and the program integrity regulation that implements the restriction, are out of step with the traditional model for public-private partnerships. Non-profit organizations that receive part of their funding from LSC are treated more stringently than almost all other government-funded non-profits, including faith-based organizations.¹¹³ Other non-profits must account strictly for their receipt of government funds, but are not forced to operate dual systems out of separate offices in order to use their private funds to engage in constitutionally protected activities.¹¹⁴

LSC has sought to defend this “physical separation” model in court by claiming that such stringent separation is necessary to ensure that it does not indirectly subsidize or appear to endorse the disfavored, restricted activities, such as representation of undocumented immigrants or class actions.¹¹⁵ However, that claim is belied by the fact that faith-based organizations that receive government funds are subject to a much more relaxed separation regime.¹¹⁶

More specifically, the First Amendment's Establishment Clause bars the federal government from subsidizing or endorsing a religious grantee's religious activities,¹¹⁷ yet, under the current federal Faith-Based Initiative, the government allows religious organizations to rely on a single set of staff to run federally funded, non-religious programs in a single physical space in which the organizations conduct privately financed religious activities such as worship and proselytization.¹¹⁸ The government has asserted that such a modest level of separation is good enough to avoid subsidization as well as the appearance of endorsing a privately funded religious message.¹¹⁹ The disparity in treatment with legal services programs is particularly striking since the Constitution's Establishment Clause actually forbids governmental endorsement of a religious message, whereas the Constitution does not require the government to distance itself from the provision of legal representation and, indeed, in some cases may even require government to provide representation.¹²⁰

The punitive nature of LSC's physical separation regime is further underscored by contrasting it with the more reasonable rules applied in 2002 to federally funded stem cell research. Scientists using private funds to conduct research on federally proscribed stem cell lines were required, for years, to operate two entirely separate labs, one for their privately funded research, another for their publicly funded research.¹²¹ In 2002, the National Institutes of Health found this restriction so expensive, inefficient, and contrary to principles of scientific research that it removed the restriction.¹²² NIH permitted government funded scientists to conduct privately funded stem cell research alongside federally funded research, in a single lab, so long as they use rigorous bookkeeping methods to ensure that any restricted stem cell experiments are financed exclusively with private dollars.¹²³

LSC-funded organizations should, at minimum, be placed on a level playing field with these and other federal grantees. In addition, given LSC's stringent accounting and auditing

requirements, the federal government would have every assurance that its money would be spent for the purposes for which it was appropriated. LSC grantees abide by strict accounting rules that ensure that costs are properly allocated among LSC and other grants.¹²⁴ LSC recipients also must abide by stringent time-keeping requirements; attorneys keep track of their time in quarter-hour segments.¹²⁵ Additionally, each LSC-funded program is audited annually by the Office of the Inspector General.¹²⁶ These accounting procedures are more rigorous than those that exist for many other federal grantees and would continue to ensure that LSC funds are not misspent if the non-LSC funds restriction, or any other restrictions, were removed.

2. Restriction on Non-LSC Funds Interferes With Growing State and Local Efforts to Expand Access to Justice.

State and local governmental institutions and private charitable donors are essential partners in state justice systems designed to expand access to civil justice. For example, money for civil legal services is contributed by Interest on Lawyers' Trust Accounts (IOLTA),¹²⁷ state legislative appropriations, civil court filing fees, and a variety of other state and local

THE NON-LSC FUNDS RESTRICTION CURRENTLY TIES UP APPROXIMATELY \$490 MILLION IN NON-LSC FUNDING ANNUALLY, MUCH OF IT FROM THESE STATE AND LOCAL GOVERNMENT SOURCES.

contributions, all intended to enable low-income individuals, families, and communities to obtain civil legal assistance.¹²⁸ But, the federal government undercuts this important function, by effectively limiting how state and local contributions can be spent by local legal aid non-profits.

The non-LSC funds restriction currently ties up approximately \$490 million in non-LSC funding annually, much of it from these state and local government sources.¹²⁹ Real federal funding levels have declined from the high water mark achieved in FY 1981.¹³⁰ Since that year, annual federal

underfunding of LSC has meant that LSC finances less and less of legal services organizations' work while the restriction continues to apply federal control over the entirety of those organizations' activities. Nationally, 58.1 percent of the funds that go to LSC grantees came from non-LSC sources in 2007, up from 40 percent the year the restriction was enacted.¹³¹

The proportion is much more skewed in some states. In New Jersey, for example, LSC funds amounted to only 13 percent of legal aid programs' total funding in 2007, yet the restriction encumbered the remaining 87 percent.¹³² Overall, LSC grantees in 28 states received less than half of their funds from LSC sources in 2007,¹³³ yet the restriction limited what these programs could do with all of their funds. Thus the restriction, coupled with funding trends in recent years, has given the federal government increasingly disproportionate control over legal services organizations' activities and over the money of state, local, and private contributors.

IN NEW JERSEY, LSC FUNDS AMOUNTED TO ONLY 13 PERCENT OF LEGAL AID PROGRAMS' TOTAL FUNDING IN 2007, YET THE RESTRICTION ENCUMBERED THE REMAINING 87 PERCENT.

3. Restrictions Waste Precious Resources that Could Go Toward Serving More Families in Need.

In some states with significant non-LSC funding, justice planners have established entirely separate organizations and law offices, funded by state and local public funders and by private charitable sources, to carry out the activities that LSC-funded programs are otherwise prohibited from conducting.¹³⁴ However, because LSC's program integrity regulation requires physical separation between LSC-funded and non-LSC-funded organizations, the costs associated with overhead, personnel, and administrative expenditures are duplicated.¹³⁵

Twin systems inevitably cost more to run. And, thus, the restriction creates dramatic inefficiencies in a system that is already under-funded. The money contributed by state and local governmental funders, and by private charitable donors could be used to finance basic legal services for families, but instead has to be spent on duplicate offices, equipment, executive directors, and the time spent coordinating their efforts.

In Oregon, for example, legal aid programs spend approximately \$300,000 each year on duplicate costs to maintain physically separate offices throughout the state.¹³⁶ If the restriction on state and local governmental funds and private money were lifted, the redundant costs could be eliminated. The significant savings from ending dual operating systems would enable legal services organizations to cover more conventional legal services cases – evictions, domestic violence cases, predatory lending disputes – in underserved rural parts of the state where access to legal assistance is limited.

