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## Bridging the Gap: Providing “Access to Justice” for Middle-Market Litigants

“In crowdfunding, the interest of the individual is aligned with the interests of the crowd.”<sup>1</sup>

### I. INTRODUCTION

Peter Thiel’s recent funding of a high-profile lawsuit against Gawker is just one of many factors that has led to an explosion of interest in third-party litigation funding (TPLF).<sup>2</sup> TPLF allows a third-party individual or entity to invest in a lawsuit with the expectation of a return from the plaintiff’s recovery.<sup>3</sup> This new focus on the industry sheds light on the availability of

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1. *Eight Crowdfunding Quotes that Highlight the Benefits of the Model*, PRODIGY NETWORK: BLOG (July 13, 2016), <https://www.prodigynetwork.com/blog/eight-crowdfunding-quotes-that-highlight-the-benefits-of-the-model> [<https://perma.cc/ZWD6-ZK4X>] (quoting Rodrigo Niño and noting his view of crowdfunding to help balance distribution of wealth). Rodrigo Niño is the Chief Executive Officer (CEO) of Prodigy Network, a platform for real estate crowdfunding that seeks to provide an opportunity for small investors to access large real estate projects. See *About Us*, PRODIGY NETWORK, <https://www.prodigynetwork.com/about> [<https://perma.cc/XSC6-72CG>] (introducing Prodigy Network’s team and explaining mission).

2. See Davey Alba, *You Too Can Invest in Lawsuits. But Not Quite Like Peter Thiel*, WIRED (Aug. 29, 2016), <https://www.wired.com/2016/08/now-can-invest-lawsuits-just-like-peter-thiel/> [<http://perma.cc/6VYS-WBVB>] (attributing tech companies’ frenzy over new start-up Legalist to Thiel’s litigation against Gawker); see also Martha C. White, *Peter Thiel vs. Gawker: Case Highlights World of ‘Litigation Funding’*, NBC NEWS (May 29, 2016), <http://www.nbcnews.com/business/business-news/peter-thiel-vs-gawker-case-highlights-world-litigation-funding-n581726> [<https://perma.cc/RB56-DAUK>] (explaining Hulk Hogan’s lawsuit against Gawker publicly exposed TPLF). Professor Victoria Shannon Sahani of Washington and Lee University School of Law lists many factors leading to the expansion of TPLF, including: technological advancements, increasing costs of litigation, rollback of maintenance and champerty laws, and many more. See Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 869-70 (2015) [hereinafter Shannon, *Harmonizing*]. Former professional wrestler Hulk Hogan filed an invasion-of-privacy lawsuit against Gawker with the help of billionaire Peter Thiel. See White, *supra*. Thiel’s interest in financially assisting Hogan stems from his own issues with Gawker, which began when the website announced his homosexuality in 2007. See Ryan Mac & Matt Drange, *Behind Peter Thiel’s Plan to Destroy Gawker*, FORBES (June 7, 2016), <http://www.forbes.com/sites/ryanmac/2016/06/07/behind-peter-thiel-plan-to-destroy-gawker/#187197315848> [<https://perma.cc/647M-3GBN>] (discussing start of feud between Peter Thiel and Gawker). Some also refer to TPLF as alternative litigation finance (ALF). See Manuel A. Gómez, *Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool*, 49 U.S.F. L. REV. 307, 307 (2015) (describing concern over “financier[s] extraneous to” litigation “assert[ing] control over” litigation in ALF).

3. See Lyndon F. Bittle & Richard A. Blunk, *Market Watch: Shifting Tides in Commercial Alternative Litigation Finance*, 78 TEX. B.J. 776, 776 (2015) (noting expenses incurred through litigation and paid for by third-party financiers); Sasha Nichols, Note, *Access to Cash, Access to Court: Unlocking the Courtroom Doors with Third-Party Litigation Finance*, 5 U.C. IRVINE L. REV. 197, 216 (2015) (suggesting third-party funders limit investments to those with likely successful returns); see also William Alden, *Looking to Make a Profit on*

litigation funding services—such as LexShares, Trial Funder, Mighty, and Legalist—which seek to fund the “middle market for litigation finance.”<sup>4</sup>

Eventually, the TPLF industry evolved into crowd litigation funding (CLF), which operates in a similar manner with one exception: The financier is a large group of individuals, each contributing small sums of money.<sup>5</sup> Both CLF and TPLF provide financing for litigants who cannot afford an attorney, or whose attorneys do not handle large contingency-based cases.<sup>6</sup> TPLF investors treat these transactions as any other type of investment—balancing the scope of the risk against the likely rate of return.<sup>7</sup> Nevertheless, those who contribute to CLF typically do so because of some altruistic or empathetic tendency toward the cause.<sup>8</sup>

In the United States, many individuals have difficulty pursuing claims in the court system because they lack access to proper representation.<sup>9</sup> While legal aid organizations provide free legal services to low-income or indigent individuals seeking redress for their grievances, these organizations have limited funds, and therefore must place a cap on how many people they can assist.<sup>10</sup> The disparity between the limited resources of legal aid organizations and the number of people who cannot afford representation creates what the legal community calls the access-to-justice gap.<sup>11</sup>

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*Lawsuits, Firms Invest in Them*, N.Y. TIMES (Apr. 30, 2012), [http://dealbook.nytimes.com/2012/04/30/looking-to-make-a-profit-on-lawsuits-firms-invest-in-them/?\\_r=0](http://dealbook.nytimes.com/2012/04/30/looking-to-make-a-profit-on-lawsuits-firms-invest-in-them/?_r=0) [https://perma.cc/JTR9-GBXY] (citing 91% return in 2012 for leading investment firm, Burford Capital).

4. See Alba, *supra* note 2 (outlining various litigation funding services and corresponding purposes); see also Sara Randazzo, *Litigation Funding Moves into Mainstream*, WALL ST. J. (Aug. 4, 2016), <http://www.wsj.com/articles/litigation-funding-moves-into-mainstream-1470338402> [https://perma.cc/4BJZ-N9CM] (declaring LexShares and Trial Funder cause of TPLF’s mainstream shift).

5. See Gómez, *supra* note 2, at 307-08 (clarifying how CLF works in practice); see also Kerrod Giles, *Crowdfunding Litigation: Is It a Viable Alternative?*, LEXOLOGY (Oct. 7, 2016), <http://www.lexology.com/library/detail.aspx?g=5e78d3e8-57fd-453e-9e55-e09854e27501> [https://perma.cc/N296-TWH4] (suggesting CLF practical alternative to traditional funding).

6. See Gómez, *supra* note 2, at 307-08 (explaining how crowdfunding can help cover high-cost litigation); Nichols, *supra* note 3, at 216-17 (discussing profit-driven contingency lawyers and limitation on cases).

7. See Bittle & Blunk, *supra* note 3, at 777 (outlining typical TPLF arrangements).

8. See Gómez, *supra* note 2, at 308 (distinguishing crowdfunders from other third-party financiers by respective motives).

9. See Carrie Johnson, *Rights Advocates See ‘Access to Justice’ Gap in U.S.*, NPR (Mar. 10, 2014), <http://www.npr.org/sections/thetwoway/2014/03/10/288225649/rights-advocates-see-access-to-justice-gap-in-u-s> (citing report from Columbia Law School’s Human Rights Clinic).

10. See, e.g., *About VLP*, VOLUNTEER LAW. PROJECT, <https://www.vlpnet.org/about/> [https://perma.cc/2V5N-RS92] (explaining reason for project’s establishment in 1977); *Bay Area Legal Aid (BayLegal)*, PROBONO.NET/BAYAREA, [https://www.probono.net/sf/volunteer/item.bay\\_area\\_legal\\_aid\\_baylegal](https://www.probono.net/sf/volunteer/item.bay_area_legal_aid_baylegal) [https://perma.cc/V22C-GB87] [hereinafter *BayLegal*] (describing purpose and scope of services provided in Bay Area); *Frequently Asked Questions About the Legal Aid Society*, LEGAL AID SOC’Y, <http://www.legal-aid.org/en/las/aboutus/legalaidsocietyfaq.aspx> [https://perma.cc/2ELB-KCJB] [hereinafter *Legal Aid FAQs*] (outlining practice areas, funding, and eligibility for services in New York City).

