INTEREST OF AMICUS CURIAE

The New York County Lawyers' Association ("NYCLA") is a not-for-profit membership organization of attorneys, judges, and law students committed to the provision of effective legal representation to individuals who cannot afford counsel. NYCLA's founding statement, adopted in 1908, shows NYCLA's commitment to making legal representation available to those who cannot afford it: one of NYCLA's primary objectives was "arranging for the provision by its members of free legal services for indigent, low income and other persons in need."

NYCLA's original mission statement promoted *pro bono publico* work by its members, the sole way that legal needs of poor people were met at that time. Subsequently, in addition to encouraging *pro bono* work, NYCLA has actively sought to secure adequate compensation for attorneys who provide legal representation to poor people, and its current mission statement broadly promotes "ensuring access to justice for all." NYCLA Mission Statement, adopted November 11, 2003. http://www.nycla.org/about nycla.

In 1965, NYCLA co-sponsored and drafted the Assigned Counsel Plan, providing representation to indigents in criminal trial and appellate proceedings in New York City. NYCLA now provides members to the committee that supervises the Plan. *See*, 22 NYCRR §§612.3-612.4. As the Supreme Court, New York

County, has recognized, "NYCLA has played a significant and unique role in the creation and implementation of the Assigned Counsel Plan that reflects its history and charitable purposes in the monitoring and oversight of the Plan and the training of its attorneys." *NYCLA v. Pataki*, 188 Misc.2d 776, 783 (Sup. Ct. N.Y. Co. 2001), *affd sub nom*, *NYCLA v. State*, 294 A.D.2d 69 (1st Dept. 2002). The Appellate Division agreed: "NYCLA is an important bar association, which has played a significant role in the creation and implementation of the Assigned Counsel Plan in New York County, which continues to train attorneys to provide effective representation to children and adults under the Plan." *NYCLA v. State*, 294 A.D.2d 69, 75 (1st Dept. 2002).

In 2000, NYCLA filed a lawsuit against the State and City of New York, challenging the constitutionality of the statutory rates paid to assigned counsel who represent children and indigent adults in all family and criminal state court proceedings in New York City. NYCLA ultimately prevailed in that litigation, *NYCLA v. State*, 196 Misc.2d 761 (Sup. Ct. N.Y. Co. 2003). The case was withdrawn by stipulation after the legislature finally enacted increased rates for assigned counsel. *See*, *NYCLA v. State*, 2 A.D.3d 1489 (1st Dept. 2003).

In 2004, NYCLA sponsored a Housing Court Initiative, studying the provision of legal assistance to indigent litigants in that court, culminating in a

resolution in favor of expanding legal assistance to those litigants. *See, infra*, p. 25. In 2005, NYCLA received an award from the New York City Council for its work in ensuring access to justice.

SUMMARY OF ARGUMENT

In the present action, various individuals and organizations have sued the Legal Services Corporation ("LSC") and the United States, challenging the constitutionality of restrictions that Congress initially imposed upon federally funded legal services programs as part of the Omnibus Budget and Reconciliation Act of 1996. The District Court struck down the restrictions as applied by LSC to the non-LSC funds possessed by plaintiff legal services programs, and the defendants appealed. The District Court also upheld three specific restrictions that Congress imposed in the 1996 law prohibiting legal services programs which receive federal funds from: from obtaining attorneys' fees under any fee-shifting statute; participating in class action lawsuits; and engaging in outreach to represent clients. Plaintiffs have cross-appealed from the part of the decision upholding

those three restrictions and have also cross-appealed from a portion of the decision that concerns LSC's applications of all restrictions to plaintiffs' non-LSC funds.

NYCLA submits this brief in support of plaintiffs' cross appeal as to the three restrictions. While this brief does not discuss the main appeal and the remaining portion of the cross-appeal, NYCLA supports the plaintiffs in their position on those issues. NYCLA also supports the amicus brief filed on behalf of bar associations.

The instant brief argues that the restrictions on class action litigation and attorneys' fees for legal services lawyers violate the Constitution and public policy, and are unreasonable, and that the ban on outreach also violates the Constitution.

ARGUMENT

POINT I

RESTRICTIONS ON CLASS ACTION LAWSUITS AND FEES ARE UNLAWFUL

A. The 1996 restrictions violate the First Amendment

The District Court briefly considered the First Amendment implications of the 1996 Amendments' prohibition on legal services attorneys participating in class action litigation and on seeking or receiving attorneys' fees, ruling that neither restriction violated the First Amendment. Velazquez v. Legal Services Corp., 349 F.Supp.2d 566, 595-96 (E.D.N.Y. 2004). The District Court's opinion squarely conflicts with the reasoning of the United States Supreme Court in striking down an analogous restriction in the same Amendments, i.e., the prohibition on legal services attorneys' arguing the unconstitutionality of welfare statutes.