The restrictions also make LSC-funded organizations ineligible to receive certain private funding. Legal Services NYC has been unable to obtain additional funds from a local foundation due to the restrictions on its representation of immigrants.¹³⁷ Legal Services NYC partners with 14 community-based organizations in an innovative “Single Stop Program” that provides legal assistance and social services together at outreach sites in community-based organizations around New York City.¹³⁸ This effort, which helps families keep their homes, obtain essential medical care, qualify for emergency food benefits, and more, has been funded by a local anti-poverty foundation.¹³⁹ Concerned about the needs of New York's large immigrant population, the foundation added funding to ensure that legal assistance would be provided to immigrants regardless of immigration status.¹⁴⁰ Because of the restriction on non-LSC money, however, Legal Services NYC could not seek this added funding from the foundation to expand this successful community-based outreach program.¹⁴¹

Finally, as is described above (in Part IV.A.1), the restrictions prohibit legal aid organizations from relying on additional revenue through court-ordered attorneys' fee awards to finance additional work on behalf of families in need.

All of these limits are unjustifiable in a system desperate for funds.

V. THE SOLUTION

A growing number of national, state, and local voices have called for reform of the legal services restrictions. In 21 states, reports authored by planning bodies dedicated to promoting access to justice and to closing the justice gap have identified the federal legal services restrictions as substantial barriers to justice.¹⁴² Many others institutions and leaders have spoken out about the harms of the LSC restrictions, and particularly about their application to non-LSC funds. Describing a lawsuit filed by Oregon against the “program integrity rule,” Governor Ted Kulongoski said: “The important point is that for the first time a *state* is now party to a suit that attempts to free Legal Aid from restrictions that serve no purpose other than to close the courthouse door to plaintiffs who have no ability to hire private attorneys.”¹⁴³

The calls for change are coming from across the political spectrum. In 2005, the National Council of Churches, along with 31 other groups of faith, sent a letter to leaders in the House of Representatives urging Congress to lift the restriction on non-LSC funds.¹⁴⁴ In 2006, the National Association of Evangelicals urged Congress to do the same.¹⁴⁵ The removal of restrictions is likewise a priority of the civil rights community.¹⁴⁶

THE PRESIDENT HAS ASKED CONGRESS TO REMOVE THE NON-LSC FUNDS RESTRICTION AND THE RESTRICTIONS THAT PROHIBIT PROGRAMS FROM USING LSC FUNDS TO PARTICIPATE IN CLASS ACTIONS AND TO CLAIM ATTORNEYS’ FEE AWARDS.

Now the national economic crisis has cast a bright light on the problem, making clearer than ever the need for immediate correction of the LSC restrictions. With homeowners facing foreclosure at alarming rates and thousands of people losing jobs each month, the need for legal services is urgently pressing.¹⁴⁷ In a time of austerity, correcting the LSC restrictions would bring in additional funds to finance legal representation of the poor.

Given this widespread support and recognition of the growing need, steps are being taken within the federal government to fix the problem. The Civil Access to Justice Act of 2009, recently introduced in the Senate, would ease the most troubling restrictions put in place in 1996.¹⁴⁸ More recently, the Obama Administration, in its FY 2010 budget, recommended that Congress lift three of the major restrictions in this year’s federal appropriations process. Specifically, the President has asked Congress to remove the non-LSC funds restriction and the restrictions that prohibit programs from using LSC funds to participate in class actions and to claim attorneys’ fee awards.¹⁴⁹ This support from the Obama Administration is complemented by a broad range of organizations that are calling for reform: recently, more than 100 leading groups from the access to justice, non-profit advocacy, faith-based and civil rights community called on Congress to eliminate the most egregious restrictions on legal aid.¹⁵⁰

Congress should take the following, cost-free steps:

1. Remove the application of the LSC restrictions to state, local, private and other non-LSC funds that legal aid organizations receive.
2. Remove restrictions on LSC funds that interfere with the ability of legal services attorneys to protect their clients' rights, that is, eliminate the restrictions: on seeking attorneys' fee awards; on class actions; on legislative and administrative advocacy, and on solicitation.
3. Remove restrictions that prohibit representation of documented immigrants and people in prison who need help with reentry matters.

Across America, families and communities face unprecedented financial pressures and look to civil legal aid programs for essential help. In combination with necessary funding increases, the removal of these select LSC funding restrictions will help revitalize the nation's legal services system at a critical moment.

ENDNOTES

- 1 See Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 Contemp. Econ. Pol'y 158, 169 (2003); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law & Soc'y Rev. 419, 429 (2001); see also Rebecca L. Sandefur, *Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes* 3 (Mar. 26, 2008) (unpublished manuscript, on file with the Brennan Center) (concluding that "lawyer-represented cases are more than 5-times more likely to prevail in adjudication than cases with self-represented litigants.").
- 2 What is LSC, <http://www.lsc.gov/about/lsc.php> (last visited April 12, 2009) [hereinafter What is LSC] (noting that LSC is "the single largest provider of civil legal aid for the poor in the nation.").
- 3 Legal Servs. Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 5 (2005) [hereinafter Justice Gap].
- 4 *Id.* at 14.
- 5 *Id.* at 17.
- 6 *Id.*
- 7 See Deborah L. Rhode, *Access to Justice* 104 (2004) (noting that the "current legal aid structure denies assistance to the politically unpopular groups who are least able to do without it and blocks the strategies most likely to address the root causes of economic deprivation.").
- 8 See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53-1321-56 (1996). Congress has carried forward these restrictions each year by incorporating them in the annual appropriations rider for LSC.
- 9 See *id.* at 1321-56.
- 10 See *id.* § 504(a) (prohibiting any "entity" that engages in enumerated restricted activities from receiving LSC funds).
- 11 See, e.g., *Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 561 F.Supp.2d 1187 (D. Or. 2008); J.J. Sullivan, C.C. Carr, & A. Santos-Singh, *An End to Redundancy? CLS and PLA Anxiously Await Federal Court Ruling on Working Together*, Phila. Law., Fall 2005, at 18 (describing dual system set up in Philadelphia).
- 12 As Deborah L. Rhode has succinctly phrased it, "[e]qual justice under law is one of America's most proudly proclaimed and widely violated legal principles." Rhode, *supra* note 7, at 3.
- 13 See 42 U.S.C. § 2996 (1977).
- 14 *Id.*
- 15 See *id.* § 2996c.
- 16 See *id.* § 2996e.
- 17 What is LSC, *supra* note 2.
- 18 See 42 U.S.C. § 2996f(a)(2)(C).
- 19 What is LSC, *supra* note 2.
- 20 Legal Servs. Corp., *Legal Services Corporation Fact Book 2007*, at 8 (2008) [hereinafter *Fact Book 2007*], available at <http://www.lsc.gov/pdfs/factbook2007.pdf>.
- 21 What is LSC, *supra* note 2.

