

**U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law**

**Written Testimony of
Rebekah Diller, Deputy Director, Justice Program
on behalf of
The Brennan Center for Justice at NYU School of Law
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**Submitted for the
Hearing on Legal Services Corporation held on October 27, 2009**

The Brennan Center for Justice at NYU School of Law¹ thanks Chairman Cohen and the Subcommittee on Commercial and Administrative Law for holding this hearing on the Legal Services Corporation (“LSC”) and for providing this opportunity to discuss the pressing need for civil legal assistance in the nation – a crisis that threatens one of our nation’s proudest traditions: “equal justice for all.”

Other witnesses have testified about the extremely well-documented shortage of legal assistance for the poor, the “justice gap.” Drawing on two recent Brennan Center reports – “Foreclosures: A Crisis in Legal Representation,” and “A Call to End Federal Restrictions on Legal Aid for the Poor”² – this testimony will focus on two factors that exacerbate the justice gap: the explosion of legal need caused by the foreclosure crisis, and the severe barriers to justice imposed by restrictions on LSC grantees that have in past years been enacted in the appropriations process. By reauthorizing and strengthening the Legal Services Corporation, the single largest source of funding for civil legal aid for the poor, The Civil Access to Justice Act of 2009 (H.R. 3764) would make huge strides toward remedying these problems.

I. The Foreclosure Epidemic Has Exacerbated the Need for Legal Assistance.

Even before the current economic downturn, there was a severe shortage of representation for low-income people in civil cases. By most estimates, 80 percent of the legal needs of low-income people go unmet. The current recession, and accompanying foreclosure epidemic, has made matters much worse by pushing more

families into poverty and by creating vast legal need for those homeowners facing foreclosure. Poverty statistics from the U.S. Census Bureau reveal that nearly 54 million people were income-eligible for federally funded legal aid in 2008, up from approximately 51 million just one year before.³

A. Most Homeowners Facing Foreclosure Do So Without an Attorney.

The mortgage foreclosure crisis continues unabated. Nationally, foreclosure filings in the third quarter of 2009 were up 5 percent from the previous quarter and nearly 23 percent from the same period last year.⁴ Often lost in the discussion about the foreclosure crisis is the fact that it is also a legal crisis.

No definitive nationwide study has been done on the number of persons without legal representation in the foreclosure process.⁵ However, all indications are that people overwhelmingly face foreclosure without the protection of legal counsel.

In connection with our report, “Foreclosures: A Crisis in Legal Representation,” the Brennan Center contacted 30 court clerks’ offices in counties with the highest rates of foreclosure in the ten most foreclosure-impacted states.⁶ Few tracked data on representation. The data the Brennan Center was able to obtain, from these and other jurisdictions, however, reveals that the number of homeowners proceeding without representation in foreclosure actions is remarkably high:⁷

- In Stark County, Ohio, a particularly hard-hit locale, data suggests that 86 percent of defendants in foreclosure proceedings went without counsel in 2008.⁸
- In Connecticut, over 60 percent of defendants facing foreclosure of their property in 2007-08 did not have counsel. Of those without counsel, 43 percent attempted to represent themselves. The remaining 57 percent failed to respond to the notice of foreclosure.⁹
- In New York, data in Queens County shows that as many as 84% of defendants in proceedings involving foreclosures on “subprime,” “high cost” and or “non-traditional” mortgages (which are disproportionately targeted to low-income and minority homeowners) proceeded without full legal representation from November 2008 to May 2009. In Richmond County (Staten Island), 91 percent of such defendants were not fully represented, and in Nassau County, 92 percent were not fully represented.¹⁰

Around the country, there are further reports of courts inundated with cases in which people are facing foreclosure proceedings *pro se*. Chief Bankruptcy Judge Henry J. Boroff of Massachusetts reported that the number of Chapter 13 *pro se* bankruptcy filings jumped from 13 percent in 2004 to 20 percent in 2007, a result in large part of the higher rates of home-mortgage foreclosures.¹¹ And, in an

unprecedented appeal to members of the organized bar, Chief Judge Robert M. Bell of the Maryland Court of Appeals wrote to every member of the Maryland State Bar asking attorneys to provide pro bono help to citizens facing foreclosure, explaining “[members of] the legal services community alone are inadequate to address the current need.”¹² Helaine Barnett, President of LSC, testified before this committee that LSC-funded programs must turn away two applicants for assistance for every person served.

