

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

**REPORT BY THE PRO BONO AND LEGAL SERVICES COMMITTEE, HOUSING
COURT COMMITTEE, AND CIVIL RIGHT TO COUNSEL TASK FORCE**

**POLICY RECOMMENDATIONS RESPECTFULLY SUBMITTED TO THE
BIDEN-HARRIS ADMINISTRATION REGARDING
CIVIL LEGAL SERVICES AND ACCESS TO JUSTICE**

I. OVERVIEW

As attorneys who work at public interest and legal services nonprofits or direct pro bono efforts at law firms, corporate legal departments and other entities, we have great hope that the Biden-Harris Administration will reverse Trump Administration policies that have deeply harmed low-income persons and families in need of free civil legal services. We also hope the Biden-Harris campaign’s “build back better” call-to-action will become a concrete commitment that extends to the communities we serve and devotes the significant resources necessary to expand our capacities to both meet immediate legal needs and advance the cause of systemic racial equity and social justice in our deeply divided nation.

Through punitive policies, executive orders, and rulemaking over the past four years, the Trump Administration targeted, among others, immigrants, racial minorities, women, and LGBTQ+ individuals; weakened the social safety net; and created an environment of fear and uncertainty for those living in poverty. In doing so, the Trump Administration made it exceedingly challenging for legal services organizations and pro bono lawyers to provide critical services to our clients. When our clients are denied access to their basic human rights, it becomes incredibly difficult to address their legal needs. This troubling environment was exacerbated by President Trump’s unsuccessful efforts to defund the federal Legal Services Corporation.

We are hopeful that the Biden-Harris Administration will reverse course and roll back the most harmful aspects of the Trump Administration’s policies and ideologies so that public interest and pro bono lawyers can effectively deliver the legal services that their clients need. Rollback is only the start, however. We respectfully urge that the incoming Administration implement funding and policies that empower vulnerable communities, many of whom were critical to their electoral success. In particular, we would like to highlight the following areas and mechanisms as priorities for the new Administration:

- 1. Increase Legal Services Corporation funding and reform LSC restrictions** so that public interest lawyers can simultaneously remediate the damage done by the Trump

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

Administration to low-income communities with unmet legal needs; help these same communities recover from COVID-19's disproportionate impact on them; and underwrite racial justice initiatives with real promise for ending systemic inequities. We further describe the need to increase LSC funding and reform restrictions on LSC activities below.

2. **Implement substantive policy reform** in a manner that prioritizes attention to and the allocation of resources for areas where the Trump Administration's policies have been particularly detrimental to vulnerable communities – namely, immigration, housing, family court matters, and consumer (including student) debt.
3. **Commit to a rulemaking policy** that allows a minimum of 60 days – and, ideally, 120 days – for public comment on proposed regulatory changes that will impact vulnerable populations with unmet legal needs, including but not limited to low-income communities, immigrant communities, and victims of domestic violence, sexual assault, and human trafficking.
4. **Charge a federal benefits task force** with reviewing and proposing revisions to all forms used to apply for federal public benefits or federal legal benefits (e.g., an immigration benefit or status change) to ensure the forms are as user-friendly as possible, including with respect to language accessibility and reading-level best practices, so that individuals with no or only limited-scope legal assistance are not unreasonably excluded from said benefits.
5. **Support and fund the expansion of the right to counsel for low-income tenants facing eviction from their homes.** The country has been facing a deepening and dire housing crisis for many years. This crisis has reached its tipping point as a result of the COVID-19 pandemic. The impact of the imminent avalanche of eviction cases and resulting judgments will fall most heavily on people of color, people with disabilities, seniors, veterans and low-income residents who constitute the vast majority of respondents in eviction cases and who are the most critically affected by the COVID-19 pandemic. No one should face a potential eviction from their home without legal representation. With federal support, New York City's right to counsel law (also known as the "universal access" law) can and should be replicated throughout the country.
6. **Ensure that the pro bono and legal services community has a place at the table in the Biden-Harris Administration,** with real mechanisms for offering input on how prospective policies and rulemaking across the federal government will impact low-income communities with unmet legal needs. This includes ensuring that the pro bono and legal services perspective is front-and-center as the Administration considers judicial nominations, as further described below.