- 22 Fact Book 2007, *supra* note 20, at 7.
- 23 Compare *id.* at 6, with Legal Servs. Corp., 1996 LSC and Non-LSC Funding [hereinafter 1996 LSC] (on file with the Brennan Center).
- 24 See Alan W. Houseman & Linda E. Perle, Ctr. for Law and Soc. Policy, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States* 21 (2007), available at http://www.clasp.org/publications/legal_aid_history_2007.pdf.
- 25 42 U.S.C. § 2996e(d)(5) (1977). Congress also prohibited recipients from using LSC and private funds to engage in administrative and legislative lobbying, unless such representation was “necessary to the provision of legal advice and representation with respect to such client’s legal rights.” Recipients were free to engage in lobbying with other non-LSC government funds, such as funds from local and state governments, if the sources of those funds permitted such activities. See 42 U.S.C. § 2996h (2004).
- 26 42 U.S.C. § 2996f(b) (1977).
- 27 *Id.* § 2996h.
- 28 *Id.* § 2996(6).
- 29 See, e.g., Robert Hornstein et al., *The Politics of Equal Justice*, 11 Am. U. J. Gender Soc. Pol’y & L. 1089, 1096 (2003); Editorial, *A Brazen Assault on Legal Services*, N.Y. Times, June 23, 1990, at 22, available at <http://www.nytimes.com/1990/06/23/opinion/a-brazen-assault-on-legal-services.html>.
- 30 Alfred S. Regnery, *Action, Legal Services Corporation and Community Services Administration, in Mandate For Leadership, Policy Management in a Conservative Administration* 1057, 1061-62, 1068 (Charles L. Heatherly ed., 1981).
- 31 *Id.* at 1061.
- 32 *Id.*
- 33 *Fact Book 2007, supra* note 20, at 7.
- 34 See Houseman, *supra* note 24, at 36.
- 35 *See id.*
- 36 *See id.*
- 37 *See id.* at 36-37.
- 38 See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53-1321-56 (1996).
- 39 *See id.*
- 40 *See id.*
- 41 42 U.S.C. § 2996i(c) (1977).
- 42 Legal Aid Soc’y of Haw. v. Legal Servs. Corp., 961 F. Supp. 1402 (D. Haw. 1997).
- 43 Velazquez v. Legal Services Corp., 985 F.Supp. 323 (E.D.N.Y., 1997).
- 44 See 62 Fed Reg. 27,695 (May 21, 1997) (to be codified at 45 C.F.R. pt. 1610) (describing history of the program integrity rule).
- 45 *See id.*

- 46 See 45 C.F.R. § 1610.8 (1997).
- 47 See Brennan Ctr. for Justice, The Economy and Civil Legal Services (Feb. 1, 2009), *available at* http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services.
- 48 It is becoming increasingly acknowledged that the subprime mortgage meltdown was not just the result of objective economic forces but also the product of fraud in the mortgage business. As Sen. Patrick Leahy recently stated when introducing a bill to help federal agencies crack down on mortgage and other financial fraud, law enforcement cannot keep pace with the number of complaints: “. . . suspicious activity reports alleging mortgage fraud that have been filed with the Treasury Department have increased more than tenfold, from about 5,400 in 2002 to more than 60,000 in 2008.” 155 Cong. Rec. S1679, S1682 (2009) (statement of Sen. Leahy).
- 49 See Laura K. Abel, *Lawyers for the Poor Muzzled in Subprime Mess*, The Nation, Jan. 16, 2008 [hereinafter Abel, *Lawyers*], *available at* <http://www.thenation.com/doc/20080128/abel>.
- 50 See *id.*
- 51 See, e.g., *Duell v. Condon*, 84 N.Y.2d 773, 780 (1995); *Maplewood Mgmt. v. Best*, 533 N.Y.S.2d 612, 613-14 (N.Y. App. Div. 1988); Cal. Legal Servs. Coordinating Comm., California State Justice Plan 2001: Response to LSC Program Letter 2000-1, at 32 (2001) [hereinafter Cal. Legal Servs.].
- 52 See Carolyn L. Carter, Nat’l Consumer Law Ctr., *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* 21 (2009), *available at* http://www.nclc.org/issues/udap/content/UDAP_Report_Feb09.pdf.
- 53 42 U.S.C. § 3613(c)(2) (1988) (“[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee and costs.”).
- 54 24 C.F.R. § 3500.21(f)(1)(iii) (2009).
- 55 15 U.S.C. §§ 1601 *et seq.* (1976).
- 56 15 U.S.C. § 1639 (1994).
- 57 *Duell v. Condon*, 84 N.Y.2d 773, 780 (1995) (describing New York’s Real Property Law § 234, which permits tenants to obtain attorneys’ fees when a residential lease term permits landlords to collect fees).
- 58 Brennan Center Memorandum (May 8, 2009) [hereinafter Brennan Ctr. Memo] (on file with the Brennan Center) (summarizing interviews with legal services programs).
- 59 Complaint at 1, *Overton v. Ameriquest Mortgage Co. et al.*, No. 05-CV-4715 (E.D.N.Y. Oct. 6, 2005).
- 60 *Id.*
- 61 *Id.*
- 62 *Id.*
- 63 Brennan Ctr. Memo, *supra* note 58.
- 64 *Id.*
- 65 *Id.*
- 66 *Id.*
- 67 Brennan Ctr. Memo, *supra* note 58.