11. See Dan Lear, *Lawyers Need to Move Beyond ‘Access to Justice’ to Close the Legal Services Gap*, A.B.A.: LEGAL REBELS (Sept. 1, 2015), [http://www.abajournal.com/legalrebels/article/lawyers\\_need\\_to\\_move](http://www.abajournal.com/legalrebels/article/lawyers_need_to_move)

This Note argues that CLF would be tremendously beneficial in closing the access-to-justice gap.<sup>12</sup> After outlining a history of TPLF and the common financiers and cases involved, this Note considers the benefits and drawbacks of TPLF.<sup>13</sup> The focus then shifts to CLF, specifically considering arenas where crowdfunding has been successful in the past.<sup>14</sup> Next, this Note discusses legal aid services, their limitations, and their failure to fully address the access-to-justice gap.<sup>15</sup> This Note then analyzes the cases handled by TPLF and legal aid organizations before arguing that CLF is the best option available to solving the access-to-justice gap.<sup>16</sup>

## II. HISTORY

### A. *Third-Party Litigation Funding*

A third party may offer to fund a lawsuit in exchange for a percentage of the damages awarded, which is referred to as TPLF.<sup>17</sup> TPLF is intended, in part, to help litigants avoid paying litigation fees out of pocket or needing contingency fee arrangements with their attorneys.<sup>18</sup> While TPLF appears generous, financiers seek a significant profit from the large-scale investment due to the significant risk involved.<sup>19</sup> While no single factor sparked the development of TPLF, there are many possible contributing causes, including technological

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\_beyond\_access\_to\_justice\_to\_close\_the\_legal\_services\_g/ [https://perma.cc/RW8P-7EHH] (quoting statistics from various studies about increase of pro se litigants).

12. See *infra* Part III (advocating for use of crowdfunding to bridge gap).

13. See *infra* Section II.A (describing TPLF's purpose, major players, typical cases, and benefits); *infra* Section II.B (noting concerns involved in TPLF, which legal community must address).

14. See *infra* Section II.C (discussing development of CLF and comparing to TPLF); *infra* Section II.D (highlighting successful uses of crowdsourcing).

15. See *infra* Section II.E (exploring barriers in U.S. justice system juxtaposed with fundamental principles).

16. See *infra* Section III.A (comparing cases involving TPLF and legal aid organizations); *infra* Section III.B (explaining expansion of legal service clientele could lead to increased access to justice).

17. See Shannon, *Harmonizing*, *supra* note 2, at 863 (defining third-party funding and investors' interests); see also Victoria Shannon, *Third-Party Litigation Funding and the Dodd-Frank Act*, 16 TRANSACTIONS: TENN. J. BUS. L. 15, 16 (2014) [hereinafter Shannon, *Dodd-Frank Act*] (distinguishing payment structures between funding plaintiffs and defendants).

18. See LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION* 7-9 (2d ed. 2017) (outlining players and types of relationships in TPLF); Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 392-95 (2016) (providing examples of various third-party financiers). The litigant is not required to repay the financier if there is no award, unlike a typical loan repayment. See Sahani, *supra*, at 392; Shannon, *Dodd-Frank Act*, *supra* note 17, at 15-16 (describing TPLF alternative to self-funding and fee agreements).

19. See Michael Abramowicz, *Litigation Finance and the Problem of Frivolous Litigation*, 63 DEPAUL L. REV. 195, 232 (2014) (conceding financiers more likely to fund profitable claims); Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding—A Signaling Model*, 63 DEPAUL L. REV. 233, 239 (2014) (noting expected share of proceeds from lawsuit in return for funding).

innovations, increased costs of litigation, and the inability of parties to support themselves financially through lengthy litigation.<sup>20</sup>

The major players involved in TPLF are insurance companies, banks, hedge funds, other business entities, and wealthy individuals.<sup>21</sup> Certain litigation finance companies and hedge funds have capitalized on this investment market by bankrolling lawsuits and shifting risk away from corporations and law firms.<sup>22</sup> Similarly, wealthy individuals have capitalized on TPLF; for example, billionaire Peter Thiel invested in his own retaliatory lawsuit against Gawker.<sup>23</sup> The typical cases sought by third-party financiers fall into two categories: “consumer funding” and “commercial funding.”<sup>24</sup> Class actions, medical malpractice, personal injury, and divorce cases comprise much of the first category.<sup>25</sup> On the other hand, the second category refers to litigation arising out of business transactions relating to antitrust, contracts, intellectual property, and international commercial and investment arbitration.<sup>26</sup>

TPLF offers benefits to the legal community by promoting justice and deterring wrongdoing, encouraging legal developments, and assisting small businesses and individuals in litigation.<sup>27</sup> Allowing nonprofit organizations to

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20. See Mariel Rodak, Comment, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 504-05 (2006) (describing factors converging to create TPLF).

21. See Sahani, *supra* note 18, at 392 (discussing entities participating in TPLF); see also Maya Steinitz, *How Much Is That Lawsuit in the Window? Pricing Legal Claims*, 66 VAND. L. REV. 1889, 1891 (2013) (naming Juridica Capital Management one of largest litigation funding firms in United States); Associated Press, *Tech Billionaire Peter Thiel Revealed as Backer in Hogan's Gawker Suit*, NBC NEWS (May 26, 2016), <http://www.nbcnews.com/tech/tech-news/tech-billionaire-peter-thiel-revealed-backer-hogan-s-gawker-suit-n580711> [https://perma.cc/2STB-CRK3] (reporting billionaire Peter Thiel bankrolled Hulk Hogan's lawsuit against Gawker); Sara Randazzo, *Litigation Financing Attracts New Set of Investors*, WALL ST. J. (May 15, 2016), <http://www.wsj.com/articles/litigation-financing-attracts-new-set-of-investors-1463348262> (stating IMF Bentham Limited, Burford Capital Limited, and Gerchen Keller Capital heavily involved in TPLF).

22. See Steinitz, *supra* note 21, at 1891-92 (citing example of Juridica Capital Management's close relationship with one law firm); Randazzo, *supra* note 21 (describing changing purposes of TPLF, specifically relating to risk allocation).

23. See Alba, *supra* note 2 (arguing Thiel's wealth allows him to exact revenge without help from online funding platform Legalist).

24. See Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 460 (2012) (explaining litigation funding and two sub-industries).

25. See *id.* (highlighting personal injury and divorce cases encompassed in “consumer funding”); Joshua Hunt, *What Litigation Finance Is Really About*, NEW YORKER (Sept. 1, 2016), <http://www.newyorker.com/business/currency/what-litigation-finance-is-really-about> [https://perma.cc/CFL5-YPKW] (noting lender's tendency toward backing class-action, medical-malpractice, and personal-injury claims).

26. See Steinitz, *supra* note 24, at 460-61 (outlining business areas involved in “commercial funding”); David Lat, *Litigation Finance: What Lawyers Need to Know*, ABOVE LAW (Oct. 19, 2016), <http://abovethelaw.com/2016/10/litigation-finance-what-lawyers-need-to-know/> [https://perma.cc/U7AW-A9PN] (summarizing various commercial cases funded through TPLF).

27. See David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1107 (2013) (concluding TPLF encourages expedited development of legal precedent); Bittle & Blunk, *supra* note 3, at 777 (noting TPLF supporters say investments will only occur in viable claims after strict due diligence); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83, 85 (2008) [hereinafter

advocate for groups and individuals who cannot do so on their own strengthens the civil justice system.<sup>28</sup> An Australian empirical research study indicates that TPLF cases cite more cases than those which do not utilize third-party funding, and concludes that courts cite to cases involving TPLF twice as much as those without.<sup>29</sup> This evidence leads academics to predict that TPLF will help stimulate important legal developments.<sup>30</sup> Scholars also argue that businesses benefit from TPLF because the business and its financier have the contractual freedom to create their own terms.<sup>31</sup> Further, scholars argue that TPLF benefits individuals—specifically plaintiffs—noting that financiers are the mirror image of insurers backing defendants.<sup>32</sup>

### B. Drawbacks and Concerns of TPLF

Many scholars describe the TPLF industry in the United States as chaotic due to its lack of regulation and uniformity.<sup>33</sup> In contrast, Australia and the United Kingdom—two other countries known for a large volume of TPLF—have taken steps to regulate the practice.<sup>34</sup> Additionally, a small number of

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Martin, *Subprime Industry*] (explaining benefits for businesses and individuals); Anthony Sebok, Opinion, *Third-Party Litigation Finance Promotes Justice and Deters Wrongdoing*, N.Y. TIMES (May 27, 2016), <http://www.nytimes.com/roomfordebate/2016/05/27/the-ethics-of-investing-in-anothers-lawsuit/third-party-litigation-finance-promotes-justice-and-deters-wrongdoing> [https://perma.cc/LY8X-VN59] (illustrating how TPLF in major civil rights case helped promote justice and deter wrongdoing).

28. See Sebok, *supra* note 27 (discussing case in which civil rights groups funded representation for victims of civil rights violations). For example, in *NAACP v. Button*, a nonprofit organization acted as a third-party financier for victims of racial discrimination, allowing those harmed to access justice, and leading the Supreme Court to strike down a law limiting one's ability to obtain legal services. See 371 U.S. 415, 425-29 (1963).

29. See Abrams & Chen, *supra* note 27, at 1081 (noting increased frequency of case citations funded through TPLF).

30. See *id.* at 1107 (arguing law rapidly developed due to increased citing of cases).

31. See Martin, *Subprime Industry*, *supra* note 27, at 85 (discussing practical reality for businesses seeking litigation financing); see also Michael Pillow, *Liberty Over Death: Seeking Due Process Dimensions for Freedom of Contract*, 8 FLA. A & M U. L. REV. 39, 40-41 (2012) (noting importance of contractual freedom to courts' consideration).

