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Via Electronic Mail

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Federal Housing Finance Agency
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**Comments of Brennan Center for Justice and National Consumer Law Center
Regarding “State-Level Guarantee Fee Pricing” (77 FR 58991)**

Dear Mr. DeMarco:

The Brennan Center for Justice at New York University School of Law (the “Brennan Center”) is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. We appreciate the opportunity to comment on the Federal Housing Finance Agency’s (“FHFA” or the “Agency”) proposal to increase guarantee fees (“g-fees”) that Fannie Mae and Freddie Mac (collectively the “Enterprises”) charge to lenders who originate loans in the five states (Connecticut, Florida, Illinois, New Jersey, and New York) that—in the experience of the Enterprises—have the longest time associated with completing a foreclosure sale.¹

The National Consumer Law Center (“NCLC”) joins the Brennan Center in submitting this letter on behalf of its low income clients. NCLC is a non-profit organization specializing in consumer financial issues with significant expertise in state foreclosure laws, mortgage servicing incentives and practices, and identifying and challenging financial practices that have a disparate impact on families and communities of color.

As explained herein, the g-fee proposal as currently structured creates a number of serious legal and practical concerns. First, this proposal takes authority and independence away from state courts and infringes on due process rights. Second, the proposal is arbitrary and capricious in its calculation of risk of loss. Third, if successful at weakening state consumer protections, the proposal would have a disparate impact on communities of color, which were targeted for unaffordable subprime loans and now have disproportionately high foreclosure rates, in violation of the principles of the Fair Housing Act and Equal Credit Opportunity Act.

¹ State-Level Guarantee Fee Pricing, 77 Fed. Reg. 58991 (proposed Sept. 19, 2012).

FHFA's proposal also conflicts with the Agency's underlying mission. The Enterprises exist to serve the important purpose of promoting and preserving home ownership. The public interest, and the interest of taxpayers, is served by promoting measures to help families keep their homes; these measures also benefit lenders and investors by mitigating losses associated with foreclosure. Indeed, the FHFA has identified as one of its "three strategic goals for the next phase of the conservatorships," that it will undertake activities to "[m]aintain foreclosure prevention activities and credit availability for new and refinanced mortgages."² The g-fee proposal will accomplish precisely the opposite, by imposing costs on the states that have provided judicial protections to their citizens facing foreclosure.

1) The FHFA's Attack on State Rights Conflicts With Fundamental Principles of Federalism.

The FHFA claims the g-fee proposal is necessary in order to offset losses it sustains in the states with foreclosure processes longer than the national average. The FHFA has indicated that the g-fee proposal is intended to penalize these states, with the goal of pressuring the states to "adjust their laws and requirements sufficiently to move their foreclosure timelines and costs more in line with the national average."³ The FHFA proposal also serves as a shot across the bow aimed at states who are considering improving their foreclosure prevention laws.

In light of the myriad problems nationwide with unethical and illegal foreclosures, the FHFA has an interest in setting a nationwide "floor" regarding minimum consumer protections for homeowners facing foreclosure. This is why loss mitigation procedures and deadlines are at the heart of the FHFA's Servicing Alignment Initiative for loans owned or guaranteed by the Enterprises.⁴ But the g-fee proposal instead aims to set a "ceiling" for what judicial protections are afforded homeowners, above which states will be punished. This raises acute federalism concerns, and could well be characterized as a tax on due process rights.

The FHFA should not set a ceiling on state protections in the housing market.

It is a fundamental principle of American government that states have sovereign control over their own courts. This proposal interferes with that authority by pressuring states to change their foreclosure laws – despite the fact that states have far greater knowledge of the costs and benefits of their own proceedings.

States have found that judicial protections, such as court-sponsored mediation, are appropriate to ensure the success of the loss mitigation discussions between lenders and borrowers that are required by FHFA's own servicing rules. Indeed, the need for state laws

² News Release, Federal Housing Finance Agency, February 12, 2012, *available at* <http://www.fhfa.gov/webfiles/23344/StrategicPlanConservatorshipsFINAL.pdf>.

³ State-Level Guarantee Fee Pricing, 77 Fed. Reg. 58991, 58994 (proposed Sept. 19, 2012).