II. DISCUSSION OF CERTAIN RECOMMENDATIONS IN GREATER DETAIL

a. Legal Services Corporation Funding

The City Bar urges the Biden-Harris Administration to push for the highest level of legal aid funding possible, particularly given our nation’s confrontation with a deadly health pandemic. Specifically, the City Bar supports LSC’s request for an appropriation of \$652.6 million for Fiscal Year 2021. This request reflects an increase of \$59.6 million over last year’s request of \$593 million. Nearly 95% of the request would fund 132 local legal aid organizations in all 50 states, the District of Columbia, and the U.S. Territories. LSC estimates that this would enable LSC grantees to provide assistance with 60% more civil legal problems than they currently address, something critical during this time of a global pandemic that is disproportionately affecting poor, vulnerable and minority populations.¹

Congress created the Legal Services Corporation in 1974 to help “provide equal access to the system of justice in our nation” and to “provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel.” 42 U.S.C. § 2996b(a). LSC receives an appropriation from Congress each year. In 1976 – LSC’s first year of full congressional funding – when 12 percent of the U.S. population was eligible for LSC-funded legal assistance, the fledgling LSC was allocated (in inflation-adjusted terms) more than \$468 million. Three years later, Congress increased funding.² LSC’s present-day appropriation is far lower than it was forty years ago. Had the LSC funding level in 1980 simply kept pace with inflation, it would today be \$879 million. Present-day basic field funding is also lower – at \$6.71 per eligible person in 2018 – than it was nine years prior – at \$7.29 per eligible person – when adjusted for inflation.³ These funding reductions have a severe impact on access to justice for low-income Americans. Poignantly, the LSC 2019 intake census showed that 42% of the eligible legal problems presented received no service of any kind.⁴

b. Eliminating Restrictions on LSC Activity

The City Bar urges the Biden-Harris Administration to seek the elimination of unnecessary and regressive restrictions on the role that lawyers funded by the Legal Services Corporation can play in our legal system.

¹ See Legal Services Corporation, Overview, <https://www.lsc.gov/media-center/publications/budget-requests/overview> (All sites last visited March 22, 2021.)

² Alan W. Houseman, Poverty Law: Past and Future, in *Civil Justice an Agenda for the 1990s* at p. 320 (Esther W. Lardent ed., 1991); see also Roger C. Cramton, Crisis in Legal Services for the Poor, 26 *Vill. L. Rev.* 521, 528 (1981); LSC Fiscal Year 2021 Budget Request, <https://www.lsc.gov/media-center/publications/fiscal-year-2021-budget-request#:~:text=LSC%20requests%20an%20appropriation%20of,of%20Columbia%2C%20and%20the%20Territories>.

³ See LSC Fiscal Year 2021 Budget Request, <https://www.lsc.gov/media-center/publications/fiscal-year-2021-budget-request#:~:text=LSC%20requests%20an%20appropriation%20of,of%20Columbia%2C%20and%20the%20Territories>.

⁴ *Id.*

In the fall of 1996, after months of contentious debate, the United States Congress and President Clinton reached a compromise on the future of the LSC. Under the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (the “1996 OCRAA”), Pub. L. No. 104-134, 110 Stat. 1321, the LSC was subjected to a thirty percent reduction in federal funding and nineteen new restrictions on the types of clients and cases with which grantees of LSC funding could be involved.⁵ These restrictions applied to any legal services provider that received LSC funding.⁶ Although the restrictions allowed LSC-funded legal service providers to use private funds to participate in certain restricted activities, such as class action lawsuits, they could only do so using facilities that were physically separate from those in which LSC funds were used.⁷

