

November 7, 2021

From: Program on Human Rights and the Global Economy (PHRGE) and the National Coalition for a Civil Right to Counsel (NCCRC)

Re: Access to Justice for Minorities and the Civil Right to Counsel

Dear Dr. Varennes:

On behalf of PHRGE and the NCCRC, we welcome your upcoming visit to the United States in your capacity at the Special Rapporteur on Minority Issues. We appreciate the opportunity to express concerns regarding the lack of a general right to counsel in civil cases in the United States. As we set out below, the absence of this right disproportionately affects people of color and other minorities like women.

1. **International Legal Obligations Supporting the Right to Civil Counsel**

Human rights norms in both the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR), support the right to counsel in civil cases, particularly where fundamental human rights are at stake.

In ratifying CERD, the United States assumed responsibility “for the observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.”<sup>1</sup> In Article 5, CERD specifies this can only be achieved if States Parties guarantee the right of equality before the law or “the right to equal treatment before the tribunals and other organs administering justice.”<sup>2</sup> Under Article 6, minorities who are victims of discrimination are promised that “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions,” to

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<sup>1</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1), opened for signature Mar. 7, 1966, 1966 U.S.T. 521, 660 U.N.T.S. 195.

<sup>2</sup> *Id.* at art. 5(a).

fight against violations of human rights and fundamental freedoms.<sup>3</sup> These articles encompass both civil and criminal matters and require State Parties to proactively pursue equal access to justice for all.<sup>4</sup>

In the past, the United States has been criticized for failing to provide access to civil counsel. The Committee on the Elimination of Racial Discrimination's (CERD Committee) Concluding Observations following the 2014 review of the United States noted a real, "concern at the lack of a generally recognized right to counsel in civil proceedings (para. 22), which disproportionately affects indigent persons belonging to racial and ethnic minorities."<sup>5</sup> The CERD Committee went on to highly recommend that the United States "allocate sufficient resources to ensure effective access to legal representation for indigent persons belonging to racial and ethnic minorities in civil proceedings," particularly with regard to proceedings that affect fundamental needs such as housing and domestic violence.<sup>6</sup> Despite this clear directive, the United States did not recognize a general right to civil counsel in its most recent State Party Report submitted on June 2, 2021.<sup>7</sup> Further, the report does not include a clear plan to provide a civil right to counsel at a federal level and instead relies on "partnerships with civil legal aid organizations" and "collabora[tions] with state and local entities."<sup>8</sup>

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<sup>3</sup> *Id.* at art. 6.

<sup>4</sup> The Committee on the Elimination of Racial Discrimination (CERD Committee) has gone on to appeal to State Parties to "take the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by providing legal aid.

<sup>5</sup> Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014).

<sup>6</sup> *Id.*

<sup>7</sup> Tenth to Twelfth Periodic Reports of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/USA/10-12 (June 8, 2021).

<sup>8</sup> *Id.*

The United States also ratified the ICCPR on September 8, 1992.<sup>9</sup> Article 14 of the ICCPR directly addresses fairness before the courts in both civil and criminal matters such that, “All persons shall be equal before the courts and tribunals.”<sup>10</sup> The Human Rights Committee has further interpreted article 14’s guarantee in General Comment No. 32 stating that “While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.”<sup>11</sup>

The lack of access to counsel in civil cases disproportionately impacts minorities in the U.S. Below, we examine the impact in two areas, eviction cases and litigation from unpaid fines and fees. We then highlight local programs that are good models and that could, if scaled up, begin to redress these racial disparities in access to justice.

## 2. **The Impacts of a Lack of a Right to Civil Counsel in the U.S.**

The United States’ expanding justice gap, that is the gap between the legal needs of the population and the services available, is ubiquitous. Studies show 80 percent of the civil legal problems reported by low-income Americans are unmet.<sup>12</sup> This problem has been further exacerbated by the instability and uncertainty created by the COVID-19 pandemic.<sup>13</sup> Low-income individuals, the most vulnerable of the population, are more likely to be people of color,

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<sup>9</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 14, § 3(d), U.N. GAOR, 21st Sess., 1495th plen. mtg., U.N. Doc (Dec. 16, 1966).

<sup>10</sup> *Id.* at art. 14.