32. See Martin, *Subprime Industry*, *supra* note 27, at 85, 109 (arguing TPLF levels playing field for individuals without funds for litigation).

33. See Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 55 (2004) (noting lack of clarity in how or if laws should control TPLF); Shannon, *Dodd-Frank Act*, *supra* note 17, at 18 (criticizing "state-by-state patchwork" of TPLF laws and lack of direction from federal level); Shannon, *Harmonizing*, *supra* note 2, at 864 (attributing "wild west" industry atmosphere to minimal regulation and uniformity).

34. See Shannon, *Dodd-Frank Act*, *supra* note 17, at 16-17 (indicating limited steps taken at federal level to address TPLF). Australia's High Court, state courts, and the Australian Securities and Investments Commission have all taken judicial and legislative action to address TPLF. See *id.* The United Kingdom, after conducting an extensive study into TPLF, implemented many reforms to manage the cost of litigation, which helped expand the TPLF market. See *id.* at 17. The U.K. has managed this expansion in two main ways: a self-regulated code of conduct, created by U.K. TPLF financiers; and increased government oversight, provided by the Association of Litigation Funders, which was founded by the Ministry of Justice's Civil Justice Council. See *id.*

fundes established procedures to self-regulate the industry and address gaps in the government's regulations.<sup>35</sup> While some major financiers are generally subject to rules established by the U.S. Securities and Exchange Commission (SEC) or its counterparts in Australia and the United Kingdom, the actual reach of these regulations has been limited.<sup>36</sup> For instance, none of these agencies require financiers to self-regulate, and most statutory provisions fail to cover all TPLF transactions.<sup>37</sup>

Due to the possibly differing interests of third parties, many TPLF critics are concerned about its potential impact on our legal system, including the attorney-client relationship.<sup>38</sup> For instance, TPLF raises concerns regarding a variety of ethical pitfalls, including conflicts of interest, protection of work product, confidentiality, and privilege.<sup>39</sup> Some also argue that third-party fundes could discourage settlements that would adequately compensate the plaintiff in any normal circumstance, but fail to provide a satisfactory return on the investment.<sup>40</sup> Others believe that TPLF disproportionately favors plaintiffs, and significantly harms defendants by creating considerable resource imbalances between the parties.<sup>41</sup> Skeptics are also worried that money is the sole focus of TPLF financiers; for example, concerns stirred when the managing partner of a TPLF firm acknowledged, "We're certainly not white knights. . . . It's just a business for us."<sup>42</sup>

Additionally, TPLF potentially conflicts with ancient legal doctrines.<sup>43</sup> For example, TPLF may conflict with the usury doctrine, which is defined as "the

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35. See *id.* (detailing internal compliance and ethical codes created by certain major players).

36. See *id.* at 18-20 (evidencing areas where regulating agencies fall short).

37. See *id.* (noting lack of self-regulation requirements and disorderly application of current regulations).

38. See Bittle & Blunk, *supra* note 3, at 777 (discussing various criticisms of TPLF).

39. See *id.* (outlining issues for attorneys to pay attention to in TPLF arrangement); see also Jennifer Brown, *Uncertainty Lingers Around Third-Party Litigation Financing*, CANADIAN LAW. (Oct. 18, 2016), <http://www.canadianlawyermag.com/legalfeeds/3485/uncertainty-lingers-around-third-party-litigation-financing.html> [<https://perma.cc/Y8FH-W4AY>] (explaining in-house legal departments' wariness of TPLF and sharing privileged information with financiers). Recently, the Hong Kong Law Reform Commission recommended that TPLF should be allowed, and proposed a "code of practice" to address issues of confidentiality, conflict of interest, and privilege. See Justin D'Agostino & Briana Young, *Hong Kong Law Reform Commission Recommends That Third Party Funding Be Allowed for Arbitration*, LEXOLOGY (Oct. 18, 2016), <http://www.lexology.com/library/detail.aspx?g=cc50af74-69f7-4533-8ad5-ac523dffe0c7> [<https://perma.cc/WB99-4YBK>] (noting purpose and development process of proposed code).

40. See Bittle & Blunk, *supra* note 3, at 777 (pointing to concern about attorneys generating more frivolous lawsuits); Rodak, *supra* note 20, at 520-22 (highlighting importance of settlement in U.S. justice system and possible effects from TPLF). A majority of cases are decided through means other than trial, and more often than not end in settlement. Rodak, *supra* note 20, at 519.

41. See Joshua G. Richey, Comment, *Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation*, 63 EMORY L.J. 489, 492 (2013) (noting huge sums invested in plaintiffs' cases and resulting distorted incentives).

42. See Geoffrey J. Lysaught & D. Scott Hazelgrove, *Economic Implications of Third-Party Litigation Financing on the U.S. Civil Justice System*, 8 J.L. ECON. & POL'Y 645, 645-46 (2012) (recognizing financial interests strongest motivating factor for TPLF fundes).

43. See Courtney R. Barksdale, Note, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 709 (2007) (considering legal doctrines posing issues to TPLF).

charging of an illegal rate of interest as a condition to lending money.”<sup>44</sup> In order to show a loan is usurious, one must prove the following elements:

(1) an agreement to lend money; (2) the borrower’s absolute obligation to repay with repayment not contingent on any other event or circumstance; (3) a greater compensation for making the loan than is allowed under a usury statute or the State Constitution; and (4) an intention to take more for the loan of the money than the law allows.<sup>45</sup>

Proponents argue that TPLF arrangements are not usurious because they fail to meet the second element, as repayment is contingent upon a favorable outcome in the case.<sup>46</sup>

The related doctrines of maintenance and champerty create other issues.<sup>47</sup> Maintenance involves “a stranger provid[ing] something of value to a litigant in order to support or promote the litigation.”<sup>48</sup> Traditionally, this doctrine limited attorneys’ ability to advertise, but several U.S. Supreme Court cases between 1960 and 1990 struck down these prohibitions as violative of the First Amendment’s Free Speech Clause.<sup>49</sup> In modern-day litigation, maintenance prohibits attorneys from providing clients with financial assistance while their cases are pending.<sup>50</sup> Champerty is a form of maintenance where an individual provides financial assistance for a suit in exchange for a share in the case’s

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44. See *id.* (recognizing potential issues relating to usury doctrine); see also *Usury*, BLACK’S LAW DICTIONARY (10th ed. 2014).

45. Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85, 90-91 (2002) [hereinafter Martin, *Financing On-Line*] (outlining required elements of usury in most states in United States).

46. See *id.* at 92 (intimating TPLF not usury because no mandatory repayment upon loss). Nevertheless, some states, including Texas, hold a stricter view, where any contract in which the lender could receive more than the statutory maximum interest rate constitutes usury. See *id.* at 91 (illustrating example of usurious lending under Texas law).

47. See Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485, 485-86 (1992) [hereinafter Martin, *Syndicated Lawsuits*] (explaining relationship between champerty and maintenance).

48. Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 62 (2011) (defining maintenance doctrine generally).

49. See Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 582, 588 (2010) (explaining effect of Supreme Court cases on maintenance doctrine in mid-to-late-twentieth century); see also, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 649 (1985) (holding states may not discipline attorneys for printed solicitations with specific legal claims); *In re Primus*, 436 U.S. 412, 437-39 (1978) (holding nonprofits can educate potential litigants about rights when First Amendment concerns arise); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977) (holding printed attorney advertisement falls within First Amendment protection); *Bhd. of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 8 (1964) (holding First Amendment protection includes legal advice offered by railroad union to members); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (holding nonprofit organization’s solicitation of litigants constitutionally protected).

50. See Lyon, *supra* note 49, at 582 (describing uncertain application of outdated common law principles).

monetary award.<sup>51</sup> In other words, “maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome.”<sup>52</sup> The policy against maintenance and champerty is intended to prevent outside individuals from nefariously meddling in the litigation, which is why courts typically do not consider contingency fee arrangements champertous.<sup>53</sup> Many U.S. courts have noted that common law and statutory prohibitions on champerty still exist, though they have been reluctant to invalidate agreements on these grounds in recent years.<sup>54</sup>

Scholars attribute the reluctance of courts to invoke prohibitions on champerty to a recognition that these doctrines are outdated.<sup>55</sup> The ancient origins of usury, maintenance, and champerty laws can be traced as far back as Mesopotamia and the Roman Empire.<sup>56</sup> Courts are beginning to recognize that these archaic doctrines are no longer in harmony with current views on litigation, and are continuing the trend toward eliminating them altogether.<sup>57</sup> Justice Oliver Wendell Holmes Jr. made this point in an address over 120 years ago when he said, “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,” and especially “if the

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51. See Martin, *Syndicated Lawsuits*, *supra* note 47, at 485 (defining champerty); Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1297 (2002) (citing prohibition of selling “fruit of legal judgment or settlement”); Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1529 (1996) (describing common-law belief agreements to share profits of another’s lawsuit against public policy).