The 1996 Restrictions explicitly prohibit grantees of LSC funding from filing any class action lawsuits on behalf of clients, regardless of the subject matter or type of defendant.⁸ In addition to the class action prohibition, the 1996 Restrictions also ban legal services attorneys from attempting to influence federal, state, or local government activities. Under the legislation, grantees of LSC funds are not permitted to lobby for or against any executive order or any federal, state, or local government regulation.⁹ Grantees are also prohibited from attempting to influence the passage or defeat of any legislation, constitutional amendment, or referendum.¹⁰ This effectively muzzles an invaluable group of stakeholders: on-the-ground direct service providers who are best positioned to propose, and advocate for, common sense changes in the law to help the communities they serve.

Grantees of LSC funding are also severely restricted from accepting particular cases because of their subject matter. The LSC statute prior to 1996 prohibited grantees from accepting criminal cases, fee-generating cases, and desegregation cases, among others. The 1996 Restrictions, however, extended the prohibition to cases involving redistricting and most cases related to assisted suicide.¹¹

If restrictions on legal services only affected a few clients and lawyers, then other lawyers could perhaps provide the representation that legal services lawyers are prohibited from providing. The unfortunate reality, however, is that LSC restrictions affect the representation available to hundreds of thousands of clients, and in many parts of the country there is no one else to help them. For example, a task force on access to justice acting under the auspices of the Alaska Supreme Court has concluded that as a combined result of funding cuts and federal restrictions on LSC grantee Alaska Legal Services, “[t]here are large groups of people who are no longer eligible to receive Alaska Legal Services assistance and no other organization in place that can fill the gap to

⁵ Pub. L. No. 104-134, 110 Stat. 1321, § 504.

⁶ *Id.* § 504(d)(1).

⁷ *See* 45 C.F.R. §1610.8.

⁸ 1996 OCRAA § 504(a)(7).

⁹ *Id.* § 504(a)(2).

¹⁰ *Id.* § 504(a)(4).

¹¹ *See* Assisted Suicide Funding Restriction Act of 1997, Pub. L. No. 105-12, 111 Stat. 23, § 5(b)(1)(E); *see also* 45 C.F.R. §1643.3.

meet these needs.”¹² Similar gaps in service exist in many parts of the country.¹³

The City Bar urges the Biden-Harris Administration to eliminate all restrictions on LSC grantees, and to begin with the elimination of the restriction on class actions. It is undisputed that class actions create better access to the courts.¹⁴ The class action device accomplishes this ideal by allowing individuals to bring similar claims as a group, often in cases where the litigants would have been unable to bring their claims individually.¹⁵ If our country is to be one of equal justice and the rule of law, the poor must also have access to the legal tools that our system offers to the privileged and elite

c. Right to Counsel for Tenants Facing Eviction¹⁶

New York City’s passage of legislation in 2017 guaranteeing a right to counsel for low-income tenants was a monumental step toward equal justice. The right to counsel for tenants is leveling the playing field in Court, giving people a fighting chance to assert their legal rights, and sending a message that the lives and homes of New York City’s low-income households are entitled to be treated with dignity and respect. It has the potential, done right, to preserve low-income housing, stabilize low-income communities, stem the displacement of low-income households, promote stability in the households of thousands of children, whose development depends on it, and reduce the incidence of homelessness and its concomitant human and governmental costs.

Since New York City passed this landmark legislation, six additional localities have adopted the right to counsel modeled on New York City’s law, including Newark, San Francisco, Cleveland, Philadelphia and, as of this past election day, Boulder and Baltimore. At least eight

¹² Alaska Access to Civil Justice Task Force, Report and Recommendations 18 (2000).