<sup>11</sup> Human Rights Comm., *General Comment No. 32: Article 14, Right to Equality Before Courts and Tribunals and to a Fair Trial*, ¶¶ 9-10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

<sup>12</sup> *The Unmet Need for Legal Aid*, LEGAL SERVICES CORPORATION, <https://www.lsc.gov/about-lsc/what-legal-aid/unmet-need-legal-aid> (last visited Nov. 2, 2021).

<sup>13</sup> *See e.g.*, What is LSC Fact Sheet, LEGAL SERVICES CORPORATION, 2 (Jan. 2021), <https://lsc-live.app.box.com/s/ewilk2p01vgv6sri1yyn3ajc5mnwcaen>. The Legal Services Corporation has reported an increase in requests for assistance among its funding grantees. This is due to the pandemic’s disruption of the financial security of people across the country.

women, immigrants, the elderly, and people with disabilities.<sup>14</sup> The lack of a right to civil counsel falls hardest on minorities in the United States, making this a racial justice issue.

a. **Housing**

Minorities are disproportionately subjected to eviction cases, which often lead to homelessness. The Eviction Lab found that nearly 1 in 4 black renters lived in a county in which the black eviction rate was more than double the white eviction rate.<sup>15</sup> While black individuals only made up 19.9 percent of adult renters in the Eviction Lab data set, they made up 32.7 percent of all eviction defendants.<sup>16</sup> In contrast, white individuals, who made up over half of the adult renters in the data, received only 42 percent of eviction filings.<sup>17</sup> Black and Latinx women face a higher risk: women in general have a 2 percent higher risk of eviction than men, while Black and Latinx women have a 4 percent and 9 percent higher risk of eviction, respectively.<sup>18</sup> While the percentages may appear small, they translate to thousands more women evicted each year than men.

Landlords seeking to evict tenants take advantage of a hugely imbalanced power dynamic that falls heaviest on these groups that are disproportionately present in eviction cases. The NCCRC reviewed existing studies and found that on average only 3 percent of tenants are represented, compared to 81 percent of landlords.<sup>19</sup> Beyond their inability to afford counsel, low

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<sup>14</sup> Rebecca Buckwalter-Poza, *Making Justice Equal*, CENTER FOR AMERICAN PROGRESS, 2 (Dec. 8, 2016), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/>.

<sup>15</sup> Peter Hepburn, Renee Louis, and Matthew Desmond, *Racial and Gender Disparities among Evicted Americans*, 7 SOCIO. SCI. 649, 653 (2020).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 655.

<sup>19</sup> *Eviction Representation Statistics for Landlords and Tenants Absent Special Intervention*, NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, [http://civilrighttocounsel.org/uploaded\\_files/280/Landlord\\_and\\_tenant\\_eviction\\_rep\\_stats\\_NCCRC\\_.pdf](http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats_NCCRC_.pdf) (last modified Nov. 2, 2021).

income tenants may not be able to go to court due to employment, childcare, or transportation restrictions. Any defense available to a defendant is virtually impossible to prove without a lawyer.<sup>20</sup> Landlords rely on the pro se status of tenants to file meritless eviction cases that force tenants to leave their homes, or simply refuse to negotiate because evicting pro se tenants is so easy.<sup>21</sup>

In Utah and after an abusive incident at the hands of her boyfriend, Shenna Buist had to face the complexities and uncertainty that come with fighting an eviction without counsel. On the night she was attacked, the police charged Shenna with an infraction for disorderly conduct, a charge that was quickly dropped but set off the eviction process as it was considered “disturbing the peace,” under the apartment regulations.<sup>22</sup> Shenna was told that if she did not leave by the following Monday, her landlords would dispatch police officers to force her exit.<sup>23</sup> The eviction was filed by a law firm responsible for nearly half of all the evictions in Utah every year.<sup>24</sup> Without the resources to fight the eviction, Shenna was forced to leave her apartment with an eviction on her record that will follow her and taint her future rental applications.<sup>25</sup> Albert Stringer, a Black Utah man, was also sued by the same law firm for refusing to pay a fee for

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<sup>20</sup> Sandra Park and John Pollock, *Tenants’ Right to Counsel is Critical to Fight Mass Evictions and Advance Race Equity During the Pandemic and Beyond*, ACLU (Jan. 12, 2021), <https://www.aclu.org/news/racial-justice/tenants-right-to-counsel-is-critical-to-fight-mass-evictions-and-advance-race-equity-during-the-pandemic-and-beyond/>.