52. *In re Primus*, 436 U.S. at 424 n.15.

53. See Douglas R. Richmond, *Other People’s Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 654-55 (2005) (likening these individuals to “officious intermeddlers” and noting aversion to litigation involvement by disinterested parties).

54. See Martin, *Financing On-Line*, *supra* note 45, at 88-89 (pointing out instances of court refusal to invalidate contracts on basis of champerty); see also, e.g., *Wichman v. Benner*, 948 P.2d 484, 488 (Alaska 1997) (holding assignment of insurer’s lien did not violate public policy against champerty and maintenance); *Foster v. Allen*, 40 S.E.2d 57, 59 (Ga. 1946) (stating courts should proceed “with great caution” when voiding contracts); *Great W. Land Mgmt., Inc. v. Slusher*, 939 S.W.2d 865, 869 (Ky. 1997) (noting champerty statute’s purpose of discouraging litigation).

55. See Bradley C. Tobias, Note, *Officious Intermeddling or Protected First Amendment Activity? The Constitutionality of Prohibitory Champerty Law After Citizens United*, 22 WM. & MARY BILL RTS. J. 1293, 1305 (2014) (calling champerty laws antiquated and based on outdated view of legal system).

56. See Martin, *Financing On-Line*, *supra* note 45, at 89 (noting prohibition on usury in various cultures predating birth of United States); Martin, *Subprime Industry*, *supra* note 27, at 86 (pointing out ancient Greeks and Romans wrote laws against champerty); Richmond, *supra* note 53, at 652 (claiming origin of champerty and maintenance in medieval England).

57. See *Saladini v. Righellis*, 687 N.E.2d 1224, 1226-27 (Mass. 1997) (declaring policy reasons for original champerty laws unpersuasive); *Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269, 277 (S.C. 2000) (abolishing champerty defense); Lyon, *supra* note 49, at 576 (asserting doctrines inconsistent with modern view of litigation). The Massachusetts Supreme Judicial Court advises: “To the extent that we continue to have the concerns that the doctrine of champerty was thought to address, we conclude that it is better to do so directly, rather than attempting to mold an ancient doctrine to modern circumstances.” *Saladini*, 687 N.E.2d at 1227.



grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>58</sup>

### C. Development of CLF

Crowdfunding generally exists when two parties—an entrepreneur with an idea and “the crowd” with funds—collectively realize a business venture.<sup>59</sup> For these two parties to come together, there must be an intermediary that connects them, often called a crowdfunding platform (CFP).<sup>60</sup> Like bees to honey, CFP promotions and interactions on social media attract funders to join “the crowd.”<sup>61</sup>

There are several general models of crowdfunding.<sup>62</sup> Most scholars agree that crowdfunding ventures fall into one of four different categories: lending, equity, reward-based, and donation-based.<sup>63</sup> Funders in a lending model, similar to those in TPLF, expect a return on their investment.<sup>64</sup> Similarly, in an equity crowdfunding model, funders receive an ownership interest in the business in which they have invested.<sup>65</sup>

The reward-based and donation-based crowdfunding models are innovative tools used for litigation finance.<sup>66</sup> Under a reward-based model, contributors to the crowdfunding campaign receive rewards for their support in the form of

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58. Oliver Wendell Holmes Jr., Assoc. Justice of Mass. Supreme Judicial Court, *The Path of the Law*, Address Before the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 469 (1897).

59. See Gómez, *supra* note 2, at 309-10 (defining parties involved in crowdfunding). Manuel Gómez attributes the beginning of modern crowdfunding to emerging musicians and young inventors. See *id.* (discussing rewards early funders received for financial contributions).

60. See *id.* at 310 (concluding CFP makes connection between entrepreneur and funders possible).

61. See *id.* (describing vast web presence of CFPs). CFPs also help publicize the various projects, which helps to attract funders. See *id.*

62. See *id.* at 313-14 (highlighting various approaches to and purposes of crowdfunding); Larry N. Zimmerman, *Ethics of Crowdfunding*, J. KAN. B. ASS'N, Feb. 2016, at 17, 17 (listing five different crowdfunding models used); Michael Elliott, Comment and Casenote, *Trial by Social Media: The Rise of Litigation Crowdfunding*, 84 U. CIN. L. REV. 529, 532-33 (2016) (placing crowdfunding projects in one of four models).

63. See Elliot, *supra* note 62, at 532-33 (noting crowdfunding ventures classified into certain models). A few individuals refer to the donation-based approach as a patronage model. See *id.*; see also Ethan Mollick, *The Dynamics of Crowdfunding: An Exploratory Study*, 29 J. BUS. VENTURING 1, 3 (2013). One scholar considers a fifth category that he calls “the royalty model,” which rewards investors with a percentage of a product’s sales. See Zimmerman, *supra* note 62, at 17.

64. See Mollick, *supra* note 63, at 3 (pointing out expectation of return on investment); Zimmerman, *supra* note 62, at 17 (describing lending model similar to traditional loan); Elliott, *supra* note 62, at 532-33 (noting investors’ entitlement to return). One author notes that at times, the lending model reflects elements of the donation model because the lender seeks to promote social good through its loan. See Mollick, *supra* note 63, at 3.

65. See Mollick, *supra* note 63, at 3 (describing various forms of equity model); Zimmerman, *supra* note 62, at 17 (defining equity crowdfunding model); see also Elliott, *supra* note 62, at 533 (noting use of equity model rare).

66. See Gómez, *supra* note 2, at 323-24 (listing companies and data for prosperous examples of both models).

low value assets, such as thank-you notes, autographs, dinners, and t-shirts.<sup>67</sup> Funders who pledge larger amounts receive better quality rewards.<sup>68</sup> This model is the most commonly used form of crowdfunding.<sup>69</sup> Alternatively, in a donation-based approach, funders become philanthropists, as they receive nothing in return for their contributions.<sup>70</sup> Traditionally, nonprofit organizations used this model to collect charitable contributions for their respective causes long before the current crowdfunding explosion.<sup>71</sup> One scholar argues that the donation model does not pose any ethical concerns as long as donors have notice that they will not receive any reward in exchange for their funding.<sup>72</sup>

Crowdfunding is still very new in the litigation context, but many CFPs that are specifically tailored for lawsuits already exist.<sup>73</sup> Some describe CLF as either reward-based or donation-based, encouraging the altruistic motives that make CLF appealing.<sup>74</sup> In fact, nonprofit organizations sometimes use CLF to

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67. See *id.* at 313 (noting wide range of benefits offered in reward-based model); Joachim Hemer, A *Snapshot on Crowdfunding* 13 (Fraunhofer Inst. for Sys. and Innovation Research ISI, Working Paper No. R2/2011), <https://www.econstor.eu/dspace/bitstream/10419/52302/1/671522264.pdf> [<https://perma.cc/F8KU-92FC>] (outlining rewards given for crowd donations).

68. See Elliott, *supra* note 62, at 532 (explaining proportionality of rewards to contributions).

69. See Mollick, *supra* note 63, at 3 (noting popularity of reward-based approach).

70. See Gómez, *supra* note 2, at 313-14 (indicating no exchange for charitable contributions); Mollick, *supra* note 63, at 3 (describing “no direct return” for funders’ donations).

71. See DAVID M. FREEDMAN & MATTHEW R. NUTTING, A BRIEF HISTORY OF CROWDFUNDING: INCLUDING REWARDS, DONATION, DEBT, AND EQUITY PLATFORMS IN THE USA 5 (2015), <http://www.freedman-chicago.com/ec4i/History-of-Crowdfunding.pdf> [<https://perma.cc/RJ2S-369R>] (noting charities’ use of donation model well before crowdfunding grew in popularity).

72. See Zimmerman, *supra* note 62, at 17 (explaining condition for ethical compliance in donation-based model).

73. See, e.g., *Frequently Asked Questions*, LEXSHARES, <https://www.lexshares.com/pages/faqs> [<https://perma.cc/X452-SDNN>] (allowing crowdfunding for accredited investors only); *Funding for Your Lawsuit*, LEGALIST, <https://www.legalist.us/#about> [<https://perma.cc/N4VZ-T7S7>] (connecting financial backers to business law firms to fund commercial litigation); *How It Works*, CROWDJUSTICE, <https://www.crowdjustice.co.uk/how-it-works/> [<https://perma.cc/YXF4-H4ED>] [hereinafter *How CrowdJustice Works*] (declaring “built for legal” crowdfunding); *How It Works*, TRIALFUNDER, <https://www.trialfunder.com/how-it-works> [<https://perma.cc/L6PT-HVN2>] [hereinafter *How TrialFunder Works*] (claiming to “make access to the lucrative legal funding industry possible”); *Mission*, MIGHTY, <https://www.mighty.com/mission> [<https://perma.cc/8LHX-YHJD>] (describing mission “to help plaintiffs get . . . better deal from . . . justice system”).