- 68 Cal. Civ. Code § 2945(c)(1) (1980).
- 69 Brennan Ctr. Memo, *supra* note 58.
- 70 *Id.*
- 71 Cal. Legal Servs., *supra* note 51, at 32.
- 72 *Id.*
- 73 See Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 Penn. St. L. Rev. 1, 10-14 (2005).
- 74 See *id.* at 11 (describing case brought by the Tennessee Justice Center).
- 75 See David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia and Oregon Describe the Costs*, 17 Yale L. & Pol’y Rev. 337, 340-41 (1998).
- 76 See *id.* at 347.
- 77 See Appendix.
- 78 N.C. Legal Servs. Planning Council, *North Carolina Statewide Legal Needs Assessment 2003*, at 49 (2003), available at https://www.legalaidnc.org/Public/Participate/Legal_Services_Community/Planning_Council/NC%20Statewide%20Needs%20Assessment%2003%2024%2003.pdf.
- 79 *Barkley v. Olympia Mortgage Co.*, 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007).
- 80 *Id.* at *1.
- 81 *Id.*
- 82 *Id.* at *2.
- 83 *Id.* at *23.
- 84 See generally Barbara Gault et al., *Prospects for Low-Income Mothers’ Economic Survival under Welfare Reform*, 28 *Publius* 175 (2008) (describing effects of welfare reform laws and policies on low-income mothers); Christopher Mazzeo et al., *Work-First or Work-Only: Welfare Reform, State Policy, and Access to Postsecondary Education*, 586 *Annals Am. Acad. Pol. & Soc. Sci.* 144 (2003) (describing effects of welfare reform and state implementation on educational attainment of low-income people).
- 85 Abel, *Lawyers*, *supra* note 49.
- 86 Brennan Ctr. Memo, *supra* note 58.
- 87 See 45 C.F.R. § 1612.6 (1997).
- 88 Abel, *Lawyers*, *supra* note 49.
- 89 See, e.g., Andy Rosen, *Foreclosure Reform Bills Take Stage in Maryland Legislature*, *The Daily Rec.*, Feb. 6, 2008, http://findarticles.com/p/articles/mi_qn4183/is_20080206/ai_n21226608.
- 90 Brennan Ctr. Memo, *supra* note 58.
- 91 *Id.*
- 92 See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 1321-53-1321-55 (1996).

- 93 See Rhode, *supra* note 7, at 115-16.
- 94 See, e.g., The Legal Aid Safety Net: A Report on the Legal Needs of Low-Income Illinoisans 170, 181 (2005), available at <http://www.equaljusticeillinois.org/docs/LegalNeeds.pdf> (describing lack of non-LSC-funded legal aid organizations outside urban centers of the state).
- 95 See § 504(a)(11).
- 96 See Press Release, Legal Servs. Corp., Temporary Forestry Workers Now Eligible for LSC-Funded Services (Jan. 10, 2008), available at http://www.lsc.gov/press/updates_2008_detail_T220_R0.php.
- 97 See *id.*
- 98 See *Hearing Before the Subcomm. On Immigration, Citizenship, Refugees, Border, Security, and International Law Membership of the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of George Miller, Chairman of the Education and Labor Comm.), available at <http://judiciary.house.gov/hearings/pdf/Miller080416.pdf>.
- 99 See Mary Bauer, S. Poverty Law Ctr., *Close to Slavery: Guestworker Programs in the United States* 31 (2007), available at http://www.splcenter.org/pdf/static/Close_to_Slavery.pdf.
- 100 See *Do Federal Programs Ensure U.S. Workers Are Recruited First Before Employers Hired From Abroad?: Hearing Before the H. Comm. on Education and Labor*, 100th Cong. 90 (2008) (statement of Javier Riojas, Branch Manager, Tex. RioGrande Legal Aid), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:41982.wais.
- 101 See *id.*
- 102 See *id.*
- 103 See *id.*
- 104 See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(15).
- 105 See, e.g., Rhode, *supra* note 7, at 116; *The 2007 Assessment of Civil Legal Needs and Barriers of Low- and Moderate-Income People in Hawai'i* II-24 (2007), available at <http://www.hsba.org/resources/1/Documents/Access%20to%20Justice.pdf> [hereinafter *The 2007 Assessment*].
- 106 Mich. Prison Reentry Initiative, *The Three-Phase, Decision-Point MPRI Model*, <http://www.michpri.com/index.php?page=how-it-works> (last visited Apr. 12, 2009).
- 107 *Id.*
- 108 *Id.*
- 109 See § 504(a)(15).
- 110 Brennan Ctr. Memo, *supra* note 58.
- 111 *Id.*
- 112 *The 2007 Assessment*, *supra* note 105, at II-24.
- 113 See Office of Mgmt. and Budget, Circular No. A-122: Cost Principles for Non-Profit Organizations, available at <http://www.whitehouse.gov/omb/circulars/a122/a122.html> (setting forth accounting requirements for recipients of federal grants).
- 114 See *id.*
- 115 See *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 607 (E.D.N.Y. 2004).