⁴ *See, e.g.*, Federal Housing Finance Agency, FREQUENTLY ASKED QUESTIONS – SERVICING ALIGNMENT INITIATIVE, *available at* <http://www.fhfa.gov/webfiles/21191/FAQs42811Final.pdf>.

providing a fair forum for settlement negotiations, and enforcing the requirement that borrowers and lenders negotiate in good faith, is evidenced by state judicial opinions sanctioning parties for failing to abide by those obligations.⁵

The states are also in a better position than a federal agency to assess the particulars of their foreclosure processes, and the impact of those processes on local housing markets. Some of the laws attacked by FHFA here have been found responsible for saving billions of dollars in state revenues and for preventing billions of dollars in losses associated with preventable foreclosures.⁶

The FHFA should not interfere with state judicial procedures.

Moreover, because the FHFA's proposal does not appear to comply with the notice and comment requirement of the Administrative Procedure Act,⁷ it is likely that the impacted states will not even have the normal political processes available to protect their citizens. The states thus face strong pressure on their state judicial process from a federal agency, acting without Congressional direction. And on issues of state court proceedings, the federal government has been repeatedly instructed to defer to the autonomy of the sovereign states.

It is long settled that states have full authority over their own courts. As the Supreme Court has explained, the "general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them. The States thus have great latitude to establish the structure and jurisdiction of their own courts."⁸

In this instance, the FHFA's proposal expressly seeks to interfere with methods by which states structure systems to process foreclosure, especially when those systems are judicial. The Notice states that the FHFA "recognizes that each state establishes legal

⁵ See *HSBC Bank USA v. McKenna*, 952 N.Y.S.2d 746, 761 (N.Y. Sup. Ct. Kings County 2012) (collecting cases finding lack of good faith negotiations by plaintiff/mortgagee in state court settlement conferences).

⁶ See New York State Chief Judge Jonathan Lippman, *The State of the Judiciary 2012* (Feb. 14, 2012) 14 (explaining how state court programs and procedures "keep more New Yorkers in their homes and improve outcomes for lenders as well as borrowers"); Written Testimony of Mark Ladov and Meghna Philip, the Brennan Center for Justice at NYU School of Law, to the Task Force to Expand Access to Civil Legal Services in New York (October 4, 2012), *available at* http://www.brennancenter.org/content/resource/testimony_to_the_task_force_to_expand_access_to_civil_legal_services_in_new/ (citing Empire Justice Center estimate that state foreclosure prevention programs "saved New Yorkers at least \$3.4 billion by preventing families from slipping into homelessness, shoring up property values in struggling communities and preserving our state's property tax base").

⁷ It appears that the notice the FHFA has published does not comply with 5 U.S.C. § 553(b), as the FHFA's Notice does not label itself as a "Notice of Proposed Rulemaking." See *National Tour Broker's Ass'n v. U.S.*, 591 F.2d 896, 899 (D.C. Cir. 1978) ("It is true that the [agency] published a general notice in the Federal Register, but it was not a notice of proposed rulemaking.").

⁸ *Johnson v. Fankell*, 520 U.S. 911, 919 (1997) (internal quotation marks omitted) (internal citation omitted).

requirements governing foreclosure processing that it judges to be appropriate for its residents” but nonetheless encourages states to “adjust their laws and requirements sufficiently to move their foreclosure timeline and costs more in line with the national average.” The Notice links lengthier foreclosure timelines to the availability of “regulatory or judicial actions.”⁹

The FHFA’s interference with state court due process protection is inappropriate. Over 80 years ago, the Supreme Court explained that a state statute requiring arbitration for certain state law claims did not violate due process and emphasized that “the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.”¹⁰ This principle remains true today. The FHFA should not interfere with the states’ ability to provide due process protections in their courts.

2) The FHFA’s decision to base risk of loss solely on foreclosure timelines, and to attribute those timelines to state laws, is arbitrary and capricious.

Federal agencies have a duty to avoid acting arbitrarily and capriciously. Agencies charged with implementing congressional mandates are required to explain the relationship between the wrong to be remedied and the action taken. This duty includes examining each important aspect of a problem before taking action.