74. See Gómez, *supra* note 2, at 323 (explaining different categories of CLF). Professor Manuel Gómez researched several CLF campaigns, all of which were categorized as either reward-based or donation-based. See *id.* at 324. LexShares and TrialFunder are examples of reward-based CLF. See Press Release, LexShares, LexShares Launches Online Marketplace for Investing in Litigation (Nov. 19, 2014), <http://www.businesswire.com/news/home/20141119005851/en/LexShares-Launches-Online-Marketplace-Investing-Litigation> [<https://perma.cc/5S7Z-KQUC>] (explaining if plaintiff wins lawsuit, investors receive portion of damages); *How TrialFunder Works*, *supra* note 73 (boasting average returns over 90%). Donation-based crowdfunding solely seeks to “level the playing field” for a plaintiff in his or her suit. See *How CrowdJustice Works*, *supra* note 73 (describing community built to financially and legally aid plaintiffs’ cases); *Mission*, *supra* note 73 (seeking to fix broken system and balance fairness).

protect various public interests, such as when a Canadian group raised funds to sue its government challenging a tax on Canadian citizens.<sup>75</sup>

Under either a reward-based or donation-based model, CLF is able to remedy some of the issues that arise in TPLF.<sup>76</sup> CLF participants are not usually financially motivated, which diminishes their meddling in litigation.<sup>77</sup> Furthermore, because of their altruistic interests in particular lawsuits and the public's disapproval of frivolous or meritless claims, investors will not be inclined to donate to such suits.<sup>78</sup> Nevertheless, one author suggests that CLF inherently creates more frivolous lawsuits.<sup>79</sup> He also expresses concern about "trial[s] by media," which occur when a potential plaintiff's story spreads around the Internet and social media, thereby affecting public perception of the defendant.<sup>80</sup>

#### D. Crowdsourcing Success Stories

Like crowdfunding, crowdsourcing involves one party seeking input and support from a large group of people: "the crowd."<sup>81</sup> While crowdsourcing is

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75. See Bruce W. Bean & Abbey L. Wright, *The U.S. Foreign Account Tax Compliance Act: American Legal Imperialism?*, 21 ILSA J. INT'L & COMP. L. 333, 357 (2015) (discussing litigation crowdfunded by Canadian nonprofit organization). The Alliance for the Defense of Canadian Sovereignty collected donations to bring a lawsuit against the Canadian Attorney General challenging the Foreign Account Tax Compliance Act, an agreement made between the United States and other nations, including Canada. See Robert W. Wood, *Canadians File Suit to Block FATCA and Prohibit Handover of U.S. Names to IRS*, FORBES (Aug. 12, 2014), <http://www.forbes.com/sites/robertwood/2014/08/12/canadians-file-suit-to-block-fatca-and-prohibit-handover-of-u-s-names/#7f07c75d3acb> [<https://perma.cc/S5UD-FLXH>] (reporting lawsuit filed and parties involved).

76. See Gómez, *supra* note 2, at 321-22 (comparing CLF's potential benefits to TPLF).

77. See *id.* (explaining CLF financiers not seeking financial gain, but motivated by altruism); see also Elizabeth M. Gerber & Julie Hui, *Crowdfunding: Motivations and Deterrents for Participation*, ACM TRANSACTIONS ON COMPUTING-HUM. INTERACTION, Dec. 2013, at 1, 14-16 (noting other motivations such as helping others, joining community, and supporting causes).

78. See Gómez, *supra* note 2, at 330-31 (regarding use of CLF to facilitate frivolous or meritless claims unlikely); see also Steve O'Hear, *CrowdJustice, the Crowdfunding Platform for Public Interest Litigation, Raises \$2M and Heads to U.S.*, TECHCRUNCH (May 30, 2017), <https://techcrunch.com/2017/05/30/crowdjustice-the-crowdfunding-platform-for-public-interest-litigation-raises-2m-and-heads-to-u-s/> [<https://perma.cc/7KL9-GZ3M>] (highlighting notable cases supported by CLF including Brexit and Trump "travel ban"). Concerns that TPLF funders file frivolous or meritless claims are unfounded because CLF requires funding from multiple sources, and therefore no single individual has leverage over the litigation. See Gómez, *supra* note 2, at 331.

79. See Elliott, *supra* note 62, at 546-48 (arguing link between CLF and frivolous litigation).

80. See *id.* at 548-50 (outlining dangers "trial by media" poses to defendant companies' public images). There are several examples of trial by media. See *id.* at 550-51. For example, when musician Dave Carroll found his guitar broken after a United Airlines flight, he posted a song called "United Breaks Guitars" on YouTube, forcing United Airlines to admit fault and take other remedial measures by way of public pressure. See *id.* Another example occurred when Jeff Jarvis complained on his blog that Dell did not honor his in-home warranty, and hundreds of other customers joined with their own grievances, seriously affecting the company's bottom line. See *id.* at 551. To be sure, trials by media occur in many contexts, not just from litigation funded on CFPs. See Nicholas A. Battaglia, Comment, *The Casey Anthony Trial and Wrongful Exonerations: How "Trial by Media" Cases Diminish Public Confidence in the Criminal Justice System*, 75 ALB. L. REV. 1579, 1584-90 (2012) (discussing Casey Anthony's trial by media and resulting stigma following her child's death).

81. See David Orozco, *The Use of Legal Crowdsourcing ("Lawsourcing") to Achieve Legal, Regulatory, and Policy Objectives*, 53 AM. BUS. L.J. 145, 145 (2016) (explaining coining of term "crowdsourcing" in

a strong asset in business production, especially start-ups, many have begun to apply it to legal issues beyond litigation in very innovative ways.<sup>82</sup> For example, in the legislative context, California Assemblyman Mike Gatto used crowdsourcing to allow his constituents to draft and edit proposed probate legislation before the state legislature voted on the bill.<sup>83</sup>

In addition, Dorian Nakamoto used crowdsourcing to fund his personal lawsuit against *Newsweek*, but instead of seeking money from the crowd, he sought bitcoin.<sup>84</sup> In one of its articles, *Newsweek* alleged that Nakamoto created bitcoin, which Nakamoto claims caused him and his family to suffer severe emotional harm.<sup>85</sup> Nakamoto's crowdfunding efforts raised Bitcoin worth over \$23,000 at the time.<sup>86</sup>

Similarly, Article One Partners (AOP) is a business that uses crowdsourcing to help its clients who have been targeted with litigation by so-called "patent trolls."<sup>87</sup> Specifically, AOP provides its clients with "a crowdsourced weapon

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2005). Crowdfunding is merely a type of crowdsourcing, but seeks money from contributors instead of ideas, opinions, or information. *See id.* at 145-46 (providing examples of crowdsourcing including t-shirt company called Threadless, Wikipedia, and Kickstarter).

82. *See id.* at 146-47 (discussing benefits of crowdsourcing to businesses of all sizes and its application to legal field). Professor David Orozco coined the term "lawsourcing" to encompass the variety of new ways the legal community is using crowdsourcing. *See id.* at 148.

83. *See id.* at 147 (acknowledging Assemblyman Gatto's use of Wikispaces to encourage citizen participation in legislative process); Brian Heaton, *Is Crowdsourcing the Future for Legislation?*, GOVTECH. (July 2, 2014), <http://www.govtech.com/internet/Experts-Predict-More-Legislation-Will-Be-Crowdsourced.html> [<https://perma.cc/E3P7-NFKC>] (noting Gatto's positivity about experiment and plans to utilize crowdsourcing moving forward). The proposed bill addressed a provision of probate law that allowed courts to assign guardianship of pets belonging to deceased persons. *See Heaton, supra*. While the bill passed through the state legislature, California Governor Edmund G. Brown Jr. ultimately vetoed the legislation. *See Orozco, supra* note 81, at 147; *AB-1520 Guardians Ad Litem: Animals.*, CAL. LEGIS. INFO., [http://leginfo.ca.gov/fares/billStatusClient.xhtml?bill\\_id=201320140AB1520](http://leginfo.ca.gov/fares/billStatusClient.xhtml?bill_id=201320140AB1520) [<https://perma.cc/9UYN-85EW>] (noting California Governor's veto of crowdsourced bill).

84. *See Orozco, supra* note 81, at 146-47 (pointing to lawsuit brought by Nakamoto because of article written about him in *Newsweek*); Cassandra Khaw, *Alleged Bitcoin 'Creator' Is Crowdfunding His Lawsuit Against Newsweek Using Bitcoin*, VERGE (Oct. 14, 2014), <http://www.theverge.com/2014/10/14/6973389/dorian-nakamoto-lawsuit-newsweek> [<https://perma.cc/EK38-QS47>] (announcing Nakamoto's legal defense fund seeking bitcoin contributions to finance suit against *Newsweek*). Bitcoin is a type of currency, "digital, decentralized, [and] partially anonymous . . . not backed by any government or other legal entity, and not redeemable for gold or other commodity." Reuben Grinberg, *Bitcoin: An Innovative Alternative Digital Currency*, 4 HASTINGS SCI. & TECH. L.J. 159, 160 (2012).