¹³ See, e.g., Brennan Ctr. for Justice, *Left Out in the Cold: How Clients Are Affected by Restrictions on Their Legal Services Lawyers* (2000) at 20 (quoting Pennsylvania Justice Center attorney Peter Zurflieh as saying, “Low-income families and individuals in rural Pennsylvania have no one to represent them before their state legislators, since the LSC restrictions prevent their advocates from ever playing that role.”); Brennan Ctr. for Justice, *Restricting Legal Services: How Congress Left the Poor with Only Half a Lawyer* (2000) at 18-22 (reporting gaps in services in the rural deep South, Florida, Tennessee, Pennsylvania and Rhode Island); Pa. State Planning Steering Comm., *Pennsylvania Agenda for Legal Services, 1998-2001: The Action Plan for a Statewide Integrated Legal Services Delivery System* 32-34 (1998) (finding that clients outside of Philadelphia lack adequate access to legal services programs that are not subject to federal restrictions); Texas LSC State Planning Comm. for the Delivery of Legal Services to the Poor, *The 1998 Texas Plan: Planning for the Delivery of Civil Legal Services in Texas* (1998) (finding that very few legal services programs in Texas serve those clients who LSC grantees cannot serve since programs that receive state IOLTA funds are subject to similar restrictions).

¹⁴ Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 Ohio St L.J. 1, 17 (1984) (group representation devices such as class actions are often the most effective way of representing an individual poor person.... The individual lawsuit ... cannot remedy past and future harassment or restore the political balance of power between the institution and the individual. By contrast, the class suit can secure relief for the client that is not only longer-lasting but also broader-based”).

¹⁵ See *Eisen v. Carlisle*, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting) (finding the class action to be “one of the few legal remedies the small claimant has against those who command the status quo”).

¹⁶ The Committee is grateful for the contribution of Alison King and Andrew Scherer, co-chairs of the City Bar’s Civil Right to Counsel Task Force, in drafting this section of the report.

state legislatures and more than a dozen additional cities have had legislation introduced or have campaigns underway to secure a right to counsel for tenants who face eviction. Cities that have enacted the right to counsel have reaped major benefits: in New York City 86% of represented tenants have remained in their homes and the eviction filing rate has dropped by 30%¹⁷; in San Francisco, two-thirds of represented tenants have remained in their homes and the filing rate dropped 10% in just one year; and in Cleveland, 93% of represented tenants have avoided eviction or an involuntary move.¹⁸

We urge the Biden-Harris Administration to publicly embrace the notion that no tenant, particularly during a pandemic and its economic aftermath, should face removal from her home without legal representation, and to support the nationwide expansion of the New York City right to counsel model through stakeholder meetings, public outreach, legal guidance and federal grants programs.¹⁹

d. Federal Judiciary

One of the most lasting impacts of the Trump Administration is likely to be its transformation of the federal judiciary. By appointing well over 200 federal judges to lifetime posts, the Trump Administration has ensured that our nation’s courts – at every level – will likely have a conservative bent for the foreseeable future. In light of this, it will be critical for the Biden-Harris Administration to carefully nominate judicial appointees who represent the diversity of this nation in gender, race, background, and legal experience. In particular, we hope to see more federal judges who have a record of public service, and a commitment to underserved and marginalized communities, including public defenders and legal services lawyers. U.S. Supreme Court Justice Sonia Sotomayor once stated that, “a different perspective can permit you to more fully understand the arguments that are before you and help you articulate your position in a way that everyone will understand,” and noted that the current Supreme Court is largely composed of Ivy League-educated Justices, from major metropolitan areas, none of whom have a background in criminal defense work outside of white-collar crime. While the federal bench has long been home to former prosecutors, we urge the Biden-Harris Administration also to nominate judges who are former public defenders, immigration attorneys, and other public interest and civil legal services providers. This Administration will have the opportunity to appoint many federal judges, and he

¹⁷ For details on the success of New York City’s right to counsel program, including increased representation rates in housing court, reduced evictions and better facilitated resolutions, *see* Universal Access to Legal Services A Report on Year Three of Implementation in New York City, Office of Civil Justice of the NYC Human Resources Administration (Fall 2020), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2020.pdf.