The FHFA has not discharged this duty with its most recent g-fee increase proposal. The FHFA’s model for determining the relationship between state laws designed to protect the legal rights of homeowners and the risk of loss on Enterprise-backed mortgages is incomplete, lacking key variables that would enable it to price its g-fees more accurately and rationally. The FHFA has also failed to address why it has omitted these important variables. Specifically, the model suffers from at least four problems.

First: The model assumes that state foreclosure laws are driving delays in the foreclosure process, when evidence shows that other factors are causing delays.

The FHFA’s model assumes that state foreclosure procedures are driving the differences in processing times. But the FHFA ignores factors like attorney misconduct and persistent delays by banks in processing an unprecedented number of foreclosure cases—factors principally responsible for extending foreclosure timelines and creating the need for stricter oversight by state courts.

For example, the Florida courts faced delays on over 100,000 foreclosure cases after allegations of improper conduct emerged against the state’s largest foreclosure law firm.¹¹

⁹ State-Level Guarantee Fee Pricing, 77 Fed. Reg. 58991, 58991 (proposed Sept. 19, 2012); *see also id.* at 58991 (listing “length of time needed to secure marketable title to the property” as the most important “principal driver[]” for higher carrying costs borne by the Enterprises); *Id.* at 58993 (stating that “court mandated procedures” are often to blame for delays in foreclosure timelines).

¹⁰ *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931).

¹¹ *See* Ray Sanchez, *Florida’s Foreclosure King Investigated for Questionable Practices*, ABC NEWS, Oct. 12, 2010, <http://abcnews.go.com/Business/florida-foreclosure-lawyer-david-stern-investigated/story?id=11854272#.UKEg0aVWJE9>; *see also* Melinda Fulmer, *Foreclosures Plummet to 3-*

Steven J. Baum, P.C., previously New York's largest foreclosure firm, was responsible for court delays when it was forced to shut down after similar allegations of misconduct surfaced, and after the firm agreed to pay a \$2 million penalty in a settlement with the United States attorney's office, and a \$4 million penalty to New York authorities.¹²

Similar delays can be attributed to "robo-signing" problems and other servicer misconduct or errors. For example, in 2010, Wells Fargo announced that it would redo over 55,000 improperly filed foreclosure documents that had not adhered to legal requirements; Bank of America and J.P. Morgan Chase made similar announcements, delaying hundreds of thousands of cases around the country.¹³ Academic research into servicer implementation of the federal Home Affordable Modification Program (HAMP) also suggests that certain servicers have been ill-prepared for handling loan modification requests at current levels. One study estimated that the failure by some servicers to administer HAMP effectively led to a shortfall of at least 800,000 potential loan modifications.¹⁴

Such delays cannot be fairly attributed to state foreclosure procedures and consumer protections; instead they are the result of sheer volume and servicer/attorney misconduct or mistakes. Increasing mortgage origination fees on the hope that state legislatures will curtail foreclosure procedures will have little effect on these delays. Indeed, states with judicial foreclosure requirements are more likely to identify and remedy fraudulent practices, and states that miss this misconduct benefit from an artificially shorter foreclosure timeline.

Moreover, even if the FHFA's assessment of the reason for delay was accurate (which it is not), that is not a reason to penalize future homeowners. There is no rational connection between the wrong identified and the remedy proposed.

Second: The model assumes that each state has the same default rate equal to the national average. This assumption precludes the FHFA from considering the likelihood that states with stronger foreclosure protections have higher cure rates.

year Low in Wake of Robo-Signing Scandal, MSNBC REAL ESTATE, <http://realestate.msn.com/article.aspx?cp-documentid=28364166>; Susan Taylor Martin, *Collapse of David J. Stern Law Firm Throws Foreclosure Courts into Disarray*, TAMPA BAY TIMES, Mar. 9, 2011, <http://www.tampabay.com/news/courts/civil/article1156011.ece>.

¹² Peter Lattman, *Foreclosure Firm Steven J. Baum to Close Down*, N.Y. TIMES, Nov. 21, 2011, <http://dealbook.nytimes.com/2011/11/21/foreclosure-firm-steven-j-baum-to-close-down/>; Thom Weidlich, *Baum Foreclosure Firm Settles with New York for 4 Million*, BLOOMBURG, Mar. 22, 2012, <http://www.bloomberg.com/news/2012-03-22/baum-foreclosure-firm-settles-with-new-york-for-4-million-1-.html>.