- 116 Exec. Order No. 13279, 67 Fed. Reg. 77,141 (December 12, 2002); *White House Office of Faith-Based & Comty. Initiatives, Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government* (2002) [hereinafter *Faith-Based*], available at www.ethicsinstitute.com/pdf/Faith%20Based%20Federal%20Grants.pdf. This paper takes no position on whether the Faith-Based Initiative enables the government to fulfill its constitutional obligations.
- 117 See, e.g., *Lee v. Weisman*, 505 U.S. 577, 609 (1992) (“[O]ur cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform.”).
- 118 Exec. Order No. 13279, 67 Fed. Reg. 77141; *Faith Based*, *supra* note 116.
- 119 Exec. Order No. 13279, 67 Fed. Reg. 77141; *Faith Based*, *supra* note 116.
- 120 See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- 121 Laura K. Abel, *Drawing Lines for Dollar*, *Legal Times*, Sept. 30, 2002, at 62, available at <http://www.brennancenter.org/page/-/Justice/DrawingLinesforDollars.pdf>.
- 122 *Id.*
- 123 See FAQs [Stem Cell Information] (last visited Oct. 9, 2008) (on file with the Brennan Center). The restrictions on federally funded stem cell research have since been eased further by the Obama Administration; see Executive Order: Removing Barriers to Responsible Scientific Research Involving Human Stem Cells (March 9, 2009), available at http://www.whitehouse.gov/the_press_office/Removing-Barriers-to-Responsible-Scientific-Research-Involving-Human-Stem-Cells/.
- 124 See 45 C.F.R. § 1630.
- 125 See 45 C.F.R. § 1635.
- 126 See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 503(b), 110 Stat. 1321, 1321-53-56 (1996).
- 127 When lawyers hold clients’ funds that are either nominal in amount, or expected to be held only for a short term, they must place the funds in an interest-bearing “IOLTA account.” Pursuant to state law, the interest from these accounts are pooled (note: such interest would not exist but for such pooling) and used to fund civil legal aid for low-income people and to fund improvements to the justice system. More information available at IOLTA.org Leadership for Greater Justice, <http://www.iolta.org/> (last visited Apr. 12 2009).
- 128 See Legal Servs. Corp., *Legal Services Corporation Fact Book 2006*, at 14 (2007), available at <http://www.rin.lsc.gov/Rinboard/2006FactBook.pdf>.
- 129 *Fact Book 2007*, *supra* note 20, at 6.
- 130 *Justice Gap*, *supra* note 3, at 2.
- 131 In 2007 dollars, non-LSC funding increased from \$276 million in 1996 to \$490 million in 2007, while LSC funding decreased from \$408 million in 1996 to \$354 million in 2007 (dollar amounts adjusted for inflation using CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl>). See *Fact Book 2007*, *supra* note 20, at 6; *1996 LSC*, *supra* note 23.
- 132 See *Fact Book 2007*, *supra* note 20, at 9. The “legal aid programs” discussed here include only those programs that received some LSC funding.
- 133 See *id.* at 9-10.
- 134 See, e.g., *Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 561 F.Supp.2d 1187 (D. Or. 2008); Sullivan, *supra* note 11, at 19 (describing dual system set up in Philadelphia).
- 135 See 45 CFR §1610.5(a) (1997).

- 136 See Legal Aid Servs. of Or., 561 F. Supp. 2d at 1201.
- 137 Brennan Ctr. Memo, *supra* note 58.
- 138 Legal Servs. NYC, Single Stop, http://www.legalservicesnyc.org/index.php?option=com_content&task=view&id=37&Itemid=66 (last visited Apr. 19, 2009).
- 139 *Id.*
- 140 Brennan Ctr. Memo, *supra* note 58.
- 141 *Id.*
- 142 See Appendix.
- 143 Governor Ted Kulongoski, Guardians of Democracy: Public Service and the Rule of Law, Robert Abrams Public Service Lecture at NYU Law School (Jan. 23, 2006), *available at* http://www.oregon.gov/Gov/speech/speech_012306.shtml.
- 144 Letter from Nat'l Ass'n of Evangelicals, to Senators Richard C. Shelby and Barbara A. Mikulski (July 13, 2006), *available at* http://www.brennancenter.org/page/-/d/download_file_36360.pdf; Letter from Prison Fellowship, to Rep. Frank R. Wolf and José E. Serrano (June 7, 2004), *available at* <http://www.brennancenter.org/dynamic/subpages/letter%20to%20congress%20reentry%20legal%20aid.pdf>.
- 145 See Letter from Rev. Richard Cizik, Vice President for Governmental Affairs, Nat'l Ass'n of Evangelicals, to Rep. Frank R. Wolf and Rep. Alan B. Mollohan (July 13, 2006) (on file with the Brennan Center).
- 146 Letter from Leadership Conference on Civil Rights, to Congress (Jan. 6, 2009), *available at* <http://www.civilrights.org/library/advocacy-letters/lccr-legislative-priorities-111.html>; see also Rebekah Diller, Ctr. for Am. Progress Action Fund, *Restoring Legal Aid for the Poor: Our Nation Needs a Robust Legal Services Corporation* (2008), *available at* http://www.americanprogressaction.org/issues/2008/changeforamerica/pdf/legal_services.pdf.
- 147 See Press Release, RealtyTrac, Detroit, Sotckton, Las Vegas Post Highest 2007 Metro Foreclosure Rates (Feb. 13, 2008), *available at* <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4119&acct=64847> (reporting a 79% increase in the percent of U.S. households filing for foreclosure between 2006 and 2007). The Bureau of Labor Statistics reports that, from March 2007 to March 2009, the unemployment rate has risen 4.1% to 8.5%. See Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000. The U.S. Census Bureau reports a .2% increase in the number of Americans living at or below 125% of the federal poverty line in 2007 as compared to 2006 (not statistically significant). See Bureau of Labor Statistics & U.S. Census Bureau, Annual Social and Economic (ASEC) Supplement, http://pubdb3.census.gov/macro/032007/pov/new01_125_01.htm and http://pubdb3.census.gov/macro/032006/pov/new01_125_01.htm.
- 148 See S. 718, 111th Cong. (2009) (eliminating, *inter alia*, the restriction on non-LSC funds and attorneys' fees and easing limits on class actions, administrative and legislative advocacy, and representation of prisoners and documented immigrants.).
- 149 See Budget of the U.S. Government, Fiscal Year 2010 Appendix, at 1243 (May 8, 2009), *available at* <http://www.whitehouse.gov/omb/budget/fy2010/assets/appendix.pdf>.
- 150 See Joint letter to Senators Mikulski and Shelby and Representatives Mollohan and Wolf (June 3, 2009), *available at* <http://www.brennancenter.org/page/-/Justice/090604.LegalServices-Sign-onLtr.pdf>

APPENDIX

REPORTS FROM 21 STATES IDENTIFY FEDERAL LEGAL SERVICES CORPORATION RESTRICTIONS AS A BARRIER TO JUSTICE

The reports cited below were written by state bar associations, court-established Access to Justice Commissions and state legal services planning bodies to evaluate the provision of legal services in a particular state and to document the impact of any shortcomings on unserved and underserved populations.