In ruling that the ban on challenging the constitutionality of welfare statutes violates the First Amendment, the Supreme Court stated, "[T]he Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning." Legal Services Corp. v. Velazquez, ("Velazquez III"), 531 U.S. 533, 543 (2001). The Court concluded that Congress "may not design a subsidy to effect this serious and fundamental restriction on

advocacy of attorneys and the functioning of the judiciary." Id. at 544.

The Court further held that "[a]n informed, independent judiciary presumes an informed, independent bar." Id. at 545. The lack of an independent bar, occasioned by "restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts[,] distorts the legal system . . . ." Id. at 544.

The 1996 restrictions interfere with the manner in which the legal services attorneys can prosecute or defend cases, prohibiting those attorneys from making certain arguments, raising certain issues, and presenting certain facts, in cases that are pending before state and federal judges. Legal services attorneys cannot argue that certifying a class action is the most efficient way for the judge to proceed with a case. Nor can they argue that by awarding attorneys' fees, or threatening to do so, a judge may encourage settlement of a case or discourage continued violation of his or her order. By controlling which arguments a lawyer makes in a lawsuit that the lawyer is otherwise entitled to bring or defend, the statute creates an unconstitutional content-based restriction on speech. As with the restrictions on welfare advocacy, "by seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." Id. at 545.

With regard to the invalidated restrictions on welfare advocacy, the Supreme Court held, "If the restriction on speech and legal advice were to stand, the result would be two tiers of cases. In cases where LSC counsel were attorneys of record, there would be lingering doubt whether the truncated representation had resulted in complete analysis of the case, full advice to the client, and proper presentation to the court." Id. at 546. If the restrictions on class action litigation and attorneys' fees are permitted to stand, there will be no doubt whatsoever. The truncated representation cannot possibly result in complete analyses of the cases, full advice to the clients, or proper presentation to the courts. Both the courts and the litigants themselves will suffer if legal services attorneys cannot raise all arguments that the law permits.

In invalidating the limitations on welfare advocacy, the Court found, "The statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider. The restriction on speech is even more problematic because in cases where the attorney withdraws from a representation, the client is unlikely to find other counsel." Id. at 546.

That a lawsuit should proceed as a class action is an argument "within the province of the courts to consider." Id. Indeed, in some cases, a class action is the

most efficient, effective, and just manner in which to resolve a controversy. Similarly, an argument that a defendant is acting in a manner common to many individuals is one that the courts can consider. They should be permitted to do so.

The Supreme Court has already cautioned these defendants that "[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." Id. at 548-49. Just as the restriction on challenging the constitutionality of statutes insulated Congress' statutes from judicial review, the restrictions on class actions insulate policies and practices of the executive branch from legitimate judicial challenge. When legal services attorneys at South Brooklyn Legal Services represented an individual day care provider whose benefits had been incorrectly calculated by the City of New York, they were able to obtain substantial reimbursement for her. However, the 1996 restrictions barred the attorneys from informing the judge that the client was merely one of many victims of an improper policy of the New York City day care agency. As a result, many other individuals did not obtain the correct reimbursement, and the judge never ordered the City to re-program its computers to calculate the reimbursement rate correctly.

Not only can legal services attorneys not make motions to certify classes, but they also are unable to obtain discovery regarding defendants' practices and procedures with respect to others similarly situated, as they would have in class actions, forcing judges to rule on incomplete records in the court. That problem is exacerbated when a government defendant denies having the systemic policy or custom that the plaintiffs challenge, a situation that would normally mandate discovery on class issues. *See, e.g.*, Nicholson v. Williams, 205 F.R.D. 92, 94 (E.D.N.Y. 2001), where the court certified a class only after "[t]wo months of evidentiary hearings during July and August with supporting testimony from scores of witnesses and hundreds of documents. . . ." The court concluded that "the evidence . . . shows a common pattern in handling . . . cases" in which the government's child welfare agency removed children from mothers who were domestic violence victims. Id. at 100.

If legal services attorneys had represented the plaintiffs in the Nicholson case, the greatest relief that the plaintiffs could have obtained would have been a declaratory judgment that New York City acted unlawfully in the case of the three named plaintiffs. Those attorneys could not have obtained the systemic relief that the class of battered mothers and their children desperately needed to combat "widespread and unnecessary cruelty" on the part of the child welfare authorities.