¹⁸ *Id.* *See also* for San Francisco data, http://civilrighttocounsel.org/uploaded_files/262/PRESS_RELEASE_-_Supervisor_Dean_Preston_Holds_Hearing_Monday_on_Implementation_for_Right_to_Counsel_Law.pdf, and for Cleveland data, <https://lasclev.org/wp-content/uploads/January-2021-report-on-initial-6-months-of-Right-to-Counsel-Cleveland-high-res.pdf>.

¹⁹ The City Bar also has urged the Biden-Harris Administration to restore and expand programs that ensure access to legal representation in immigration proceedings, including legal counsel for children and noncitizens in detention. We have long supported universal representation, including in immigration court, as a due process safeguard and a way to improve efficiency in complex legal proceedings. *See* Report by Immigration and Nationality Law Committee, <https://s3.amazonaws.com/documents.nycbar.org/files/2020835-ImmigrationBidenTransition.pdf>.

should do so with an eye to creating a diverse bench that better reflects the diversity of this country as well as the diversity of the litigants who appear before and whose fundamental rights are decided by the federal courts.

III. SUPPORT FOR IMMEDIATELY RESCINDING EXECUTIVE ORDER 13950 ON COMBATING RACE AND SEX STEREOTYPING

On September 22, 2020, President Trump issued Executive Order 13950, entitled “Executive Order on Combating Race and Sex Stereotyping” (the “Order”), which, in highly divisive language, prohibited federal agencies and any organization that contracts with the federal government, including federal contractors, and subcontractors, from engaging in any and all diversity training that includes well-established concepts like unconscious bias and systemic racism, in order “to promote unity in the Federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating.” E.O. 13950 Sec.1, p. 60685. The Order also applied to the federally-funded activities of federal grant recipients, including universities and nonprofit organizations.

We applaud your Administration for so quickly rescinding this divisive Executive Order.

This Executive Order would have had far-reaching impact on many federally-funded or federally-contracted organizations working towards creating a safe, inclusive, and anti-racist community. This important work can now continue unimpeded. The City Bar, through its Office for Diversity and Inclusion and multiple Diversity and Inclusion Committees, will continue to play its part in fostering a more diverse and inclusive legal profession by working with employers, offering diversity, equity and inclusion programming, and providing opportunities to enhance the diversity pipeline into the profession.²⁰ We have eight separate Diversity and Inclusion Committees committed to this work and we frequently sponsor educational programs for New York City students from historically underrepresented groups interested in pursuing legal careers. In 2018, we advocated for New York State to institute a Diversity, Inclusion and Elimination of Bias (D&I) CLE requirement for experienced attorneys. These programs include, among other things, trainings on implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys and court personnel. We hope that other states will follow suit and institute mandated D&I CLE requirements for the legal profession.

²⁰ See Sealing the Leaks: *Recommendations to Diversify and Strengthen the Pipeline to the Legal Profession*, New York City Bar Association, Legal Education and Pipeline Task Force, May 2019, https://s3.amazonaws.com/documents.nycbar.org/files/2019527-Diversity_Pipeline.pdf; *The Diversity Gap: Black and Latinx Representation Disparities in the Legal Pipeline*, prepared for New York City Bar Association by Ashley Bernal, Research Consultant, 2020, <http://documents.nycbar.org/files/PipelineDiversityGapReport2020.pdf>.

Thank you for embracing diversity and inclusion work. We urge your administration to continue supporting efforts to root out systemic oppression and deep-rooted discrimination and bias in this country against people of color, women and LGBTQ+ individuals.

Pro Bono and Legal Services Committee
Jennifer K. Brown and Nicole L. Fidler, Co-Chairs

Housing Court Committee
Sara N. Wagner, Chair

Civil Right to Counsel Task Force
Alison King and Andrew Scherer, Co-Chairs

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Contact

Maria Cilenti, Senior Policy Counsel | 212.382.6655 | mcilenti@nycbar.org
Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | ekocienda@nycbar.org