State commissions have found that the restrictions placed on organizations receiving federal Legal Services Corporation (“LSC”) funds:

- **Present “major barriers to justice for low-income persons . . .”** (Arkansas)
- **Prevent representation “in cases ranging from an illegal tenant lockout to consumer fraud, to civil rights enforcement.”** (New Hampshire)
- **Have a “negative impact,” “in actual practice (causing great inefficiencies in the way applicants for service must be processed and referred) and principle (denial of essential and fundamental legal assistance to some who need it).”** (New Jersey)
- **Are “major obstacles . . . for achieving ‘equal access’ for disfavored clients and politically unpopular cases.”** (Texas)
- **Limit programs’ “use of the most appropriate legal strategies to effectively represent low income clients with high priority legal needs.”** (Washington)

Excerpts from state reports:

1. Alaska

An Alaska state planning report discusses the problems created by the state’s dual program system. In 2000, Alaska Pro Bono Program, a new legal services program, was separated out of Alaska’s LSC-funded program, Alaska Legal services Corporation (“ALSC”), “primarily to free its pro bono attorneys from the LSC restrictions, which had impacted on ALSC’s advocacy in particularly unfortunate ways.”¹ Because of the restriction on non-LSC funds, each component of the state’s legal services delivery system has its own accounting, human resources management system, and case management system.²

2. Arkansas

According to the Center for Arkansas Legal Services, “federal funding cuts and restrictions on advocacy continue to present major barriers to justice for low-income persons in Arkansas.”³

3. California

The attorneys' fee award restriction is identified as particularly damaging by the California Legal Services Commission. Prior to the 1996 restrictions, LSC-funded organizations recovered \$1.75 million annually in attorneys' fees, and even having attorneys' fees as a "leveraged threat" helped in resolving problems for clients in the past. The Commission reports, "If this restriction were lifted, our state would immediately benefit."⁴

4. Georgia

In addition to mentioning that Georgia's growing poor population is putting a strain on the availability of affordable legal services, the state's Committee on Civil Justice finds that "[a]nother challenge arises because legal services providers are sometimes restricted in the types of cases they are authorized to handle," specifically citing LSC-funded organizations' inability to "initiate, participate, or engage in" class action lawsuits.⁵

5. Hawaii

A report from Hawai'i's Access to Justice Hui comments on the inadequacy of the civil legal services available to the state's incarcerated population, which grew 138 percent from 1990 to 2006. "Currently, ACLU of Hawai'i is the only legal service agency with the potential to assist the inmate population; however, due to their limited resources they only accept cases which would result in a larger impact on the overall corrections system" and cannot meet the "increased the need for individual legal assistance."⁶

Additionally, as one of its recommended "systematic changes," the report includes "increasing class action lawsuits to reduce illegal conduct against the poor."⁷ While several legal services providers operate in Hawaii, the Legal Aid Society of Hawai'i ("LASH"), which is LSC-funded and thus restricted, is by far the largest. LASH employs 39 of the state's 68.2 legal aid staff attorneys. The other 29.2 are spread across 12 fairly specialized organizations, leaving few legal aid attorneys to do the work that LASH is prohibited from doing.⁸

6. Idaho

Noting several of the groups of people unable to receive assistance from LSC-funded programs, in one state planning report, Idaho Legal Aid Services writes, "[t]here is a need to establish and/or support an entity or attorneys available to provide services to these populations."⁹ However, the report also comments that while the Idaho Justice Center was formed to handle LSC-prohibited work after the restrictions were enacted, "[t]he Center, although still in existence, is essentially inactive due to lack of resources."¹⁰

7. Illinois

In discussing gaps in current service and possible remedies, the Equal Justice Illinois Campaign recommends that privately funded entities be developed in order to utilize the advocacy tools no longer available to LSC-funded organizations, specifically class action lawsuits. "The three LSC-funded programs in Illinois . . . still engage in policy work and impact litiga-

tion within the limits set by the 1996 regulations, but they are barred from using many of the tools and strategies that had been most effective in the past.”¹¹

The Campaign also suggests that new methods be developed to address the currently unmet legal needs of certain groups that are ineligible for LSC-funded organizations’ help, including immigrants. While the state’s three LSC-funded organizations’ offices are geographically well-distributed, covering distinct areas across the state and thus collectively able to serve clients statewide, non-LSC-funded legal services providers that direct services at LSC-ineligible cases, like those involving immigrants, are headquartered in urban centers and do not have the resources to establish regional offices. Because of the specialization of services required by the restrictions, “geography is a major impediment to the efficient delivery of legal services.”¹²

The Campaign’s report also stresses the need to diversify funding for legal services programs because, “[w]hile LSC was intended to serve as a stable source of general operating funds for its grantee organizations, free from the vicissitudes of politics, this has not proven to be the case.”¹³ As is true with most states, LSC funding as a proportion of total funding for legal services has been declining in Illinois, representing only 40 percent of the state’s legal aid funding in 2007.¹⁴

8. Maryland

Discussing the statewide provision of legal services, the Legal Aid Bureau (“LAB”) of Maryland reports that “due to LSC restrictions, it is unable to assist prisoners meaningfully and unable to assist most immigrants at all.”¹⁵ The report explains that immigrant populations are going underserved in the state because only a few non-LSC funded programs exist that “focus resources on immigrants/low-English capability persons.” None of these programs, the report notes, are able to provide the full range of legal services that LAB offers.¹⁶

9. Michigan

A Michigan state planning report asserts that the restrictions prevent Michigan legal services programs from ensuring a “full range of services” to all low-income people with legal problems. The report urges LSC to “ameliorate these over broad restrictions” and details how the class action, attorneys’ fee award and prisoner-related restrictions have prevented programs from meeting clients’ needs completely.¹⁷

Detailing “examples of restrictions that low income advocates have identified as interfering with full services to clients,” the report states:¹⁸

Class Actions. There are many relatively routine civil disputes that can only be handled efficiently through the procedural tool of class actions. Under the current restrictions, LSC-funded programs cannot efficiently litigate these claims. The results are that claims may be litigated in a very inefficient manner (for the courts, the clients, and for all the parties) or that the legitimate claims of low income consumers cannot be raised . . .¹⁹

Attorneys' Fees. Under Michigan law, a nominal fee applies to every case handled in Michigan courts . . . There are other cases (e.g., under Fair Housing statutes or consumer protection laws) where congressional policy clearly favors fee-shifting and where prohibiting low income clients from raising a fee claim significantly undermines an LSC-funded program's ability to adequately represent the client . . . [B]ecause an LSC program is prohibited from raising the fee claim, the client is punished—their claim is now worth less than congress intended when it passed the law . . . The fee provision places legal services attorneys in a terrible ethical bind: it is ethically difficult to accept this type of case, because the value of the case to the client is significantly diminished if the client is represented by an LSC-funded program; it is ethically difficult to reject the case because, as a practical matter, no other counsel is available to the client.²⁰