Nicholson v. Williams, 203 F.Supp.2d 153, 163 (E.D.N.Y. 2003); *on appeal*, 344 F.3d 154 (2d Cir. 2003), *on certified questions*, 3 N.Y.3d 357, 787 N.Y.S.2d 196 (2004).

The restrictions similarly bar legal services attorneys from obtaining systemic relief to stop unlawful practices of government agencies. For example, prior to the 1996 restrictions, legal services attorneys represented clients in successful litigation challenging systemic illegalities in the manner in which the Social Security Administration administered its disability benefits program. *See, e.g.*, State of N.Y. v. Sullivan, 906 F.2d 910 (2d Cir. 1990), (policies for evaluating cardiac impairments); Hyatt v. Heckler, 807 F.2d 376 (4th Cir. 1986), (practices in evaluating pain); Stieberger v. Sullivan, 738 F.Supp. 716 (S.D.N.Y. 1990), (policy of "nonacquiesence" in decisions of federal appellate courts). Under the 1996 restrictions, any current unlawful Social Security policies and practices are now insulated from judicial review, as legal services attorneys may challenge only the denial of benefits to individual claimants, but are prevented by the restrictions from representing groups of individuals harmed by systemic policies or practices that underlie the denials.

Similarly violative of First Amendment rights is the prohibition against the collection of attorneys' fees by legal services programs. Again, legal services'

history of successful Social Security litigation is instructive. The Equal Access to Justice Act ("EAJA") provides that when a federal government agency loses a case, it must pay attorneys' fees to the prevailing plaintiff if the government's position was not "substantially justified." 28 U.S.C. §2412(d). The Supreme Court has interpreted EAJA as insulating the government from the fee-shifting provision if its position, though unsuccessful, was "reasonable." Pierce v. Underwood, 487 U.S. 552, 565 (1988). In numerous cases filed by legal services attorneys, courts have found the government's positions unreasonable, and have awarded significant attorneys' fees. *See e.g.,* Hyatt v. Barnhart, 315 F.3d 239 (4th Cir. 2002).

By prohibiting legal services attorneys from obtaining attorneys' fees, Congress seeks to insulate the administrative agencies even further – even their *unreasonable* positions will be insulated. The government does not have a legitimate interest in insulating its own unreasonable positions, and that its attempt to protect its illegitimate interests, by denying attorneys' fees to legal services attorneys whose clients challenge those unreasonable positions, cannot withstand Constitutional muster.

B. The 1996 Restrictions violate the Tenth and Fourteenth Amendments by unlawfully infringing on state court judges' handling of state court lawsuits

involving one class of people – legal services recipients

1. The class action restriction

The 1996 class action restriction prevents legal services attorneys from participating in lawsuits when judges certify classes in those lawsuits. That restriction thwarts the intent of Congress in enacting Fed. R. Civ. P. 23 in 1937: to increase judicial efficiency, to increase the discretion of the judiciary in managing expanding caseloads, and to secure justice – in the form of similar results – for similarly-situated individuals.

Class action litigation evolved in England, where, in order to do complete justice, courts enforced compulsory joinder of all interested persons. Sometimes it was "impracticable or impossible to get all the interested persons before the court." Moore and Cohn, Federal Class Actions, 32 Ill. L. Rev. 307 (1937), *citing*, Knight v. Knight 3 P. W. 331 (1734). "The class action was an escape rule. Its utility and the impracticability of any other type of procedure gave impetus to its development." Id., *citing*, Cockburn v. Thompson 16 Ves. 321 (1809); City of London v. Richmond, 2 Vern. 421 (1701), *aff'd*, 1 Bros. P. C. 30 (1702). Congress reaffirmed those principles in enacting Rule 23 to encompass "those cases in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated." Amchem Products, Inc.

v. Windsor, 521 U.S. 591, 615 (1997); *accord*, Califano v. Yamasaki, 442 U.S. 682, 701 (1979). (a primary purpose of Rule 23 is to "save the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion"); American Pipe & Const. Co. v. Utah, 414 U.S. 538, 550-51 (1974); Robinson v. Metro-North Commuter R.R. Co. 267 F.3d 147, 167-68 (2d Cir. 2001).

Commentators have also remarked on the primary purpose of Rule 23. "The class action promises to prevent the unnecessary waste of judicial resources and the possibility of inconsistent judgments . . . [and is] perhaps the most efficient device available for avoidance of multiple litigation." Sherman, "Class Actions and Duplicative Litigation," 62 Ind. L.J. 507, 509-10 (1987). Indeed, the objective of all the Rules is "to secure the just, speedy, and inexpensive determination of every action." Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 53 (1967).