¹³ Eric Dash, *Wells Fargo to Amend About 55,000 Foreclosures*, N.Y. TIMES, Oct. 27, 2010, http://www.nytimes.com/2010/10/28/business/28fargo.html?_r=0.

¹⁴ Agarwal, Sumit, Amromin, Gene, Ben-David, Itzhak, Chomsisengphet, Souphala, Piskorski, Tomasz and Seru, Amit, *Policy Intervention in Debt Renegotiation: Evidence from the Home Affordable Modification Program*, Fisher College of Business Working Paper No. 2012-03-020 (November 13, 2012). Available at SSRN: <http://ssrn.com/abstract=2138314> or <http://dx.doi.org/10.2139/ssrn.2138314>.

Any rational g-fee pricing scheme examining risk of loss based on the state of origination must consider default and cure rates on a state-by-state basis, which the FHFA has failed to do.

This is because state foreclosure protections have benefits for lenders, as borrowers are given more time and oversight to negotiate a mutually beneficial loan modification or catch up on their obligations and cure defaults. For example, one study found that “state policies that offer additional time and/or promote counseling may benefit mortgage borrowers in default” by improving loan modification rates and borrower outcomes.¹⁵ This is critical, considering that banks foreclosing on homes with a loan balance at the national median lost \$145,000 on average per foreclosure in 2008.¹⁶ The FHFA has ignored the savings that are generated when state courts help to prevent foreclosure sales, or the substantial variation in state cure rates that affect risk of loss. As Professor Alan White explains in his submission to the Agency, state cure rates vary widely, and in fact “[c]ure rates for defaulted loans are higher than the national average in four of the five states singled out by FHFA for surcharges.”¹⁷

Statistics demonstrate that default rates also vary widely from state to state. As of October 2012, New York, for example, has only 1 in 2,223 properties in the foreclosure process; New Jersey has only 1 in 1200.¹⁸ These figures are better than the national average of 1 in 706. The FHFA’s unidimensional focus on the average time to a foreclosure auction is plainly an inadequate measure of risk of loss given the impact that default and cure rates have on these statistics.

Third: The model does not evaluate or consider the costs, for lenders and communities, of accelerating the foreclosure process.

The FHFA’s proposal assumes that shorter timelines result in savings for lenders and ultimately the Enterprises. Beyond discounting the benefits of increasing loan modifications and outcomes short of foreclosure, the FHFA also does not consider the costs generated by foreclosure auctions, which are particularly high today given the excessive pipeline of vacant bank-owned properties.

After a bank completes a foreclosure, the property goes up for auction and is either sold to an owner/occupier, an investor, or is not sold and the property becomes part of the bank’s balance sheet. These latter properties, called Real Estate Owned (“REO”) properties, create liabilities for banks because they are required by law to maintain them. Research has shown that maintenance of these properties (especially those in minority communities) is

¹⁵ J. Michael Collins et al., *State Mortgage Foreclosure Policies & Lender Interventions: Impacts on Borrower Behavior in Default*, 23 (SSRN, Working Paper, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475505&download=yes; see also Geoff Walsh, *Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation*, NATIONAL CONSUMER LAW CENTER (Feb. 2012) (summarizing data showing that state mediation programs and legal protections encourage loss mitigation outcomes that benefit homeowners and lenders).

¹⁶ Walsh, *Rebuilding America*, supra note 15, at 33.

¹⁷ Letter from Alan White to FHFA OPAR (Nov. 20, 2012).

¹⁸ *National Real Estate Trends*, REALTYTRAC, Oct. 2012, <http://www.realtytrac.com/trendcenter/>.

quite poor.¹⁹ Failing to maintain properties reduces their resale value and ultimately the amount of loss faced by lenders. Extending foreclosure timelines may allow more borrowers to catch up on their payments or modify their loans and help lenders avoid these REO costs.