85. *See Orozco, supra* note 81, at 146 (explaining premise of Nakamoto's lawsuit); Khaw, *supra* note 84 (citing reports of car chase involving Nakamoto trying to avoid reporters).

86. *See* Tim Hornyak, *Dorian Nakamoto Prepares for Possible Lawsuit Against Newsweek*, PCWORLD (Oct. 13, 2014), <http://www.peworld.com/article/2828712/dorian-nakamoto-prepares-for-possible-lawsuit-against-newsweek.html> [<https://perma.cc/V4G3-5B9R>] (relaying YouTube video posted by Nakamoto thanking supporters).

87. *See About*, ARTICLE ONE PARTNERS, <https://www.articleonepartners.com/about/> [<https://perma.cc/2JP-H-7YGE>] (branding itself "world's largest intellectual property research community"). AOP assists clients with decisions relating to intellectual property (IP). *See id.* This service is especially valuable when dealing with "patent trolls"—entities that hold patents without commercializing the technology in order to bring infringement suits against corporations that attempt to commercialize it. *See Orozco, supra* note 81, at 147-48

in their arsenal” to defend against patent infringement claims.<sup>88</sup> AOP uses crowdsourced services to help its corporate clientele become more knowledgeable and proactive about the legal obstacles they may face in pursuing certain patents.<sup>89</sup> One such service involves community research.<sup>90</sup> For instance, when a client uses AOP’s services, AOP gathers evidence on a particular type of patent by seeking out an online crowd to perform research, typically on prior art, or similar inventions.<sup>91</sup>

As part of an effort to stimulate our post-recession economy, federal lawmakers passed the Jumpstart Our Business Startups (JOBS) Act, which in part, allows small businesses to use “investment crowdfunding” to gain much needed capital.<sup>92</sup> Specifically, the JOBS Act permits small businesses to issue a limited quantity of stock to private citizens through online CFPs.<sup>93</sup> In passing the JOBS Act, lawmakers acknowledged crowdfunding as a tool to help small

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(noting AOP’s helpfulness to these companies); Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457, 459 (2012) (explaining concept of patent trolls).

88. See Orozco, *supra* note 81, at 147-48 (praising benefits of AOP’s IP research services).

89. See *Defend*, ARTICLE ONE PARTNERS, <https://www.articleonepartners.com/solutions/corporate/defend/> [<https://perma.cc/3CAH-6PCU>] (promising proactive way to mitigate, defend, protect, and maintain companies and their interests).

90. See Jason Mendelson, *Crowdsourcing Patent Research — Article One Partners*, MENDELSON’S MUSINGS (June 23, 2010), <http://www.jasonmendelson.com/archives/2010/06/crowdsourcing-patent-research-article-one-partners.html> [<https://perma.cc/83Y5-PAB8>] (noting success of community research service offered by AOP).

91. See *id.* (describing crowdsourcing process used by AOP); Peter Vanderheyden, *It’s Not “Just” About Crowdsourcing Anymore!*, ARTICLE ONE PARTNERS, <https://www.articleonepartners.com/blog/its-not-just-about-crowdsourcing-anymore/> [<https://perma.cc/7G5U-XV84>] (acknowledging successful use of crowdsourcing for AOP’s prior art research). The federal statute enumerating the conditions for patentability requires novelty of an invention, and grants the patent unless one of two criteria are met:

- (1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention; or
- (2) the claimed invention was described in a patent issued under section 151, or in an application for patent published or deemed published under section 122(b), in which the patent or application, as the case may be, names another inventor and was effectively filed before the effective filing date of the claimed invention.

35 U.S.C. § 102(a) (2012). This provision defines the prior art for which AOP crowd sources research. See Vanderheyden, *supra*.

92. See Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, § 302, 126 Stat. 306, 315-16 (2012) (codified as amended at 15 U.S.C. § 77d (2012)); see also Ross S. Weinstein, Note, *Crowdfunding in the U.S. and Abroad: What to Expect When You’re Expecting*, 46 CORNELL INT’L L.J. 427, 427 (2013) (recognizing JOBS Act gave small businesses green light to crowdfund). Previously, the restrictive Securities Act of 1933 did not allow for small business owners to seek investments through crowdfunding. See 15 U.S.C. §§ 77a, 77d-1, 77e (2012) (setting restrictions on small transactions and interstate commerce, and establishing registration requirements); see also Weinstein, *supra*, at 428 (noting impossibility of equity crowdfunding prior to JOBS Act).

93. See JOBS Act § 302 (listing requirements for “crowdfunding exemption”); Weinstein, *supra* note 92, at 427 (explaining JOBS Act provision).

business owners access capital and, in turn, stimulate the economy.<sup>94</sup> This legislation is a major step forward for crowdfunding because prior to its enactment, U.S. securities laws restricted small businesses from issuing stock online.<sup>95</sup>

Much like LexShares, Trial Funder, Mighty, and Legalist, Funded Justice is an online CFP that provides vital funds to individuals who are pursuing legal claims.<sup>96</sup> Funded Justice facilitates crowdfunding by reviewing and approving campaigns submitted to its website before they are offered to the public.<sup>97</sup> Typically, Funded Justice campaigns provide funds to those struggling with issues in family law, criminal law, employment discrimination, property law, and other areas as well.<sup>98</sup> Individuals are not charged to post on the website; however, Funded Justice receives 5% of the funds raised if the campaign reaches its fundraising goal.<sup>99</sup>

#### *E. Limitations on Legal Services and the Access-to-Justice Gap*

Legal services organizations help provide indigent individuals with counsel in various legal matters across the country.<sup>100</sup> While some organizations offer a wide variety of services on numerous types of cases, others must prioritize and offer a smaller selection.<sup>101</sup> Most legal aid organizations are limited by their financial resources, and therefore must limit the number of people eligible for their services.<sup>102</sup> Many organizations limit their services based on the client's income, and determine a specific client's eligibility by comparing their annual income to the federal poverty level.<sup>103</sup>

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94. See Weinstein, *supra* note 92, at 427 (noting Congress's recognition of limited available options for entrepreneurs); *supra* note 92 and accompanying text (discussing JOBS Act and new ability to crowdfund).

95. See Weinstein, *supra* note 92, at 427-28 (citing securities laws encumbering small business owners seeking capital).

96. See Elliott, *supra* note 62, at 530 (describing Funded Justice's "entirely different model of litigation finance"); *supra* note 4 and accompanying text (discussing common CFP services).

97. See *How It Works*, FUNDED JUST., <https://fundedjustice.com/how-it-works/> [<https://perma.cc/DH57-LNQU>] (detailing process for starting funding campaign).

98. See *Trending Crowdfunding Campaigns*, FUNDED JUST., <https://www.fundedjustice.com/find> [<https://perma.cc/Q8XW-NDLF>] (listing various categories of campaigns).

99. See Martha Neil, *New Crowdfunding Site Helps Individuals Raise Money for Legal Fees*, A.B.A. J. (Dec. 15, 2014), [http://www.abajournal.com/news/article/new\\_litigation\\_crowdfunding\\_site\\_seeks\\_to/](http://www.abajournal.com/news/article/new_litigation_crowdfunding_site_seeks_to/) [<https://perma.cc/L77X-VBJS>] (referencing interview with Funded Justice founder Michael Helfand).

100. See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 4 (2004) (noting historical trend of legal aid serving poor clients in charity).

101. See *BayLegal*, *supra* note 10 (outlining four areas of focus); *Legal Aid FAQs*, *supra* note 10 (listing more than fifteen case types across civil, criminal, and juvenile rights practices); *Service Area and Case Types*, VOLUNTEER LAW. PROJECT, [https://www.vlpnet.org/about/item.717-Service\\_Area\\_and\\_Case\\_Types](https://www.vlpnet.org/about/item.717-Service_Area_and_Case_Types) [<https://perma.cc/9FS7-7HZ6>] (listing more than ten case areas covered).

102. See Jason M. Wilson, Comment, *Litigation Finance in the Public Interest*, 64 AM. U. L. REV. 385, 388-89 (2014) (noting financial challenges in improving access to justice).

103. See *Legal Aid FAQs*, *supra* note 10 (explaining eligibility requirements of income near or below federal poverty line); *Legal Services Eligibility*, LEGAL AID NETWORK KY., <http://kyjustice.org/eligibility> [<https://perma.cc/HC3N-ST5U>] (providing guidelines for legal services eligibility across state of Kentucky).