The rationale underlying New York's class action rule, N.Y.C.P.L.R. 901 *et seq*., is analogous to that underlying the Federal rule: to fill "pressing needs for an effective, flexible and balanced group remedy in vital areas of social concern." Memorandum from Hugh L. Carey, Governor of New York, filed with Assembly Bill No. 1252-B (1975).

The 1996 restrictions ensure that the judges who hear Legal Services cases are unable to certify class actions, even when the judges conclude that that is the most effective way to proceed. That problem is exacerbated by the fact that judges who hear individual cases brought by Legal Services attorneys will never learn of the need for class actions, because the amendments prohibit legal services attorneys from informing judges of the existence of other class members and consequently preclude judges from doing justice for all class members.

In Lee v. Smith, 43 N.Y.2d 453, 402 N.Y.S.2d 351 (1977), for example, a group of indigent New Yorkers, represented by legal services lawyers, brought a class action lawsuit under New York rules, challenging the constitutionality of a New York welfare statute, under, *inter alia*, the state constitution. The New York Court of Appeals, in invalidating the statute, relied in large part on a provision of New York's Constitution that has no analog in the United States Constitution: N.Y. Const. Art. XVII, which charges the state with providing "aid, care and support of the needy." Id. at 459, 402 N.Y.S.2d at 355. Because of the restrictions, those lawyers could not bring that lawsuit today. Our federal system is offended if Congress is allowed to regulate state court judges' handling of state court litigation in which a state citizen sues an agency of the state to challenge a statute under the state constitution.

2. The attorneys' fee restrictions

The amount of attorneys' fees owed to prevailing plaintiffs is based upon the lodestar calculation of the number of hours worked times a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424 (1983) (fees under 42 U.S.C. §1988); *accord*, 28 U.S.C. §2412(d)(1)(B), codifying the lodestar computation in the Equal Access to Justice Act. Thus, for every hour the plaintiff's attorney is forced to work, the attorney will receive compensation if the plaintiff prevails. The lodestar method of compensation encourages defendants with losing cases to settle those cases early, rather than to draw out the litigation, which will simply increase the amount of fees that the defendants will have to pay. As the United States Supreme Court has recognized, the civil rights fee-shifting statute "gives defendants strong incentives to avoid arguable civil rights violations in the first place and to make concessions in hope of an early settlement. . . ." Hensley v Eckerhart, 461 U.S. 424, 444 n. 2 (1983); *accord*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 487 n. 31 (1982) (awarding fees "encourage[s] compliance with and enforcement of the civil rights laws.") Thus, "assessing fees against defendants in all circumstances may deter wrongdoing in the first place." Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3rd Cir. 1977).

But for the 1996 restrictions, the judicial use of attorneys' fees functions

equally well when the plaintiff is represented by a legal services attorney. "The possibility that a state's potential liability for attorneys' fees may encourage it to achieve greater compliance with the civil rights laws is not diminished because the state has funded the legal services organization representing the plaintiff. By contrast, if the state were led to expect a reduction in its obligations because it had contributed funds to plaintiffs' counsel, the deterrent effect of a potential fee award would be undermined. Similarly, while potential liability for attorneys' fees may encourage a state defendant to settle civil rights litigation that has been brought against it, if the state could immunize itself against a fee award by contributing to the financing of plaintiffs' counsel the state would have less incentive to settle pending litigation and more incentive to resist civil rights compliance by defending against the suit until trial." Dennis v. Chang, 611 F.2d 1302, 1307 (9th Cir. 1980).

When a defendant knows that it will never have to pay attorneys' fees, the defendant can defend with impunity even the most frivolous of cases. The judge, who normally has a multitude of tools to manage litigation and bring recalcitrant defendants into line, loses one important tool when the court cannot force the defendant to pay attorneys' fees to the prevailing plaintiff. When the judge is a federal court judge, the restriction has separation of powers implications. When the judge is a state court judge, the restriction has Tenth Amendment implications.

When the only litigant who cannot employ the tool is one who is represented by a legal services lawyer, the ban denies that litigant the equal protection of laws.