Relatedly, decreasing the length of the foreclosure processes reciprocally increases the number of properties being auctioned for re-sale at any one time. This would increase each bank's costs by increasing the size of its REO pipeline.²⁰ This increase in the supply of houses available will put negative pressure on housing prices, and, consequently, increase the loss suffered by lenders.

Fourth: The FHFA does not fully consider the public interest.

One of the “principle duties of [the FHFA] shall be to ensure that the activities of each regulated entity and the manner in which such regulated entity is operated are consistent with the public interest.”²¹ The FHFA has not fully considered the adverse effect its action will have on matters of public interest. For example, studies have shown that properties located within 300 feet of three or more other properties in foreclosure sell at a decrease in value of 5%.²² This loss in value translates into lower property tax revenue for local governments.²³ In addition, crime rates increase in neighborhoods with vacant properties owned by the bank. A single foreclosed home on a block can lead to as much as a 5.7% increase in violent crime.²⁴ The FHFA must take a broader view of what collateral effects foreclosure has on American communities before it takes its proposed action.

For these reasons, the FHFA's analysis is incomplete because it does not include the important consequences of mortgage foreclosures. Its incomplete model ignores many of the costs and benefits that the FHFA is required by law to consider and explain. Without fully considering these factors, the model arbitrarily and capriciously attributes the risk of loss to state legal protections.

¹⁹ See National Fair Housing Alliance, *Banks are Back – Our Neighborhoods Are Not* (2012), available at <http://www.mvfairhousing.com/pdfs/2012-04-04%20The%20Banks%20Are%20Back.PDF>.

²⁰ See Federal Reserve Bank of New York, “The Volume in the Distressed Residential Real Estate Pipeline” (Oct. 5, 2012) (projecting that shorter foreclosure timelines would result in increased REO inventories).

²¹ 12 U.S.C. § 4513(a)(1)(B)(v) (2006).

²² See John P. Harding et al., *The Contagion Effect of Foreclosed Properties* (Social Science Research Network, Working Paper No. 1160354, 2008).

²³ See Empire Justice Testimony on Foreclosure Funding and Process: Hearing on Mortgage Foreclosures in New York Before the State Assembly Standing Comm. on Housing, Assembly Standing Comm. on Judiciary, Assembly Standing Comm. on Banks, 2011 Leg. 235th Sess. (Nov. 7, 2011) (statement of Rebecca Case) (finding losses in tax revenue in New York State to be \$61 billion from 2008 to 2010).

²⁴ Ingrid Gould Ellen, Johnanna Laco, and Claudia Ayana Sharygin, *Does Foreclosures Cause Crime?*, Furman Center for Real Estate Urban Policy (2011), available at http://furmancenter.org/files/publications/Ellen_Laco_Sharygin_ForeclosuresCrime_June27_1.pdf.

3) The FHFA’s proposal would have a disparate impact on communities of color in violation of federal civil rights laws.

The FHFA’s proposal also conflicts with the federal government’s commitment to promoting fair lending practices and equal economic opportunity for all. If successful, the FHFA’s campaign to scale back state foreclosure protections would have a disparate impact on communities of color. These communities were targeted for unaffordable loans during the subprime lending bubble (after years of suffering from “redlining” and an absence of credit).²⁵ They are now suffering from disproportionately high foreclosure rates.²⁶ Using the FHFA’s leverage over guarantee fees to reduce legal protections for homeowners – and to threaten states who might be considering strengthening their consumer protection laws – will impose particularly substantial costs on communities of color.²⁷ This disparate impact violates the fair lending principles enshrined in the Fair Housing Act and the Equal Credit Opportunity Act.²⁸

Substantial evidence shows that communities of color have been targeted for expensive and unaffordable mortgage loans.²⁹ A joint report from HUD and the U.S. Department of Treasury issued in 2000 found that “borrowers in black neighborhoods [were] five times as likely to refinance in the subprime market than borrowers in white neighborhoods,” even when controlling for income.³⁰ This report found that “borrowers in *upper-income* black neighborhoods were twice as likely as homeowners in *low-income* white neighborhoods to refinance with a subprime loan.”³¹ In 2006, the Center for Responsible Lending found that, within the subprime market, minority borrowers were over 30 percent

²⁵ See, e.g., Alan M. White, *Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing*, 60 South Carolina Law Review 677, 687-92 (explaining how minority homeowners were disproportionately targeted for and sold subprime loans).