<sup>21</sup> *Id.*

<sup>22</sup> Eric S. Peterson, Taylor Hartman, Ria Agarwal, Cathy McKittrick, and McKhelyn Jones, *Some Utah Landlords are Evicting Domestic Violence Victims*, THE SALT LAKE TRIBUNE (Mar. 19, 2021), <https://www.sltrib.com/news/politics/2021/03/19/some-utah-landlords-are/>.

<sup>23</sup> *Id.*

<sup>24</sup> Eric S. Peterson and Jennifer Greenlee, *For Utah renters, a 3-day eviction notice often shows up before federally mandated 30-day notice*, THE SALT LAKE TRIBUNE (Nov. 2, 2021), <https://www.sltrib.com/news/2021/11/02/utah-renters-day-eviction/>.

<sup>25</sup> Eric S. Peterson, Taylor Hartman, Ria Agarwal, Cathy McKittrick, and McKhelyn Jones, *Some Utah Landlords are Evicting Domestic Violence Victims*, THE SALT LAKE TRIBUNE (Mar. 19, 2021), <https://www.sltrib.com/news/politics/2021/03/19/some-utah-landlords-are/>.

internet service that he had repeatedly told his landlord he never used and didn't want.<sup>26</sup> Unlike Shenna, Albert had a lawyer who helped him fight multiple threats from said firm who insisted he owed thousands of dollars worth of fees, and eventually settled the matter without having to pay the landlord anything.<sup>27</sup> Because of Utah's minimal tenant protections, Albert nevertheless had to move out, but he was given more time to do so and figure out his next steps, as well as greater security when he was going through the process.<sup>28</sup>

An eviction and the loss of a home can lead to even more costs and consequences for tenants. First, a tenant with an eviction case on their record is essentially blacklisted, as many landlords will not consider an applicant with a prior eviction filing, even if the tenant won the case.<sup>29</sup> Tenants can also face further negative consequences from an eviction such as homelessness and resulting incarceration, criminal prosecution, loss of child custody, loss of access to neighborhood schools, loss of a job, material hardship, and mental health issues like depression.<sup>30</sup>

#### **b. Fines and Fees**

U.S. state and local governments use monetary fines to punish individuals for a wide range of crimes, misdemeanors, and other violations like traffic violations.<sup>31</sup> The fines are imposed upon an individual's conviction and are intended both to deter future crimes and as a

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<sup>26</sup> Eric S. Peterson and Jennifer Greenlee, *For Utah renters, a 3-day eviction notice often shows up before federally mandated 30-day notice*, THE SALT LAKE TRIBUNE (Nov. 2, 2021), <https://www.sltrib.com/news/2021/11/02/utah-renters-day-eviction/>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Sandra Park and John Pollock, *Tenants' Right to Counsel is Critical to Fight Mass Evictions and Advance Race Equity During the Pandemic and Beyond*, ACLU (Jan. 12, 2021), <https://www.aclu.org/news/racial-justice/tenants-right-to-counsel-is-critical-to-fight-mass-evictions-and-advance-race-equity-during-the-pandemic-and-beyond/>.

<sup>30</sup> Matthew Desmond, Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295 (2015) <https://doi.org/10.1093/sf/sov044>.

<sup>31</sup> *Fines and Fees - 2020*, NATIONAL CENTER FOR ACCESS TO JUSTICE, <https://ncaj.org/state-rankings/2020/fines-and-fees> (last visited Nov. 2, 2021).

present-day punishment.<sup>32</sup> By contrast, fees are intended to raise revenue and include examples like court-appointed attorney fees, court clerk fees, crime lab analysis fees, late fees, installment fees, and other surcharges.<sup>33</sup> Fees are designed to “shift the costs of the criminal justice system from taxpayers to defendants, who are seen as the ‘users’ of the courts.”<sup>34</sup> After the Great Recession in 2008, there was a large increase in the number fines and fees across the country and dollar amounts of each fee.<sup>35</sup> These amounts can quickly add up to insurmountable debt for indigent, minority defendants, who can face consequences including suspended driver’s licenses or larger jail sentences stemming from a failure to pay.<sup>36</sup>