B. Legal Services Lawyers Can Save Families’ Homes and Stabilize Communities.

Facing a foreclosure is daunting for even the most sophisticated home owner. Without a lawyer, it can be extremely difficult to figure out what is required to defend oneself. Complicated legal notices may require specific responses – such as the filing of an “answer” with a court – by a particular date in order to prevent judgment from being entered in favor of the lender. Legal papers may not spell out in detail how the lender has arrived at the sums allegedly owed and generally do not give the homeowner any clues as to possible defenses or solutions.

Civil legal aid lawyers across the country can help to ensure that low-income homeowners facing foreclosure will not unjustly lose their homes. In the process, their work helps all of us by stabilizing communities, checking freefalls in home values, and preventing the blight that accompanies abandoned homes. In our “Foreclosures: A Crisis in Legal Representation” report, we identify the following five ways in which legal representation can help low-income families save their homes.

1) Legal services attorneys can raise claims that protect homeowners from lenders and servicers who broke the law. A troubling portion of the millions of foreclosures in this country are the product of unlawful and abusive lending practices to which our regulatory and law enforcement systems have been slow to react. Identifying these violations requires knowledge of complex state and federal law as well as the wherewithal to scrutinize voluminous and difficult to decipher loan documents. Such tasks are difficult enough for the attorney untrained in lending laws; for a *pro se* litigant, they are nearly impossible. Yet, with so few lawyers available to pursue civil remedies for homeowners who are injured by these violations, the homeowners get victimized repeatedly and the lenders are permitted to violate the law with impunity.¹³

2) Legal services attorneys help homeowners renegotiate their loans. Effective loan modifications are those that get late fees and other penalties waived, reduce or fix the interest rate to an affordable level, and in the best cases, reduce the principle loan amount. Homeowners represented by legal counsel are often better able to negotiate meaningful loan modifications. Lawyers can review loan documents and assess viable claims and defenses and use these claims to persuade lenders to agree to more favorable terms. Moreover, with the assistance of a lawyer, a homeowner can

often bypass the lender's loss mitigation department and obtain the attention of someone in a position to significantly change loan terms. As the Congressional Oversight Panel has stated, "[m]any borrowers are ignored until they retain assistance of a legal advocate or local public official."¹⁴

3) Legal services attorneys help ensure that the foreclosure process is followed properly. Another way in which lawyers are able to assist homeowners is by ensuring that lenders are indeed entitled to repossess a home and by ensuring that excessive and illegitimate fees are not assessed against the homeowner. One of the most basic requirements is that the foreclosing party must own the underlying mortgage or, in legal parlance, have "standing." However, due to the securitization frenzy, in which mortgages were bought, bundled with other mortgages into securitized assets, chopped up, and sold many times over to creditors across the world, it is not always clear that the party attempting to foreclose can prove that they own the mortgage. Indeed, a study from the University of Iowa by Professor Katherine Porter of Chapter 13 bankruptcy cases filed by homeowners found that approximately 40% of home loans were missing original mortgage notes.¹⁵ The same study shows that a startling number of mortgage servicers and lenders make calculation mistakes and also demand unnecessary and excessive fees.¹⁶ With the assistance of a lawyer, a homeowner is better able to identify mistakes and compel corrections.

4) Legal assistance can help homeowners achieve bankruptcy protection. Although typically an option of last resort – as the bankruptcy laws do not permit judicial modification of mortgages on primary residences – bankruptcy is one way that homeowners can temporarily suspend a foreclosure, which sometimes will create space in which to reach more favorable resolutions. The act of filing for bankruptcy creates an "automatic stay" which precludes all lenders and creditors from proceeding with legal action against the debtor.

5) Legal services attorneys help tenants when a landlord's property is foreclosed. Approximately 40 percent of families facing eviction due to foreclosures are rental tenants.¹⁷ Although legal protections for tenants are minimal in many states, a lawyer can at least ensure that the jurisdiction's eviction requirements are followed and can protect tenants from other types of abuses too, such as when a landlord continues to collect the rent, long after he or she has relinquished title to the home in a foreclosure proceeding. Keeping a tenant in his or her home, even if not permanently, can make a substantial difference in the quality of life for the individual or family, and can help preserve the value of the property, while preventing blight in the neighborhood - a good result for everyone.