C. The 1996 restrictions violate public policy

Since 1965, publically-funded legal service attorneys have provided civil legal representation for indigent litigants, initially as part of the United States Office of Equal Opportunity. Cummings, *The Politics of Pro Bono,* 52 UCLA L. Rev. 1, 20 (2004). In 1974, Congress established the Legal Services Corporation ("LSC") to promote resolution of disputes pursuant to the rule of law. Id. In 1982, President Reagan proposed eliminating all federal funding for LSC, and returning the administration of legal services to the state and local areas and the provision of legal services to the private bar, on a pro bono basis. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism,* 32 UCLA L. Rev. 474, 548 (1985). That proposal was met with strong opposition from a variety of groups including "fourteen past presidents of the ABA, 187 local bar groups, deans of 141 law schools and hundreds of judges." Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation From the 1960's to the 1990's*, 17 St. Louis U. Pub. L. Rev. 241, 256 (1998). The proposal failed to win Congressional approval.

"The explicit premise for providing LSC attorneys is the necessity to make

available representation 'to persons financially unable to afford legal assistance.'" Velazquez III, at 546, quoting, 42 U.S.C. § 2996(a)(3). Thus, it is the public policy of our country to provide legal representation for indigent litigants in civil cases. By making legal services litigation less efficient and more protracted, the 1996 restrictions undermine that policy.

There is an overwhelming need for legal representation of indigent people in civil cases. In New York City, almost one in five residents lives below the federal poverty line, i.e., nearly 1.7 million New Yorkers. Levitan, *Poverty in New York City, 2003: Where is the Recovery? Where was the Recession?* (Community Service Society, Sept. 2004), http://www.cssny.org/pdfs/PovertyNYC2003.pdf. The combined governmental expenditures on civil legal services for the poor in 2001 totaled $600 million, representing one-half percent of the more than $130 billion dollars Americans spent on lawyers. Johnson, *"Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies,"* 24 Fordham Int'l L.J. 83, 85 (2000).

In New York State, 86 percent of civil legal needs of poor households go unmet. NYS Unified Court System, "The Future of Pro Bono in New York" (January, 2004), v. 2 p. 1 ("Pro Bono") http://www.nycourts.gov/reports/probono/proBono_Vol2_report.pdf. Similarly,

nationwide, approximately four-fifths of the civil legal needs of the poor are unmet. Rhode, "Access to Justice," 69 Fordham L. Rev. 1785 (2001).

Instead of providing increased funding for legal assistance for poor people, "over the last two decades, national spending on legal aid has been cut by a third. . . ." Rhode, *supra*, at 1786. Our country spends approximately $8 per person per year to provide civil legal assistance to poor people. Id. at 1788. Well over ten times the current appropriations, or "about three to four billion dollars, would be required to meet the civil legal needs of low-income Americans." Id. at 1789. The 1996 restrictions accelerate that trend by making it more expensive and inefficient to provide legal representation to poor people (prohibiting class actions), and by eliminating one sources of funds entirely (attorneys' fees).

Currently, funding for civil legal services in New York is 40 percent lower than it was in the early 1990s. Office of Deputy Chief Administrative Judge for Justice Initiatives, New York State Unified Court System, http://www.courts.state.ny.us/ip/justiceinitiatives/index.shtml. The shortage of legal representation for the poor raises the questions of equal justice and equal access to the courts for indigent New Yorkers and indigent Americans.

The private bar strongly supports legal service attorneys because members of the private bar simply cannot do the work that legal services attorneys provide.

The threshold problem is finding interested lawyers willing to volunteer their time and efforts. "Only a third of the nation's large law firms have committed themselves to met the American Bar Association's Pro Bono Challenge, which requires contributions equivalent to 3-5% of gross revenues," a standard that itself is minimal. Rhode, *supra*, at 1810.

Even with more volunteers, there remain concerns of coordination and costs, firm obligations, and, most importantly, the quality of legal work and representation provided by private attorneys unfamiliar with housing, public benefits, and Social Security law, areas in which legal services attorneys have expertise. Mogill, *Professing Pro Bono: To Walk the Talk*, 15 Notre Dame J.L. Ethics & Pub. Pol'y 5, 17 (2001). For example, New York's Real Property Actions and Proceedings Law creates a special and arcane set of procedures governing landlord-tenant disputes. Nationally, the Social Security Act, rules, and regulations create a "byzantine labyrinth" of abstruse substantive and procedural rules. *See*, Wallschlaeger v. Schweiker, 705 F.2d 191, 194 (7th Cir. 1983).

Furthermore, the 1996 restrictions prohibit legal services attorneys from obtaining fees under fee-shifting statutes, even in cases in which they have referred the client to the private bar and the private bar has rejected the cases. Those cases provide windfalls for losing defendants, who would otherwise have had to pay

attorneys' fees to the prevailing plaintiffs. NYCLA submits that providing such a windfall to individuals or agencies who have been found to have violated the law or the Constitution, merely because the plaintiff is indigent and no private attorney would take her case, is unsound public policy and is inimical to the rule of law.