²⁶ See, e.g., ACLU, *Justice Foreclosed: How Wall Street’s Appetite for Subprime Mortgages Ended up Hurting Back and Latino Communities* (October 2012); Melanca Clark and Maggie Barron, Brennan Center for Justice, *Foreclosures: A Crisis in Legal Representation* 6-11 (2009).

²⁷ Protections against discrimination fully apply to loan modification offers and negotiations. See, e.g., *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 538 (7th Cir. 2011) (explaining that ECOA’s protections against discrimination apply to loan modification offers).

²⁸ For an example of a disparate impact analysis under the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*, and the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, *et seq.*, in the mortgage lending context, see, e.g., *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 254 (D. Mass. 2008) (“If the facts alleged in the complaint are to be believed – which they must at this point in the litigation – the net effect of Countrywide’s pricing policy is a classic case of disparate impact: White homeowners with identical or similar credit scores pay different rates and charges than African American homeowners . . .”).

²⁹ For a discussion of data on racially discrimination in subprime lending, see Alan M. White, *Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing*, 60 S. Carolina L. Rev. 677 (2009).

³⁰ *Curbing Predatory Home Mortgage Lending: A Joint Report*, UNITED STATES DEPARTMENT OF THE TREASURY AND UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, at 46-48 (June 2000) (“HUD/Treasury Report”), available at <http://archives.hud.gov/reports/treasrpt.pdf>.

³¹ *Id.*

more likely to get higher-rate loans than whites, even after accounting for credit risk differences.³²

This history of racial discrimination in unfair lending has led to communities of color being especially hard hit by the foreclosure crisis. By 2010, African Americans and Latinos were 47 percent and 45 percent more likely than whites to face foreclosure, respectively.³³ This disparate impact holds true in the states under attack by FHFA's proposed fee increase.³⁴ In New York, a map of distressed home loans shows that two-thirds of homeowners facing foreclosure live in communities of color.³⁵ In Florida, more than half of the loans issued during the housing boom were sold to Latinos, who are now disproportionately represented among the loans that are seriously delinquent or in foreclosure.³⁶ In Connecticut, "81% of African Americans, and 79% of Latinos . . . live in the areas with the least access to opportunity," and these "[l]ow opportunity areas also represent over half of recent mortgage foreclosures."³⁷ A 2011 analysis of the Chicago area found 40.5 and 40.3 percent of properties in predominately African American and Latino communities respectively were underwater compared to only 16.7 percent in predominately white communities.³⁸ As one study concluded: "Simply put, the greater the degree of Hispanic and especially black segregation a metropolitan area exhibits, the higher the number and rate of foreclosures it experiences."³⁹

A draft analysis by the Empire Justice Center illustrates the vicious cycle in which these communities of color are currently trapped. The Empire Justice Center has mapped out loans at risk of foreclosure across New York State, and shown that in many communities these mortgages are heavily concentrated in minority neighborhoods. To make matters

³² Debbie Gruenstein Bocian, Keith S. Ernst, and Wei Li, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, Center for Responsible Lending, (May 31, 2006), *available at* http://www.responsiblelending.org/mortgage-lending/tools-resources/rr011-Unfair_Lending-0506.pdf.

³³ Debbie Gruenstein Bocian, Wei Li, and Keith S. Ernst, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis*, Center for Responsible Lending, (June 18, 2010), *available at* <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf>.

³⁴ See Center for Responsible Lending, *State Rates of Completed Foreclosure and Serious Delinquency, by Borrower Race and Ethnicity (2004-2008 Originations)* (2001), *available at* <http://www.responsiblelending.org/mortgage-lending/research-analysis/lost-ground-State-data-by-borrower-race-ethnicity.pdf> (showing higher foreclosure rates among African Americans and Latinos than among non-Hispanic whites in Connecticut, Florida, Illinois, New Jersey and New York).

³⁵ Neighborhood Economic Development Advocacy Project, *FORECLOSURES IN NEW YORK: WHAT'S REALLY GOING ON*, (January 2012), *available at* http://www.nedap.org/resources/documents/NEDAPForeclosuresinNYS_WhatsGoingOn.pdf.