Despite the existence of legal aid organizations, there is still a large gap in access to legal services.<sup>104</sup> This gap consists of those people who are above the income eligibility requirements for legal aid, but still cannot afford the astronomical cost of hiring a private attorney.<sup>105</sup> When middle-income individuals are turned away from legal aid, they are left with few options: pay for an attorney at a private law firm, where rates start at about \$300 an hour; seek out a sole practitioner, who will likely charge no less than \$255 an hour; or represent themselves, potentially to their detriment because of their inexperience or lack of familiarity with the law.<sup>106</sup> Two TPLF models could help close the access-to-justice gap: the “cause model” and the “profit model.”<sup>107</sup> The “cause model” consists of TPLF provided through legal services, pro bono programs, and other public interest groups that serve indigent clients.<sup>108</sup> Alternatively, plaintiffs who do not qualify for the “cause model” may seek out entities practicing the “profit model,” such as contingency fee lawyers.<sup>109</sup>

It is a widely accepted and embraced principle in the U.S. legal system that there shall be “equal justice under law.”<sup>110</sup> Nevertheless, many argue that the system has inevitably failed to achieve that goal because “the almighty dollar has become the gatekeeper of the courthouse door.”<sup>111</sup> For years, members of

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104. See Steven A. Krieger, *Low Bono Legal Counsel: Closing the Access to Justice Gap by Providing the Middle Class with Affordable Attorneys*, 18 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 143, 153-54 (2016) (defining access-to-justice gap).

105. See *id.* at 154 (noting legal aid services must turn away certain clients who cannot afford alternative).

106. See *id.* at 154-55 (demonstrating difficult positions these individuals find themselves in and “reasonable” attorney’s fees); see also U.S. ATTORNEY’S OFFICE FOR THE DISTRICT OF COLUMBIA, LAFFEY MATRIX – 2014-2015 (2015), [http://www.justice.gov/sites/default/files/usao-dc/legacy/2014/07/14/Laffey%20Matrix\\_2014-2015.pdf](http://www.justice.gov/sites/default/files/usao-dc/legacy/2014/07/14/Laffey%20Matrix_2014-2015.pdf) [<https://perma.cc/H3K4-LNV5>] (defining \$255 minimum reasonable fee for licensed attorneys). Courts use various methods to determine reasonable attorney’s fees, including use of the Laffey Matrix, which defines hourly fees based on years of experience. See Krieger, *supra* note 104, at 155; see also *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 374-76 (D.D.C. 1983) (establishing criteria for reasonable attorneys’ fees), *aff’d in part, rev’d in part*, 746 F.2d 4 (D.C. Cir. 1984), *overruled by* *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (1988). The lack of knowledge of pro se litigants leads to lengthened proceedings, which can negatively impact administrative efficiency. See Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 OHIO ST. J. ON DISP. RESOL. 659, 668-69 (2013) (pointing to effect on judges’ patience creating disadvantage to pro se litigants).

107. See Nichols, *supra* note 3, at 201 (explaining two options for low-income plaintiffs).

108. See *id.* at 208-16 (detailing practices of public interest groups, like nonprofits, law school clinics, and pro bono programs).

109. See *id.* at 216-18 (explaining limitations on contingency fee attorneys due to cash flow issues and caseload).

110. See Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 869-70 (2009) (noting widely embraced principle); Lauren J. Grous, Note, *Causes of Action for Sale: The New Trend of Legal Gambling*, 61 U. MIAMI L. REV. 203, 203 (2006) (indicating premise of equality lies at heart of American legal system).

111. Grous, *supra* note 110, at 203. English philosopher and jurist Jeremy Bentham once published a series of letters in which he wrote:

the legal community have called—to no avail—for reforms to protect the fundamental ideal of equality before the law by addressing the access-to-justice gap.<sup>112</sup>

The Sixth Amendment to the U.S. Constitution guarantees the right to an attorney only in criminal proceedings, not in civil matters.<sup>113</sup> Nevertheless, *Marbury v. Madison*<sup>114</sup> eloquently articulates that the right of an individual to sue for an injury is “the very essence of civil liberty,” and “[o]ne of the first duties of government is to afford that protection.”<sup>115</sup> In 2001, one scholar estimated that only two- to three-fifths of the civil legal needs of middle-income individuals were met, and only one-fifth of the poor.<sup>116</sup> At the same time, however, another scholar argues that our current legal system “appears ready to resolve these longstanding affordability and accessibility issues.”<sup>117</sup> This belief is founded upon the idea that the increased access to technology will act as a catalyst for wider access to legal services.<sup>118</sup>

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Wealth has indeed the monopoly of justice against poverty: and such monopoly it is the direct tendency and necessary effect of regulations like these to strengthen and confirm. But with this monopoly no judge that lives now is at all chargeable. The law created this monopoly: the law, whenever it pleases, may dissolve it.

Letter from Jeremy Bentham: Letter XII: Maintenance and Champerty (Mar. 1787), in DEFENCE OF USURY 117, 123 (1816).

112. See Johnson, *supra* note 9 (announcing access-to-justice report put out by Columbia Law School’s Human Rights Clinic). The Columbia Law School’s Human Rights Clinic acting co-director, Risa Kaufman, describes the access-to-justice gap as a “human rights crisis.” See *id.* Some argue that moving away from the term “access to justice” will help the legal community see the bigger picture: giving people access to simple legal services. See Lear, *supra* note 11 (arguing most middle-income individuals seek advice on wills, estate plans, business, and employment contracts). Another example of these outcries is the Boston Bar Association’s Walk to the Hill for Civil Legal Aid, a march to the steps of the Massachusetts State House to lobby state legislators for increased funding for legal aid services. See *Walk to the Hill for Civil Legal Aid*, BOS. B. ASS’N, <https://www.bostonbar.org/membership/events/event-details?ID=25318> [<https://perma.cc/CE22-3LLV>] [hereinafter *Walk to the Hill*].

113. See U.S. CONST. amend. VI (guaranteeing assistance of counsel for accused). See Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1322 (1966) (noting different rights afforded to indigent criminal defendants versus civil litigants).

114. 5 U.S. (1 Cranch) 137 (1803).

115. *Id.* at 163.

116. See Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785 (2001) (lamenting equal justice “most . . . widely violated legal principle”).

117. See Renee Newman Knake, *Democratizing Legal Education*, 45 CONN. L. REV. 1281, 1291-92 (2013) (asserting greater freedom from regulation and technological advances create conditions for closing gap).

118. See *id.* at 1292 (accounting for online access “literally in [individual’s] own living room”).



## III. ANALYSIS

A. *Third-Party Investment vs. Legal Aid Services*

Despite the benefits of TPLF, its negatives significantly outweigh its positives.<sup>119</sup> A shift toward CLF, however, would see the same or similar benefits, but would also remedy many of the problems that plague TPLF.<sup>120</sup> Specifically, CLF would allow for development in the law, greater access and freedom to litigate for both individuals and businesses, and the prevention of injustice, by providing financial resources to those who otherwise might not have their day in court.<sup>121</sup>

Unlike TPLF, CLF does not promote the intrusion of third parties into litigation, and discourages other potential damages to the attorney-client relationship.<sup>122</sup> These problematic issues do not exist with CLF because there is no single individual or entity investing in a controlling portion of the litigation.<sup>123</sup> Also unlike TPLF, CLF does not pose concerns involving the usury, maintenance, and champerty doctrines.<sup>124</sup> Usury is not an issue in CLF because funders are not seeking a monetary return on their investments, which means that they cannot charge an illegal interest rate.<sup>125</sup> Similarly, CLF does not pose a champerty concern because CLF investors do not share in the profits

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119. See *supra* notes 27-32 and accompanying text (describing benefits of TPLF); *supra* Section II.B (listing concerns about current state of TPLF); see also Abrams & Chen, *supra* note 27, at 1106-07 (summarizing TPLF benefits); Bittle & Blunk, *supra* note 3, at 777 (highlighting TPLF criticisms such as increased frivolous litigation and decreased number of settlements); Shannon, *Harmonizing*, *supra* note 2, at 864 (noting chaos created by lack of TPLF regulation).

120. See *supra* notes 76-78 and accompanying text (discussing CLF's potential benefits); see also Gómez, *supra* note 2, at 321-22 (explaining how CLF curtails unease of outside interference by financiers in litigation).

121. See Abrams & Chen *supra* note 27, at 1103 (reporting crowdfunded cases cited two times more than cases funded by traditional means); *supra* notes 27-32 and accompanying text (recognizing benefits offered by TPLF due to increased funding); *supra* note 75 and accompanying text (noting CLF used by nonprofit organizations to advocate for public interests); *supra* notes 84-86 and accompanying text (examining Nakamoto's use of CLF for lawsuit against *Newsweek's* false reporting); *supra* notes 97-99 and accompanying text (discussing Funded Justice, and how it utilizes CLF to help individuals acquire financing); see also Bittle & Blunk, *supra* note 3, at 777 (observing outside funding "enables plaintiffs with meritorious claims to sustain litigation against well-funded defendants").

122. See *supra* notes 38-42 and accompanying text (discussing potential problems with TPLF); *supra* notes 76-78 and accompanying text (explaining how CLF prevents investor meddling and frivolous suits); see also Brown, *supra* note 39 (addressing what some critics consider troubles with TPLF).