Claims on Behalf of Prisoners. While this prohibition might appear to be aimed at prisoners' rights cases, the reality is that there has been little or no prisoners' rights litigation filed by Michigan programs for many years. Most claims on behalf of 'prisoners' historically handled by Michigan programs are priority cases in family law or housing law areas where an eligible client is incarcerated for a short period of time for reasons not directly related to the civil legal case . . . The effect of this restriction is that vulnerable clients with compelling civil cases that fit directly within traditional legal services' case priorities are left without counsel as they face a court hearing.²¹

10. Minnesota

Prior to the 1996 restrictions, Mid-Minnesota Legal Assistance ("MMLA") used to deliver services for Central Minnesota Legal Services ("CMLS"), an LSC-funded entity, in a sub-contract arrangement. However, a state planning report details that, "[s]ince over 83 percent of MMLA's funds were non-LSC, and since MMLA's other funders did not share Congress's support of the restrictions, MMLA's board declined to let a minority stakeholder control all of MMLA's activities." The MMLA/CMLS contract was terminated.²²

11. Missouri

A state planning report states:

Restrictions imposed by Congress on legal services providers are also barriers that need to be addressed. One of the most troublesome restrictions is the prohibition on legal services providers requesting or collecting attorney fees from opposing parties. The restriction on filing class actions suits removes one tool that all attorneys, other than those working for a legal services program, have at their disposal to help clients.²³

12. New Hampshire

A state planning report describes the federal restrictions as “an additional challenge” for legal services providers. Congressional restrictions on seeking attorneys’ fee awards “prevent legal services representation in cases ranging from an illegal tenant lockout to consumer fraud, to civil rights enforcement.” The report also notes that prohibitions on class actions, and representation in rule making and legislative proceedings “ended services customarily provided to clients by LSC funded programs in New Hampshire for nearly twenty-five years.”²⁴

13. New Jersey

Despite the “degree of coordination and structured collaboration” among New Jersey’s legal services providers that “is not matched elsewhere,” a state planning report strongly emphasizes the “negative impact” of the “discouraging and constricting” restrictions “in actual practice (causing great inefficiencies in the way applicants for service must be processed and referred) and principle (denial of essential and fundamental legal assistance to some who need it).” The report envisions a system in which “restrictions based upon negative views toward certain categories of clients, or certain types of legal problems or situations” are not imposed on legal services work.²⁵

In its discussion of the strengths of the current legal services system, the report notes that the New Jersey State Bar Association has worked against restrictions on legal services, and that New Jersey Legal Services, “not encumbered by the myriad LSC restrictions,” can lobby on issues concerning low-income people’s legal problems. The report finds that “major challenges” still include “[f]inding new, more efficient approaches for addressing on a broader scale recurrent, repetitious and costly legal problems and case types, including adequate representational capacity in alternative forums, such as the legislature and administrative agencies,” forums in which LSC-funded organizations’ activities currently are restricted.²⁶

14. New Mexico

A report by the New Mexico’s Access to Justice Commission lists funding state legal services priorities as its first funding goal: “Highest priority should be given to obtaining state goals for the system.”²⁷ However, the federal restriction on non-LSC funds ensures that state goals cannot govern the use of all funds, nor can they govern the use of just state-appropriated funds. The federal government’s application of the restrictions to the entire pool of money received by LSC grantees ensures that state goals cannot take precedence.

Along with increased federal LSC funding, the Commission recommends the “removal of Congressional restrictions on LSC recipients” and states that the Commission “should actively support any efforts by the National Legal Aid and Defender Association (NLADA) to remove or modify selected restrictions on LSC funds.”²⁸

15. North Carolina

A report by the Legal Services Planning Council describes how the restrictions related to representing immigrants greatly affect the ability of Legal Aid of North Carolina’s “Farmworker

Unit” to serve all migrant farmworkers in the state. Specifically, the report identifies the ban on class actions as negatively affecting the representation of H-2A (temporary foreign agricultural) workers in North Carolina, as it states that challenging “illegal but widespread practices” among employers without a class action is “impossible.”²⁹

16. Oklahoma

In its assessment of the legal services system’s weaknesses, the Oklahoma Bar Association states that because of “institutional barriers or LSC restrictions,” some client groups are “especially under-served,” identifying nursing home residents, the mentally ill, juveniles, incarcerated persons with civil problems, and undocumented aliens as examples.³⁰

17. Pennsylvania

A 1998 Pennsylvania state planning report highlights the disparity between LSC funding amounts and the ultimate percentage of total legal services’ funds that falls under the federal restriction. In 1998, Pennsylvania legal services organizations received 37 percent of the funding from LSC; however, 17 LSC-funded organization received “substantial amounts of other funding,” and because of the federal restriction on non-LSC funds, “a total of 75 percent of the legal services funding in Pennsylvania is *de facto* restricted in this way.” The report suggests that funding be reallocated to “un-restrict” services so that “residents everywhere in the state, and/or special client populations that currently need unrestricted services but are not covered by an unrestricted program would be covered.”³¹ (Today, even with non-LSC funds going to unrestricted legal services providers, the LSC restrictions encumber the \$25.6 million that LSC-funded Pennsylvania programs receive from non-LSC sources.³²)

18. Texas

A state plan for the delivery of civil legal services states:

For those who truly believe in the concept of ‘equal justice for all,’ a state system for the delivery of legal services to the poor must contain adequate resources for the representation of clients who are ineligible for federally-funded legal services and for those eligible but whose legal needs cannot be met by the LSC grantees due to restrictions. Unfortunately, there are major obstacles in Texas for achieving ‘equal access’ for disfavored clients and politically unpopular cases.³³

The delivery plan finds, “Texas needs an unrestricted source of funds that will allow any indigent person full access to the system of justice without limitations or exceptions.”³⁴

In a self evaluation report, the Texas Access to Justice Commission stresses the need to resolve the “dual dilemma” of inadequate funding and restrictions on legal services programs.³⁵

19. Virginia

A state planning report identifies providing low-income people “access to a full range of services” as a primary goal and lists encouraging the removal of restrictions at a national level as the first strategy for accomplishing this goal.³⁶ The report also recommends that each program monitor the federal restrictions’ impact on clients and develop a plan for helping all clients gain access to an attorney with “an appropriate range of legal options.”³⁷