³⁶ See ACLU, *Justice Foreclosed: How Wall Street's Appetite for Subprime Mortgages Ended up Hurting Back and Latino Communities* 21 (Oct. 2012).

³⁷ Kirwan Institute, *People, Place and Opportunity: Mapping Communities of Opportunity In Connecticut* 3 (Nov.2009).

³⁸ Woodstock Institute, *Struggling to Stay Afloat: Negative Equity in Communities of Color in the Chicago Six County Region* 3 (Mar. 2012).

³⁹ Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 *Am. Sociological Review* 629, 644 (2010).

worse, in the three counties where lending was analyzed so far, those with the highest default rates also have the lowest amount of new lending activity. In other words, these communities are the least likely to have new homeowners ready to purchase foreclosed properties. Without new buyers available, the FHFA's goal of pushing more homes into foreclosure more quickly would only increase the number of vacant, bank-owned properties in communities of color - dragging down property values further and increasing the risk of blight and crime in these neighborhoods.

Meanwhile, as noted above, there is evidence that homeowners in foreclosure – who are disproportionately represented in communities of color – benefit from the legal protections under attack in this proposal. For example, since New York implemented mandatory mediation and added other procedural protections to the foreclosure process, the number of homeowners who failed to show up in court to attempt to save their homes has plummeted; the default rate for defendants in foreclosure cases dropped from approximately 90% in 2008 to 10% in 2011.⁴⁰ The number of homeowners who have been connected with lawyers and housing counselors has also grown substantially due to the efforts of these same court mediation programs; between 2008 and 2011, New York's Foreclosure Prevention Services Program assisted more than 80,000 homeowners and saved at least 14,000 homes from foreclosure.⁴¹ Because two-thirds of New York's default properties are in communities of color, any attempt to scale back these benefits will have a disparate impact on minority homeowners.

A similar story is told in Connecticut. According to one reporter, of the more than 7,100 cases that had completed the state's judicial mediation process through June 2010, at least 62 percent – more than 4,400 cases – led to a solution that allowed families to remain in their homes.⁴² Although lacking statistics on borrower demographics, this reporter estimated that half of the homeowners helped through mediation were people of color.⁴³

In short, the FHFA's proposal – if successful at weakening the nation's consumer protection laws – would have a disparate impact on communities of color. This would violate the fair lending principles of the Fair Housing Act and the Equal Credit Opportunity Act.⁴⁴

⁴⁰ Chief Administrative Judge Ann Pfau, 2011 Report of the Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009 (“2011 N.Y. Courts Foreclosure Report”) at 4, *available at* <http://www.courts.state.ny.us/publications/pdfs/ForeclosuresReportNov2011.pdf>.

⁴¹ Empire Justice Testimony on Foreclosure Funding and Process: Hearing on Mortgage Foreclosures in New York Before the State Assembly Standing Comm. on Housing, Assembly Standing Comm. on Judiciary, Assembly Standing Comm. on Banks, 2011 Leg. 235th Sess. (Nov. 7, 2011) (statement of Rebecca Case- Grammatico).

⁴² Ann-Marie Adams, *Losing Ground: Foreclosure Rate Higher Among Minority Homeowners*, HARTFORD GUARDIAN (Aug. 19, 2010), *available at* <http://www.thehartfordguardian.com/2010/08/19/losing-ground-foreclosure-rate-higher-among-minority-homeowners/>.

⁴³ *Id.*

⁴⁴ See 12 C.F.R. pt. 202, supp. 1, § 202.6 cmt 2 (disparate impact regulations for ECOA); Keith v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988) (disparate impact analysis under FHA); see also Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 Alb. Gov't L. Rev. 164 (2009) (discussing disparate impact analysis in fair housing and fair lending litigation).

Diluting state legal protections for homeowners in foreclosure would effectively pull the safety net out from under the borrowers and communities who have been hardest hit by discriminatory lending practices. The FHFA should reconsider its analysis of the costs and benefits of such laws and requirements, and withdraw its current proposal to increase state-level guarantee fees.

Respectfully submitted,

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