D. The 1996 restrictions are unreasonable

1. Restrictions on class actions

The District Court gave only a brief rationale for upholding the ban on class action lawsuits, finding it "reasonable" because Congress determined that "advocacy on behalf of poor individuals for social and political change" is not "an appropriate use of Federal funds," which should be limited to the provision of "basic legal assistance." Velazquez v. Legal Services Corp., 349 F.Supp.2d 566, 595-96 (E.D.N.Y. 2004).

NYCLA categorically rejects the notion that financing of class action advocacy on behalf of low income litigants is not "an appropriate use of Federal funds." What the Conference Committee characterized as "advocacy for social and political change" was simply the filing of class action lawsuits on behalf of poor people to protect their constitutional rights when those rights had been violated. No type of legal assistance is more "basic" than upholding the Constitution. Indeed, challenging the constitutionality of a state or federal statute, or a policy or

practice of the executive branch, is hardly a tactic that legal services programs created. On the contrary, the obligation of the judiciary to determine the constitutionality of the actions of the other two branches of government has been well-recognized for nearly two hundred years. Marbury v. Madison, 5 U.S. 137 (1803). Moreover, poor people, as well as rich people, have an important interest in vindicating Constitutional rights.

It is likewise incorrect that "any funding devoted to advocacy is funding taken away from basic legal assistance." There is no distinction between "advocacy" and "basic legal assistance." Rather, advocacy – here, in the form of class litigation – is simply one form of basic legal assistance where multiple individuals are harmed by a single pattern or practice of unlawful conduct, and sometimes the most efficient form.

It is not reasonable to equate class action lawsuits and "advocacy for social and political change." First, many class action lawsuits previously brought by legal services attorneys obtained results that could be characterized only as providing "basic legal assistance," e.g., to obtain recompense for consumers who had been victimized creditors using illegal tactics, Kimber v. Federal Financial Corp., 668 F.Supp. 1480 (M.D.Ala. 1987), or to obtain compensation for students defrauded by false advertising by a trade school. Moy v. Adelphi Institute, Inc.,

866 F.Supp. 696 (E.D.N.Y. 1994).

Second, effectuating social and political change does not require a class action lawsuit. Perhaps the most famous example of litigation effectuating enormous social change was not a class action lawsuit at all, but the result of a *pro se* petition for certiorari, hand-written by an indigent prisoner, which resulted in a determination that the United States Constitution mandates defense counsel for criminal prosecutions of accused felons. Gideon v. Wainwright, 372 U.S. 335 (1963). More recently, individual litigants have set precedents establishing due process rights of parents, Stanley v. Illinois, 405 U.S. 645 (1972), and the rights of individuals to utilize 42 U.S.C. §1983 as a means to obtain relief for constitutional violations. Monroe v. Pape, 365 U.S. 167 (1961). Thus, prohibiting legal services attorneys from handling class action lawsuits does not eliminate social change through litigation, but it does seriously impede those attorneys from providing basic legal assistance to poor people.

2. The attorneys' fee restrictions are unreasonable

The District Court's basis for finding the attorney fee restrictions reasonable is extremely brief, simply quoting from a Congressional Committee report that claims that such cases would be serviced by the private bar. Velasquez v. Legal Services Corp., 349 F.Supp.2d 566, 596 (E.D.N.Y. 2004).

NYCLA disagrees with the premise that "cases which provide an opportunity for the collection of attorneys fees can be serviced by the private bar." NYCLA's experience has shown that legal services attorneys who handle cases where fees are potentially available do not compete with the private bar. The representation of tenants in Housing Court is a prime example.

NYCLA has long been concerned with the lack of representation for tenants in New York City Housing Court. Studies have found that representation in Housing Court is of critical importance to tenants in preventing homelessness. "More leaseholder families are losing their homes through eviction and seeking shelter. Legal assistance can help most families facing eviction remain in their homes or relocate to another apartment." New York City Family Homelessness Special Master Panel, "Family Homelessness Prevention Report" 8 (November, 2003) ("SMP Report"), http://cccnewyork.org/publications/SMP%20Prevention%20Report%20FINAL.pdf. "Legal services can prevent evictions at every stage in the eviction process. . . ." Id. at 3. "Practice and experience has shown that tenants with legal representation are better able to address poor housing conditions. In addition, with legal assistance, tenants facing eviction, even with late-stage Housing Court cases, can be assisted so as to save their homes." Id. at 45. It should be noted that Housing Court

is not the only court in which litigants benefit from counsel. In the instant case itself, the Supreme Court has recognized the importance of lawyers to the proper functioning of all courts. Velazquez III, at 546-48.