In sum, the foreclosure crisis has created a multitude of new legal needs of low-income families. Legal services attorneys are essential to help those in need and to contain the spillover effects and widespread dislocation caused by the foreclosure epidemic. By reauthorizing and strengthening the Legal Services Corporation, the Civil Access to Justice Act of 2009 (H.R. 3764), would ensure that the federal

infrastructure for equal justice is better able to provide assistance. In particular, by setting a funding authorization level of \$750 million, the bill would make huge strides toward ensuring that more families in need – whether due to foreclosure or other crisis – could obtain assistance.

II. The Restrictions on Representation Imposed by Appropriations Riders Have Undermined the Efficiency and Effectiveness of Lawyers for the Poor.

In addition to funding shortages, the capacity of legal aid programs to help the poor is impeded by outdated, ill-conceived and wasteful funding restrictions imposed by Congress in 1996. These restrictions, which have been carried forward in a rider to the annual LSC appropriation, cut deeply into low-income people's capacity to secure meaningful access to the courts, harming them additionally and unnecessarily in foreclosure cases, eviction matters, domestic violence proceedings, benefits disputes, consumer debt cases, and other civil legal matters.

First, Congress restricted the legal tools of LSC-funded lawyers for the poor. Specific restrictions prohibits the poor from relying on these lawyers: 1) to participate in class actions; 2) to bring claims for court-ordered attorneys' fee awards; 3) to learn about and enforce their rights; and 4) lobby policymakers or legislators (except under very narrow circumstances).¹⁸

Second, Congress limited the categories of people who can rely on LSC-funded lawyers, excluding: 1) certain populations of legal immigrants; 2) all undocumented immigrants; 3) people in prison, even those about to reenter society; 4) people charged with illegal drug possession in public housing eviction proceedings.¹⁹

Finally, Congress imposed an extraordinarily harsh restriction on LSC-funded programs -- a poison pill restriction -- that extends the federal funding restrictions to cover the privately financed activities of LSC recipient programs as soon as they accept their first dollar in federal LSC funds. As a result, more than \$526 million in funding from state and local governments, private donations, and other non-LSC sources is restricted under the same terms as the LSC funds.²⁰

The pending fiscal 2010 Commerce-Justice-Science Appropriations bill – which contains the LSC appropriation and rider – may eliminate a piece of the restrictions. The House-passed bill removes restrictions on attorneys' fee awards while the bill that has passed the Senate Appropriations Committee (but has not yet been voted on by the full Senate) would remove most restrictions on non-federal funds. It remains to be seen what the final bill will do. However, regardless of the outcome of this year's appropriations process, a more extensive re-tooling of the restrictions, as is contemplated in the Civil Access to Justice Act, is in order.

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, people 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. Many of the examples involve efforts to combat predatory lending and other consumer scams that are tied to the mortgage meltdown and foreclosure crisis.

When legal aid offices are able to take cases in which consumer fraud was involved,²¹ 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.²² Moreover, the restrictions on legislative advocacy have gagged legal aid attorneys, preventing them from performing their critical role in alerting legislatures to the problems of low-income communities, including those that led to the subprime lending crisis.²³

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

Attorneys’ fee awards serve three related, and equally important, functions when legal services organizations are representing clients. 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 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 serve more clients.²⁴

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.²⁵ 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.

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.

For example, 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.²⁶ To protect homeowners and ensure that they are informed of their rights, California law regulates the practices of these foreclosure consultants.²⁷ 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.²⁸ 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.

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.²⁹ 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.³⁰ It does not make sense for Congress to prevent legal services programs from relying on awards paid by wrongdoers to finance at least a portion of part of the cost of representing the poor.

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 ensuring that all similarly situated persons obtain relief when a defendant violates the law. This legal tool also provides 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 essential 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.³¹ Historically, class actions by legal services programs ensured that poor children obtained medical coverage,³² forced the Social Security Administration to abide by court rulings,³³ and challenged consumer fraud.³⁴ 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.³⁵ As the North Carolina Legal Services Planning Council has concluded, challenging some “illegal but widespread practices” without a class action lawsuit is “impossible.”³⁶

As with the attorneys’ fee restriction, the class action limitation has a particularly harmful effect on efforts to combat consumer frauds that target 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.

3. Restriction on Legislative and Administrative Advocacy 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.³⁷

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.³⁸ 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.³⁹ 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.⁴⁰ 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.⁴¹

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.⁴² 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.⁴³ The LAB attorney was the only person in the workgroup positioned to represent the interests of borrowers.⁴⁴ Input from this attorney ensured that the proposed consumer protections were not unduly limited to the most extreme types of loan products and resulted in a more wide-ranging consumer protection bill being passed by the Legislature.