20. Washington

In a study of the implementation of regional access to justice plans, the Washington Access to Justice Commission identifies, in almost every region of the state, a dearth of services available for those who are ineligible for state or federally funded legal services due to restrictions. The Commission finds the restrictions to be “highly problematic obstacles to access to justice.”³⁸ “Planners also noted that confusion still exists regarding how the legal aid entities relate to each other.”³⁹

The Commission states:

. . . federal and state legislative restrictions continue to significantly limit the Alliance [for Equal Justice]’s ability to provide access and a full range of civil legal services to all low income communities by excluding certain classes of clients from publicly funded legal assistance, and limiting the Alliance’s use of the most appropriate legal strategies to effectively represent low income clients with high priority legal needs.⁴⁰

21. West Virginia

A state planning report states:

No firm, group or organization now provides widely available access to the legal system, or even information, except the LSC funded programs which are limited by the various LSC regulations on client eligibility, reporting and subject restrictions. A large number of needs of low income people remain unmet because of limited funding for non-LSC programs and restrictions on LSC programs.⁴¹

¹ Alaska Legal Services Corporation, *State Planning Self-Evaluation Report*, at 12 (2002), available at http://www.lri.lsc.gov/state_planning/slfevals/ak_slfeval_02.pdf.

² *Id.* at 26.

³ Center for Arkansas Legal Services, *Forging New Standards of Excellence II: A Re-Examination of the Arkansas State Plan for the Delivery of Legal Services to the Poor*, at 5 (1998), available at http://www.lri.lsc.gov/state_planning/stateplans/AR604061.pdf.

⁴ California Legal Services Coordinating Committee, *California State Justice Plan 2001:Response to LSC Program Letter 2000-1*, at 32 (2001), available at http://www.lri.lsc.gov/state_planning/

slfevals/ca_slfeval_01.pdf.

- 5 The Committee on Civil Justice, *Addressing the Legal Needs of Georgia's Poor*, at 39 (Oct. 2006), available at http://www.gaccj.org/pdf/bar_journal.pdf.
- 6 Hawai'i Justice Foundation et al., *Achieving Access to Justice for Hawai'i's People, The Community Wide Action Plan: Ten Action Steps to Increase Access to Justice in Hawai'i by 2010 and The 2007 Assessment of Civil Legal Needs and Barriers of Low- and Moderate-Income People in Hawai'i*, at II-24 (Nov. 2007), available at <http://www.hsba.org/resources/1/Documents/Access%20to%20Justice.pdf>
- 7 *Id.* at II-46.
- 8 *Id.* at II-35.
- 9 Idaho Legal Aid Services, Inc., *Idaho's State Plan and Self Evaluation*, at 18 (Jun. 2002), available at http://www.lri.lsc.gov/state_planning/slfevals/id_slfeval_02.pdf.
- 10 *Id.* at 21.
- 11 The Chicago Bar Foundation et al., *The Legal Aid Safety Net: A Report on the Legal Needs of Low-Income Illinoisans*, at 170 and 181 (Feb. 2005), available at <http://www.equaljusticeillinois.org/docs/LegalNeeds.pdf>.
- 12 *Id.* at 53 and 60.
- 13 *Id.* at 127.
- 14 Legal Services Corporation, *Fact Book 2007*, at 9 (June 2008), available at <http://www.lsc.gov/pdfs/factbook2007.pdf>.
- 15 Legal Aid Bureau, Inc., *Response to Program Letter 2000-7*, at 6 (Aug. 2002), available at http://www.lri.lsc.gov/state_planning/slfevals/md_slfeval_02.pdf.
- 16 *Id.* at 7.
- 17 The State Bar of Michigan, The Michigan State Bar Foundation & The Legal Services Association of Michigan, *Michigan State Planning Report*, at 27-29 (Sept. 1998), available at http://www.lri.lsc.gov/state_planning/stateplans/MI423110.pdf.
- 18 *Id.* at 27.
- 19 *Id.* at 27-8.
- 20 *Id.* at 28-9.
- 21 *Id.* at 29.
- 22 *Minnesota State Planning Self-Evaluation Report*, at 30-31 (Sept. 2001), available at http://www.lri.lsc.gov/state_planning/slfevals/mn_slfeval_02.pdf.
- 23 *Coordination Committee for Legal Services and Related Pro Bono Program, State Plan for Missouri*, at 6 (1998), available at http://www.lri.lsc.gov/state_planning/stateplans/MO526020.pdf.
- 24 *State Planning Report of the New Hampshire Legal Services Community*, at 3 (Oct. 1998), available at http://www.lri.lsc.gov/state_planning/stateplans/NH130010.pdf.
- 25 Legal Services of New Jersey, *Justice for All 2000: A Master Plan for Legal Services in New Jersey 1999-2001*, at 7 and 12 (Sept. 1998), available at http://www.lri.lsc.gov/state_planning/stateplans/NJ331016.pdf.
- 26 *Id.* at 8 and 10-11.

- 27 *State Plan for Providing Civil Legal Aid to Low Income New Mexicans*, Access to Justice Commission, at 28 (May 2007), available at <http://www.nmbar.org/Attorneys/ATJ/2007StatePlanforProvidingCivilLegalAidtoLowIncomeNewMexicans.pdf>.
- 28 *Id.* at 30.
- 29 North Carolina Legal Services Planning Council, *North Carolina Statewide Legal Needs Assessment*, at 49 (2003), available at https://www.legalaidnc.org/Public/Participate/Legal_Services_Community/Planning_Council/NC%20Statewide%20Needs%20Assessment%2003%2024%2003.pdf.
- 30 Oklahoma Bar Association, *Oklahoma State Legal Services Plan*, at 9 (1998), available at http://www.lri.lsc.gov/state_planning/stateplans/OK737056.pdf.
- 31 Pennsylvania State Planning Steering Committee, *The Action Plan for a Statewide Integrated Legal Services Delivery System*, at 40-4 (1998), available at www.lri.lsc.gov/state_planning/stateplans/PA339131.pdf.
- 32 Legal Services Corporation, *Fact Book 2007*, at 10 (June 2008), available at <http://www.lsc.gov/pdfs/factbook2007.pdf>.
- 33 Texas Steering Committee, *The 1998 Texas Plan: Planning for the Delivery of Civil Legal Services in Texas*, at 32 (Sept. 1998), available at http://www.lri.lsc.gov/state_planning/stateplans/TX744116.pdf.
- 34 *Id.* at 33.
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