Despite the importance of counsel, only 11.9 % of tenants in Housing Court are represented by counsel. SMP Report, p. 23 n. 88. Since most of the tenants with attorneys are not poor, the percentage of indigent tenants with representation is even lower. This is so despite the existence of a fee-shifting provision in New York's landlord-tenant law. When a tenant has a written lease (as most New York City tenants do), and the lease provides that the tenant will be responsible for the landlord's attorneys' fees in a lawsuit (as most written leases do), the provision is deemed reciprocal, so that if the tenant prevails, the landlord must pay the fees of the tenant's attorney. N.Y. Real Prop. Law §234; Duell v. Condon, 84 N.Y.2d 773, 647 N.E.2d 96, 98 (1995); Maplewood Management v. Best, 143 A.D.2d 978, 533 N.Y.S.2d 612, 613 (2d Dept. 1988).

However, the existence of a fee-shifting statute has not made landlord-tenant litigation into a specialty that is "otherwise . . . pursued by the private bar." Velazquez v. Legal Services Corp., *supra* at 596. On the contrary, tenants are still woefully unrepresented in Housing Court. Except for the few cases that legal services lawyers handle, poor tenants still do not have attorneys in Housing Court.

For many reasons, the private bar simply will not handle cases on behalf of indigent tenants. This well-known and well-demonstrated fact has impelled the courts and others to look elsewhere for legal assistance for those tenants. The Special Master Panel, established by the settlement of McCain v. Dinkins, 84 N.Y.2d 216, 616 N.Y.S.2d 335 (1994), recommended that the New York City government "[i]ncrease the availability of anti-eviction legal services and explore new approaches to maximize the delivery of legal services to households with housing problems." New York City Family Homelessness Special Master Panel, "Family Homelessness Prevention Report" 8 (November, 2003), http://cccnewyork.org/publications/SMP%20Prevention%20Report%20FINAL.pdf. The panel also recommended "explor[ing] new approaches to maximize the delivery of legal services to households with housing problems." Id. at 45. On March 14, 2005, NYCLA's Board of Directors approved a resolution that "The New York County Lawyers' Association hereby endorses, as a matter of principle, a right to the appointment of free counsel for all tenants in Housing Court unable to afford counsel, and supports initiatives to establish a right to the appointment of free counsel for such tenants in Housing Court, including initiatives that recognize the right for particularly vulnerable sub-populations of tenants such as the elderly."

NYCLA, which is comprised in large part of members of the private bar, has

always been a leader in promoting the pro bono work of its members, as well as in encouraging pro bono work by the private bar, on behalf of indigent New Yorkers. However, even an increased commitment to pro bono work will not provide the resources sufficient to handle the civil legal needs of the poor. Legal services attorneys, with their knowledge and expertise, are a better solution to meet the needs of poor litigants.

Moreover, awarding attorneys' fees to legal services programs does not constitute a double recovery for lawyers whose salaries' are being paid by the federal government. Legal services programs do not use attorneys' fees to pay the salaries of attorneys already subsidized by government funding. Instead, the programs use the attorneys' fees to hire additional attorneys, who can provide representation to individuals in a wide array of cases, such as advocacy on behalf of battered women, for which no attorneys' fees are available. "Legal services organizations often must ration their limited financial and manpower resources. Allowing them to recover fees enhances their capabilities to assist in the enforcement of congressionally favored individual rights." Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3rd Cir. 1977). Moreover, "[e]ven when funded by the state, legal services organizations operate on limited budgets and must allocate their resources among competing projects. Fee awards in civil rights cases encourage

legal services organizations to pursue such litigation because the awards permit replenishment of the funds available for the organization's work." Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980).

POINT II

RESTRICTING SOLICITATION BY LEGAL SERVICES ATTORNEYS IS UNLAWFUL

A. The restriction is an unconstitutional viewpoint-based infringement of expression of both LSC grantees and their potential clients

The solicitation restriction prohibits any LSC-funded lawyer who expresses to an individual the view that she should retain a lawyer from representing the individual, and prohibits any other LSC-funded lawyer from presenting in court the view that that individual's rights have been violated. It thus imposes a sanction upon the lawyer's expression of her opinion to the individual. Not only does this distort the legal process, by preventing attorneys from presenting certain positions in court, *see,* Velasquez III, at 543, it restricts the lawyer's First Amendment right to express her view to the potential client. *See,* NAACP v. Button, 371 U.S. 415 (1963); In re Primus, 436 U.S. 412 (1978).