B. Restriction on State, Local, Private and Other Funds Wastes Precious Dollars That Could be Used to Serve More Clients.

This restriction on non-LSC funds – all the money possessed by LSC recipient programs from sources other than LSC, including state and local governments, private donors, IOLTA revenue and other sources – is virtually unprecedented in its sweep. It is common for government to restrict the activities it funds; but, it is extremely rare and raises grave constitutional concerns when Congress restricts the advocacy in which organizations may engage with their own, private funds.

Acknowledging that the restriction overreached, LSC issued a “program integrity regulation” to provide grantee programs – at least in theory – with some opportunity to spend their own funds in support of the restricted activities.⁴⁵ However, LSC’s regulation, itself, imposes conditions so onerous that almost no program in the country has been able to comply. To spend non-LSC funds on restricted work, grantees must create a new organization run out of a physically separate office, with separate staff and equipment.

This model is wholly out of line with the way the federal government treats other non-profit grantees, including, most notably, faith-based organizations. Many non-profits must strictly account for government funds, but virtually none are forced to operate dual systems, isolating their publicly funded activities from their privately funded activities, out of separate offices.⁴⁶

The restriction on state, local and private funds also undercuts the important function that state and local governments, and private donors, can play in closing the justice gap – the restriction prohibits these local authorities from running their own justice systems in the way that they, and their state and local partners, deem best. In certain states with relatively greater amounts of non-LSC funding, justice planners have sought to create entirely separate organizations and law offices, funded by state and local public funders and private charitable sources, and dedicated performing the categories of work that LSC-funded programs cannot do. But, because the restriction requires this work to be done through a physically separate organization, overhead, personnel, and administrative costs are wasted. Dollars that could finance more services urgently needed by families across the country are eaten up by the costs of running duplicate offices.

To illustrate this problem, consider the example of Oregon, where legal aid programs spend approximately \$300,000 each year on duplicate costs to maintain

physically separate offices throughout much of the state. If the restriction on non-LSC funds were lifted, the redundant costs could be eliminated. The significant savings from ending the dual operating systems would enable the legal services organizations to provide coverage for 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. Removing the restriction would encourage more private donors to be brought into the system as well.

III. Conclusion

For all these reasons, the Brennan Center urges Congress to pass the Civil Access to Justice Act of 2009 and revitalize the infrastructure of equal justice for the poor.

¹ The Brennan Center is a nonpartisan think tank and advocacy organization that focuses on justice and democracy. Through advocacy, research and litigation, the Brennan Center has been deeply involved over the last decade in efforts to ensure equal justice for all in our courts. Our Access to Justice Project is one of the few national initiatives dedicated to helping ensure that low- and moderate-income families have effective and unobstructed access to the courts.

² Those reports are attached hereto as Appendices A and B, respectively.

³ U.S. Census Bureau, *People Below 125 Percent of Poverty Level and the Near Poor*, available at <http://www.census.gov/hhes/www/poverty/histpov/hstpov6.xls>.

⁴ See *Foreclosure Activity Hits Record High in Third Quarter*, RealtyTrac, Oct. 15, 2009, available at <http://www.realtytrac.com/foreclosure/foreclosure-rates.html>.

⁵ See Mike Stuckey, *The Home You Save Could be Your Own: In Foreclosure Crisis More Homeowners Representing Themselves in Court*, MSNBC, Jan. 28, 2009, <http://www.msnbc.msn.com/id/28877173/> (“There’s no way to know how many *pro se* foreclosure cases are currently moving through U.S. courts, but anecdotal accounts from lawyers and others indicate the number is growing along with the nation’s mortgage crisis, which has reached unprecedented proportions.”).

⁶ Based on calls by the Brennan Center to county court clerks in Florida, Ohio, Illinois, Nevada, California, Arizona, Idaho, Michigan, Georgia and Oregon.