The American Bar Association has released guidance on court fines and fees explicitly calling for a “prohibition against incarceration and other disproportionate sanctions” for an individual’s failure to pay.<sup>37</sup> Because fines and fees are not income-adjusted, they have a disproportionate impact on low-income people of color, who are over-represented among low income Americans.<sup>38</sup> Indeed, punishment for the failure to pay, such as incarceration and other sanctions like the immediate suspension of a defendant’s driver’s license, can have a substantial adverse impact on the life of an defendant and further exacerbate indigent defendants’ existing financial issues. For example, a defendant may lose their job after a period of incarceration or when they can no longer drive to or for work.

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<sup>32</sup> Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen, and Noah Atchison, *The Steep Costs of Criminal Justice Fees and Fines*, THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, 6 (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Ten Guidelines on Court Fines and Fees*, AMERICAN BAR ASSOCIATION, 5-6 (Aug. 2018), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_in\\_d\\_10\\_guidelines\\_court\\_fines.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_in_d_10_guidelines_court_fines.pdf).

<sup>38</sup> *Id.* at 3.

Individuals can end up in modern-day debtors' prison in four different ways:

(1) many courts may revoke or withhold probation or parole upon an individual's failure to pay; (2) some states authorize incarceration as a penalty for failure to pay, such as through civil contempt; (3) some courts force defendants to "choose" to serve prison time rather than paying a court-imposed debt; and (4) many states authorize law enforcement officials to arrest individuals for failure to pay and to hold them while they await an ability-to-pay hearing.<sup>39</sup>

Those who face incarceration for a failure to pay fines and fees often lack access to counsel, depending on the type of proceeding and the applicable federal/state law. The complexity of the subject is worsened by a lack of uniform guidance across states. However, at the very least, fines and fees cases that could lead to incarceration meet all the requirements under human rights norms for a civil right to counsel: (1) there is a threat of incarceration, (2) a represented government plaintiff, and (3) formal proceedings implicating an unconditional liberty interest.<sup>40</sup>

### 3. **Good Practices in Local Models**

The best models supporting a civil right to counsel are those that do not place limitations on who is eligible for the benefit. Many right to counsel programs around the country impose income limitations that reserve representation for only the neediest of defendants. However, adopting models without limitations would improve the fairness of the justice system as a whole and help eliminate bias in the exercise of determinations of eligibility, while also providing assistance to the minorities disproportionately represented among civil litigants requiring assistance.

#### a. **San Francisco, California**

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<sup>39</sup> *Id.* at 3.

<sup>40</sup> *Analyzing the Right to Counsel in Civil Fines and Fees Cases Involving Incarceration*, NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, 1 [http://civilrighttocounsel.org/uploaded\\_files/228/Right\\_to\\_counsel\\_in\\_fees\\_and\\_fines\\_cases\\_NCCRC\\_.pdf](http://civilrighttocounsel.org/uploaded_files/228/Right_to_counsel_in_fees_and_fines_cases_NCCRC_.pdf) (last visited Nov. 2, 2021).



San Francisco distinguished itself when, with a 2012 city ordinance, it declared the intention to become the nation’s first “right to civil counsel city.”<sup>41</sup> Then on June 5, 2018, San Francisco voters approved an initiative to guarantee the tenant right to counsel (“TRC”) regardless of income.<sup>42</sup> The bulk of the city’s funding is awarded to a lead partner, currently the Eviction Defense Collaborative, that serves as a primary source of referral and directs tenants to other legal aid organizations in San Francisco.<sup>43</sup> The city partners with these organizations by identifying those that already provide legal representation to tenants and supports their efforts with funding from the city.<sup>44</sup>

The program offers full-scope representation, *pro per* assistance, and limited-scope representation at a pretrial mandatory settlement conference.<sup>45</sup> In a hearing in February 2020, the Mayor’s office reported on the success of the right to counsel program. Of the clients accepting full-scope representation, 67 percent of overall households and 80 percent of Black households were able to stay in their home.<sup>46</sup> Further, a 94.3 percent of cases taken by the TRC involved low and moderate income households, as well as mostly minority defendants.<sup>47</sup> From 2018 to 2019

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<sup>41</sup> SAN FRANCISCO, CAL., ADMIN. CODE § 58.1 – 58.3 (2011),

<https://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/committees/materials/rls111189tdr.pdf>.