The restriction impairs the rights of poor people to present their viewpoint in a court, by limiting their access to their most likely legal representative, subverting the goal of providing legal assistance to those who cannot afford it. *See, e.g.*, NYS Code of Professional Responsibility, EC2-1 ("[I]mportant functions of the legal profession are to educate people to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services

fully available.")

B. The restriction has no legitimate policy justification.

The selection of a group of potential litigants who cannot be represented by LSC-funded lawyers is entirely arbitrary. There is no logical distinction between individuals who have sought legal advice and individuals who have not; both could have exactly the same claim and exactly the same need to assert that claim.

There is no reason that funded organizations should give priority to individuals who seek help without being encouraged to do so; both may need the help just as badly. Indeed the individual who does not even know about the availability of help may have a greater need for it. Our ethical canons recognize that "legal problems may not be self-revealing and often are not timely noticed." NYS Code of Professional Responsibility, EC2-2.

The district court justified the restriction – that giving such advice is inherently bad – by stating that it is "unacceptable for any Federally-funded legal aid program to solicit clients at a time when [LSC] and the legal aid community continue to testify that they must turn away eligible clients away [sic] due to lack of resources." Velasquez, 349 F. Supp. 2d at 597-98, citing H.R. Rep. No. 104-196 at *121. But this makes no sense. The concept cannot be justified to conserve the time spent soliciting clients, because the regulations allow funded

organizations to spend as much time in community education and outreach as they wish. 45 C.F.R. § 1638.4(a). It cannot be based on the desire to conserve resources by limiting clients, because clients are perforce limited by the limited resources of funded organizations. It cannot be based on the desire to serve only the most needy individuals, because clients who are aware of legal services programs and are able to request services are not inherently more needful than potential clients who do not know about the existence of legal services programs. Indeed, outreach allows the legal services programs to select their cases from a larger pool, thereby devoting more of their resources to those most in need.

C. The restriction hurts poor people by denying them access to the courts.

Poor people who need the services of LSC-funded organizations but are denied because the organization is prohibited from representing them likely will not be able to enforce their rights. It is well known that the legal needs of poor people are generally unmet. *See* "Unified Court System," *supra*. Organizations such as NYCLA, a large part of whose mission is "arranging for the provision by its members of free legal services for indigent, low income and other persons in need," do not have the resources to represent all those who cannot obtain representation from LSC-funded programs. Thus, the effect of the restriction is that the legal claims of many poor people will not be preserved.

D. The restriction is viewpoint -based.

The District Court found that the restriction was viewpoint neutral, but the lawsuits of poor people do advance a particular viewpoint, advocating the unique goals of poor people and sharing a common theme. Poor-person litigants are tenants whose landlords have not provided adequate services, consumers who have been exploited by shady merchants, clients of government agencies who have been treated unfairly and arbitrarily. They are exclusively on one side of these and many other disputes, primarily seeking some parity with their more-privileged fellow citizens. Discouraging and limiting the claims of poor people who seek to advocate their unique interests is hostile to a particular point of view.

E. The restrictions prevents funded organizations from providing services where they will do the most good and best conserve the organizations' resources.

The viewpoint-discriminatory nature of the rule is especially irrational and destructive in circumstances where legal services programs learn of illegal practices affecting individuals other than their clients. When a lawyer representing a client learns that others have suffered the same wrong at the hands of the same defendant, the restrictions prohibit her from reaching out to them, preventing those wronged parties, who have claims identical to the present client's, from obtaining

representation and redress. The regulation wastes the knowledge which the attorney has already acquired about the particular facts and circumstances of the legal wrong, and denies courts the benefit of hearing from an attorney already well-versed in the factual and legal issues. If the potential client manages to find pro bono assistance elsewhere, it duplicates the expenditure of limited pro bono resources. The regulation insulates defendants from the full range of claims warranted by their wrongful actions. Valid claims, advancing the unique needs of poor people, are suppressed, simply because the claimants are poor. The restriction is viewpoint based, and should be invalidated.

CONCLUSION

For all the foregoing reasons, *amicus curiae* New York County Lawyers' Association respectfully requests that this Court:

1. Reverse the decision of the district court to the extent that it upheld the restrictions on class action litigation, receipt of attorneys' fees, and outreach by legal services programs; and

2. Affirm the decision of the district court to the extent that it invalidated the program integrity regulations as applied to plaintiffs; and

3. Grant such other and further relief as may be deemed just and proper.

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