⁷ In Stark County, Ohio, the court provided mediation in a total of 387 out of several thousand foreclosure cases, with nearly half being settled through this process in 2008. See Laurie Huffman, *Help Available to Avoid Foreclosure*, Apr. 25, 2009, *The Review*, available at <http://www.the-review.com/news/article/4574235>. Connecticut has a court-run mediation program in place that became mandatory for lenders in June of 2009. To date, 34% of eligible homeowners (defined as an owner-occupant of a one, two, three or four family residential property) have taken advantage of the program. See Douglas S. Malan, *Foreclosure Mediation Becomes Mandatory*, Conn. Law Trib., Jun. 8, 2009, available at <http://www.ctlawtribune.com/getarticle.aspx?ID=33993>. New York has a court-run mandatory mediation program available to homeowners with “sub prime,” “high cost,” or “non-traditional” mortgages, as defined by statute. A bill is currently being considered in the New York State Senate that would extend the program to non-subprime mortgage holders. See James Pethokoukis, *US Mayors Urge States to Require Mortgage Mediation*, Reuters, Jun. 11, 2009, available at <http://www.reuters.com/article/companyNewsAndPR/idUSN115228752009061>. Other jurisdictions throughout the country have in place or are contemplating similar programs. See *Id.* Mediation programs are a welcome intervention where the alternative is to allow homeowners to “go it alone” through the entire process. This is most true when a homeowner does not possess complicated legal claims against the lender. However, such forums can be an inadequate substitute for full legal representation where legal claims do exist, even in the few jurisdictions that routinely provide access to at least some form of free assistance from lawyers in settlement or mediation conferences, as in New York City. This is because mediation conferences primarily focus on determining whether the lender will agree to modify some term of the loan, but is not the forum in which a homeowner can raise, much less prevail on, legal claims. Telephone Interviews, Meghan Faux, South Brooklyn Legal Services; Mark Lawson, Legal Aid Society of Greater Cincinnati; Jonathan Levy, Legal Services for New York City; Andrew Pizor, National Consumer Law Center; Marshall Greene, Bronx Neighborhood Office of the Legal Aid Society (September 14 - 18, 2009). For an overview and analysis of the promise and limitations of foreclosure mediation programs around the country, see Geoffrey Walsh, National Consumer Law Center, *State and Local Foreclosure Mediation Programs: Can They Save Homes?* (September 2009).

⁸ Based on the Brennan Center’s own review of 269 docket sheets representing a sample of the 2685 foreclosure cases filed in Stark County, Ohio in 2008, available on-line at <http://www.starkcjis.org/docket/main.html>. Docket numbers for the 2008 foreclosure filings were provided to the Brennan Center by the Stark County Clerk of Court’s Office. Note that the data

describe only the representation status of the first defendant named in the case caption, since the first party is typically the property owner (although entities possessing a legal interest in the property are routinely named as additional defendants in the foreclosure complaint). A defendant was counted as having legal representation when the docket indicated that an attorney for the defendant entered an appearance in the case, or where a defendant filed an answer in the case, with the following single exception. Defendants described in the docket as proceeding *pro se* were counted as unrepresented even if they had filed an answer; however, this occurred in only nine of the 269 cases that the Brennan Center reviewed. Commercial and other non-owner occupied property foreclosures were not excluded from the data.

⁹ Data obtained from Connecticut Judicial Branch Court Operations office (on file with Brennan Center) for Fiscal Year 2007 through 2008. Note that the data describe only the representation status of the property owner (although additional entities possessing a legal interest in the property are routinely named as additional defendants on the foreclosure complaint). Commercial and other non-owner occupied property foreclosures are included in the data, although a court official for the Connecticut Judicial Branch, conveyed to the authors his observation that these constituted only about 10 to 15 percent of the total foreclosure proceedings. Telephone Interview, Gregory Pac, judicial statistician, Connecticut Judicial Branch, September 15, 2009.

¹⁰ Data obtained from the Office of Court Administration, New York State Unified Court System for “subprime,” “high-cost,” and “non-traditional” mortgage foreclosure cases in which a Request for Judicial Intervention was filed between November 1, 2008 through May 1, 2009 (on file with Brennan Center). In New York, “subprime,” “high-cost,” and “non-traditional” loans are defined by statute, and include home loans originated between January 1, 2003 and September 1, 2008, with high interest rates and/or points and fees. See Foreclosure Prevention and Responsible Lending Act, 2008 N.Y. Laws ch. 472; N.Y. Banking L § 6-1 (2009). Representation rates were calculated as a percent of all defendants for whom legal representation information was recorded. Clerks in Richmond County (Staten Island), Queens, and Nassau County stated that it is not common practice within their respective offices to record attorney of record information for “incidental” or additional defendants, e.g., entities possessing a legal interest in the property. Legal representation information also may not have been recorded for homeowner defendants that failed to respond to a foreclosure notice, and did not request or attend a settlement conference. If such homeowners were included in the data, defendant legal representation rates would be even lower than that reported here. Telephone Interviews, Joseph Como, Chief Clerk, Richmond County Supreme Court; Maureen Daquila, First Deputy Chief Clerk, Queens County Clerk’s Office; Kathryn Driscoll Hopkins, Chief Clerk, Nassau County Supreme Court; Stanley Drosky, Principal Management Analyst, New York Supreme Court, Office of Court Administration, Division of Technology (Sept. 14 - 28, 2009).