<sup>42</sup> J.K. Dineen, *SF’s Measure F wins, will give tax funded legal help to tenants facing eviction*, THE SAN FRANCISCO CHRONICLE (June 5, 2018), <https://www.sfchronicle.com/politics/article/SF-Measure-F-to-give-tax-funded-legal-help-to-12970924.php>.

<sup>43</sup> *Id.*

<sup>44</sup> Laura Waxmann, *Tenant Advocacy Groups Set to Receive Funding under ‘Right to Counsel’ Program*, SAN FRANCISCO EXAMINER (Nov. 28, 2018), <https://www.sfexaminer.com/news/tenant-advocacy-groups-set-to-receive-funding-under-right-to-counsel-program/>.

<sup>45</sup> *Implementation of Proposition F - Tenant Right to Counsel: Hearing Before the Land Use and Transportation Committee*, 2020 Leg. (February 24, 2020)(presentation of Mayor’s Office of Housing and Community Development to Land Use Committee) <https://sfgov.legistar.com/View.ashx?M=F&ID=8159426&GUID=8A4C2AFF-8E15-4E38-9F6A-AC58CAA46D71>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

the program saw a 10 percent decrease in the filing rate of evictions.<sup>48</sup> Funding for the program is expected to continue to rise based on this success.

### **b. New York City, New York**

In August of 2017, New York City signed into law legislation making it the first city in the United States to commit to making legal services available to all tenants facing eviction proceedings.<sup>49</sup> Three years later, in its report on Year Three of a five-year implementation of the right to counsel, the program is reporting massive success and has been used as a model by cities around the U.S.<sup>50</sup> In 2020, 38 percent of tenants are now represented in housing court, an increase from 32 percent the previous year and from 1 percent in 2013.<sup>51</sup> Of the tenants that are represented in housing court, 86 percent are able to remain in their homes.<sup>52</sup>

The New York City program currently provides counsel to any household in New York City with an income under 200% the federal poverty line, which for a family of four is around \$53,000.<sup>53</sup> It launched initially by identifying and targeting the New York neighborhoods where the risk of eviction and displacement was the highest.<sup>54</sup> These neighborhoods were low-income areas with a majority Black and brown population. New York City contracts with nonprofit legal services organizations across the city, which now consists of 21 legal services providers, to

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<sup>48</sup> *Id.*

<sup>49</sup> *Universal Access to Legal Services A Report on Year Three of Implementation in New York City*, DEPT. OF SOC. SERV. (2020), [https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ\\_UA\\_Annual\\_Report\\_2020.pdf](https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2020.pdf).

<sup>50</sup> *Id.* at 1.

<sup>51</sup> *Id.* at 2.

<sup>52</sup> *Id.* at 27.

<sup>53</sup> Allison Dikanovic, *Tenants' 'Right to Counsel' Expands Citywide. Here's Why that's a Big Deal*, THE CITY (May 20, 2021), <https://www.thecity.nyc/2021/5/20/22444023/right-to-counsel-expands-citywide-why-thats-a-big-deal-tenants-nyc>.

<sup>54</sup> *Universal Access to Legal Services A Report on Year Three of Implementation in New York City*, DEPT. OF SOC. SERV. (2020), [https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ\\_UA\\_Annual\\_Report\\_2020.pdf](https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2020.pdf).

provide counsel.<sup>55</sup> The city has also begun working to provide on-site legal services for tenants in public housing who were facing administrative termination of tenancy proceedings.<sup>56</sup> In fiscal year 2020, New York City provided legal advice and representation to over 37,000 households comprising over 92,000 individuals.<sup>57</sup>

#### 4. Conclusion

The lack of a civil right to counsel is a national problem that undermines the human right of access to justice. We urge you to recognize and bring attention to the significant impact lack of civil counsel has on U.S. minorities' access to justice, and their enjoyment of fundamental rights such as housing, procedural fairness, and even liberty. We also urge you to recommend expansion of promising models such as that in San Francisco, which allows equal and fair access to all, or New York's highly successful model.

Respectfully submitted,



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<sup>55</sup> *Id.* at 15.

<sup>56</sup> *Id.* at 1.

<sup>57</sup> *Id.* at 15.