123. See *supra* notes 59-61 (describing crowdfunding process with large crowd of individuals or entities donating small amounts); *supra* note 77 and accompanying text (noting lack of financial interest by crowdfunders); see also Gerber & Hui, *supra* note 77, at 14-17 (outlining numerous examples of crowdfunding supporters not financially motivated).

124. See *supra* notes 43-44, 47 and accompanying text (noting potential legal issues at play in TPLF); see also Barksdale, *supra* note 43, at 716 (explaining usury, champerty, and maintenance doctrines' stifling effect on firms' attempts to fund cases).

125. See Gómez, *supra* note 2, at 308 (discussing crowdfunding contributors' selfless motives for participating); *supra* note 44 and accompanying text (defining usury).

of any lawsuit.<sup>126</sup> As applied today, the maintenance doctrine would also not be a concern as long as the attorney does not participate in the funding process beyond direct litigation costs.<sup>127</sup>

TPLF cannot fully address the access-to-justice gap because it is not available to all litigants in need, but CLF has the potential to do so.<sup>128</sup> TPLF can be broken into two separate categories, both types having one significant factor in common—an extremely high rate of return.<sup>129</sup> As such, this funding only addresses the access-to-justice concern for low-income individuals having claims for medical malpractice and significant personal injury because these types of cases usually involve high damages.<sup>130</sup> Even though legal services organizations can represent some low-income clients in lower-value case areas such as landlord-tenant, foreclosure prevention, custody and guardianship, probate, and bankruptcy, the biggest problem facing legal aid organizations is funding.<sup>131</sup> Because legal services organizations lack the funding to help all individuals unable to afford private attorneys or qualify for free legal aid, CLF can help fill the gap by providing financing.<sup>132</sup>

As discussed earlier, one scholar suggests TPLF is the solution to the access-to-justice gap because the “cause model” serves indigent clients and the “profit model” provides services to others.<sup>133</sup> These models accurately characterize the current state of affairs, but by no means provide a solution to the access-to-justice problem.<sup>134</sup> There are still individuals who do not fit into either model, due to their annual income and the value of their claims, and these are the individuals that crowdfunding can help the most.<sup>135</sup>

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126. See *supra* note 51 and accompanying text (defining champerty); see also Gómez, *supra* note 2, at 308 (noting even in reward-based models, funders receive only negligible rewards).

127. See Lyon, *supra* note 49, at 582 (pointing to existing prohibitions on attorney lending to clients); *supra* note 50 and accompanying text (discussing present-day application of maintenance doctrine).

128. See *supra* notes 97-99 and accompanying text (discussing success of Funded Justice in providing access through CLF).

129. See *supra* notes 24-26 and accompanying text (exploring types of cases sought by funders in TPLF); see also Steinitz, *supra* note 24, at 479-80 (comparing practice of venture capital funds to litigation finance firms having high-risk, high-return portfolios).

130. See *supra* note 25 and accompanying text (noting types of cases in consumer funding category); see also Hunt, *supra* note 25 (pointing to one company making \$11 million profit from September 11th responders' case).

131. See *Service Area and Case Types*, *supra* note 101 (listing covered case types); *supra* notes 101-103 and accompanying text (recognizing organizations' struggle to meet legal aid needs and describing financial constraints faced); see also Wilson, *supra* note 102, at 388-89 (noting inadequate funding for public interest organizations).

132. See *supra* notes 103-106 and accompanying text (explaining individuals who fall into access-to-justice gap); see also Krieger, *supra* note 104, at 149 (arguing legal community has duty to develop new methods for providing access to justice).

133. See *supra* notes 107-109 and accompanying text (differentiating between two models of TPLF).

134. See *supra* note 104 and accompanying text (defining access-to-justice gap); see also *Walk to the Hill*, *supra* note 112 (showing present need to lobby for greater access to justice).

135. See Krieger, *supra* note 104, at 151 (noting efforts to increase services yielding benefit to only 50% of individuals who qualify).

### B. Crowdfunding to the Rescue

Previous crowdsourcing successes illustrate how crowdfunding can help average citizens participate in various legal fields.<sup>136</sup> As discussed above, examples of these areas of success include legislation, defamation lawsuits, patent infringement litigation, financing startup companies, and, to a limited degree, access to justice.<sup>137</sup> Funded Justice, the CFP for individual litigation finance, is one example of how CLF may serve as a future solution for the access-to-justice gap.<sup>138</sup> Specifically, this type of CFP allows individuals to fund litigation when their potential damages are too minimal to interest any traditional third-party financier, but their compelling personal stories can convince a large number of friends and family to contribute small amounts towards their goal.<sup>139</sup>

Opponents of CLF express concerns that CLF promotes frivolous litigation, tipped scales, and trial by media.<sup>140</sup> But as mentioned previously, CLF funders are average citizens with philanthropic interests.<sup>141</sup> Such altruistic interests reduce the risk of meritless claims due to a strong disapproval of them by the public, including the funders themselves.<sup>142</sup> Furthermore, CLF can remedy the imbalance created by TPLF in favor of plaintiffs, because there will be donors that believe in a defendant's cause just as much as a plaintiff's.<sup>143</sup> The risk of trial by media is an important concern, but this concern should not outweigh the harmed individual's interest in adjudicating his or her claim and obtaining relief.<sup>144</sup> Furthermore, trials by media often occur in cases outside the CLF context and cannot necessarily be controlled by the parties in any case.<sup>145</sup>

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136. See Orozco, *supra* note 81, at 146-48 (observing crowd success in creating legislation, individual litigation, and patent research).

137. See *supra* Section II.D (highlighting specific examples of crowdsourcing success).

138. See *supra* notes 97-99 and accompanying text (discussing concept of CLF providing individuals with access to courts); see also *Trending Crowdfunding Campaigns*, *supra* note 98 (indicating various types of cases amenable to CLF).

139. See *supra* notes 98-99 and accompanying text (identifying types of cases posted on Funded Justice website); see also Gómez, *supra* note 2, at 315 (discussing different motivations driving crowdfunding campaigns).

140. See *supra* notes 79-80 and accompanying text (indicating risks posed by CLF); see also Elliott, *supra* note 62, at 549 (worrying defendants judged by public perception rather than jury of peers); Richey, *supra* note 41, at 492 (pointing out financiers sometimes receive up to 40% of total damages awarded to litigant).

141. See *supra* note 8 and accompanying text (describing motives of CLF investors).

142. See *supra* note 78 and accompanying text (noting improbability of CLF leading to increase in frivolous filings); see also Gómez, *supra* note 2, at 330-31 (comparing frivolous and meritless claims and describing general reactions).

143. See *supra* note 41 and accompanying text (discussing tipped scales in favor of plaintiffs); see also Richey, *supra* note 41, at 508-09 (describing imbalance between plaintiffs and defendants created by TPLF).

144. See *supra* notes 110-117 and accompanying text (expounding on central U.S. legal principle of equality before law); see also Rhode, *supra* note 110, at 871 (discussing lack of court access for low-income litigants served by legal aid programs).

145. See Battaglia, *supra* note 80, at 1583-90 (using "trial by media" example outside of CFL context to highlight negative effects). Trials by media have strong negative effects on public perception of the criminal justice system. See *id.* at 1610.

CLF also has the potential to empower legal aid organizations to reach more individuals.<sup>146</sup> If communities can channel more resources toward legal aid services, these organizations will have more funding, giving them the ability to help more low-income litigants.<sup>147</sup> In sum, crowdfunding is one of the best tools currently at our disposal to shrink the access-to-justice gap because it avoids issues presented by alternative funding models, and connects those outside the scope of traditional legal aid services with new sources of funding.<sup>148</sup>

#### IV. CONCLUSION

CLF provides an avenue for the expansion of legal services to more low- and middle-income individuals. Legal aid organizations have the opportunity to use CLF as a tool to address their budget issues and remedy their inability to serve a financially diverse crowd of potential litigants. The interconnectedness of society today allows people to share information and money rapidly online, which bands people together to help others, unlike ever before.

Funded Justice demonstrates precisely how CLF can be used to help close the access-to-justice gap. It illustrates a successful use of CLF by showing how, collectively, individuals can raise funds for others and prescreen potentially fraudulent and frivolous claims that concern so many. With entrepreneurial spirit, the legal community can move toward creating more CFPs, similar to Funded Justice, and open the courthouse doors to financially diverse individuals who deserve justice.

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146. See Gómez, *supra* note 2, at 327 (positing legal aid groups can promote various cases on CFP).

147. See Rhode, *supra* note 110, at 908-09 (stressing government budget constraints' impact on legal services and critical need for new funding sources); see also *Walk to the Hill*, *supra* note 112 (promoting event to lobby state legislature for increased legal aid funding).

148. See *supra* Section II.D (evidencing favorable outcomes for other uses of crowdsourcing); see also Gómez, *supra* note 2, at 333-34 (noting increased opportunities for litigants through CLF).