¹¹ Barbara Rabinowitz, *Mortgage Woes in Massachusetts Lead to Spike in Pro Se Debtors Under Chapter 13*, Mass. L. Wkly., Oct. 8, 2007.

¹² Letter from Chief Judge Robert M. Bell, Md. Ct. App., to Maryland Lawyers (July 7, 2007) (on file with the Brennan Center).

¹³ See Michael Powell, *Prosecutions Lag as N.Y. Foreclosure Frauds Surge*, N.Y. Times, Apr. 14, 2009, at A1.

¹⁴ Congressional Oversight Panel, *Foreclosure Crisis: Working Toward a Solution* 39 (Mar. 6, 2009), available at <http://cop.senate.gov/documents/cop-030609-report.pdf>.

¹⁵ Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy*, 87 Tex. L. Rev. 17 (2008).

¹⁶ *Id.* at 121.

¹⁷ Danilo Pelletiere, National Low Income Housing Coalition, *Recognizing Renters in the Foreclosure Crisis* 9 (2009), available at <http://www.nlihc.org/doc/NLIHC-Renters-in-Foreclosure-UCLA-5-2009.pdf>; see also Rhode Island Legal Services, *Moving Out Rhode Island: An Analysis of 2008 Foreclosure Related Evictions* (June 2009), available at <http://www.rhomeless.org/Portals/0/Uploads/Documents/Public/Eviction%20Report.pdf> (highlighting

extent of evictions in Rhode Island caused by foreclosures and noting that over two thirds of evictions occurred in minority communities).

¹⁸ See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53 to -56. Congress has carried forward these restrictions each year by incorporating them in the annual appropriations rider for LSC.

¹⁹ See *id.* at 1321-55 to -56.

²⁰ See Legal Servs. Corp., Fact Book 2008, at 6 (2009), available at https://grants.lsc.gov/Easygrants_Web_LSC/Implementation/Modules/Login/Controls/PDFs/factbook2008forRIN.pdf.

²¹ 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).

²² See Laura K. Abel, *Lawyers for the Poor Muzzled in Subprime Mess*, The Nation, Jan. 16, 2008, available at <http://www.thenation.com/doc/20080128/abel..>

²³ See *id.*

²⁴ 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), available at http://www.lri.lsc.gov/state_planning/slfevals/ca_slfeval_01.pdf.

²⁵ *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).

²⁶ Rebekah Diller & Emily Savner, Brennan Center for Justice, *A Call to End Federal Restrictions on Legal Aid for the Poor* (2009).

²⁷ Cal. Civ. Code § 2945(c)(1) (1980).

²⁸ Diller & Savner, *supra* note 26.

²⁹ Cal. Legal Servs., *supra* note 24.

³⁰ *Id.*

³¹ 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).

³² See *id.* at 11 (describing case brought by the Tennessee Justice Center).

³³ 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).

³⁴ See *id.* at 347.

³⁵ Diller & Savner, *supra* note 26, at 25-33

³⁶ 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.

³⁷ 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).

³⁸ Abel, *supra* note 22.

³⁹ Diller & Savner, *supra* note 26.

⁴⁰ See 45 C.F.R. § 1612.6 (1997).

⁴¹ Abel, *supra* note 22.

⁴² 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.

⁴³ Diller & Savner, *supra* note 26.

⁴⁴ *Id.*

⁴⁵ 45 C.F.R. § 1610.8.

⁴⁶ The contrast with how faith-based organizations are treated is particularly striking because the Establishment Clause of the federal Constitution bars the federal government from subsidizing or endorsing a grantee's religious activities. 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.”). Yet, the federal Faith-Based Initiative permits religious organizations to run federally funded programs in the same physical space and with the same personnel used for religious activities, such as worship and proselytization.