



Neighborhood Economic Development Advocacy Project

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STATEMENT OF ALEXIS IWANISZIW, NEDAP

NYC COUNCIL COMMITTEE ON COMMUNITY DEVELOPMENT

Oversight: Systemic Problems in the Ongoing Mortgage Foreclosure Crisis, and its Effect on New York City Neighborhoods

January 30, 2012

Thank you, Chairman Vann and other members of the Community Development Committee, for holding today's hearing and for inviting me to testify. I am a Senior Program Associate at NEDAP, a non-profit resource and advocacy center that works with community groups in New York City and State to promote economic justice and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty.

NEDAP has been at the forefront of fighting abusive lending and foreclosure in New York City and State since the mid-1990s, using a variety of strategies, including policy advocacy, community education and outreach, coalition-building, and research and documentation. NEDAP convenes New Yorkers for Responsible Lending (NYRL), a state-wide coalition of 159 affordable housing, seniors, consumer, civil rights, and legal services organizations, along with community development financial institutions, that are dedicated to combating predatory and abusive financial services practices. NEDAP also runs the NYC Foreclosure Prevention Gap Loan Program, which provides low-cost loans to lower income New Yorkers to prevent foreclosure.

Foreclosure risk remains disturbingly high in New York, especially in lower income neighborhoods and communities of color. As documented in a report released today, NEDAP found that 94,890 mortgages were in default or delinquent in 2011, based on its analysis of new data on 90-day pre-foreclosure notices sent to homeowners in New York City. This staggering number indicates severe mortgage distress and risk of foreclosure and destabilization for a huge number of families and communities throughout the city. As the attached maps demonstrate, mortgage defaults and delinquencies as well as foreclosures have had devastating effects on communities of color. The same New York City communities that lenders targeted for high cost and abusive subprime loans -- such as Bedford Stuyvesant, Flatbush, and East New York in Brooklyn, and Jamaica, St. Albans, and Springfield Gardens in Southeast Queens -- are now being significantly destabilized by high concentrations of mortgage defaults and foreclosures.

There are fundamental and well-documented problems with the mortgage servicing industry that are greatly exacerbating these problems, and present real obstacles to foreclosure prevention. Servicers are failing to get borrowers into affordable loan modifications, even where that would be the best outcome for both the investor and the borrower. Servicers have been causing extreme frustration and distress for homeowners and advocates by repeatedly losing paperwork, denying modification requests with no basis, misapplying payments, and plowing through with foreclosures even while homeowners are working on a loan modification. While the Obama Administration's Home Affordable Modification Program (HAMP) was supposed to help ease some of these problems, it has largely been a disappointment because it continues to rely on voluntary action by servicers. Further, although it creates a uniform structure for affordable modifications, it increases rather than reduces the debt burden of distressed homeowners.

The mortgage securitization structure has given servicers a disincentive to work with borrowers and seek sustainable loan modifications. It costs servicers money to complete a loan modification, while servicers receive substantial fees for foreclosures. Unfortunately, the rather modest incentives that HAMP offers to servicers have failed to alter this balance and incentivize modifications. For years servicers made a lot of

money aggressively collecting from borrowers and gouging borrowers for fees, rather than working on modifications -- they have been unable to change this culture, or to hire and train the staff needed to handle modifications.

Although the “robo-signing” scandal -- in which servicers were caught filing false affidavits with the courts in foreclosure cases -- received a lot of media attention, the problems are long-standing. There are several key points worth highlighting. The false affidavits do not represent a “mere technicality,” as the industry would have us believe. Instead, the false affidavits constitute a fraud on the courts, and often mask fundamental defects in the chain of ownership of the note and mortgage, as well as problematic accounting about what a borrower actually owes. The robo-signing must be seen as a continuation of a much bigger chain of fraud and abuse by the industry that runs through the whole process, from origination, to securitization, to servicing—and it is critical that the industry be held accountable for this history and pattern of broad abuse.

It is a fundamental concept of foreclosure law, and of due process itself, that a lender cannot take someone’s home in a foreclosure action unless they own the note and mortgage. As recognized in City Council’s proposed Resolution 989, the byzantine securitization process and the industry’s widespread use of Mortgage Electronic Recording Systems (MERS) have clouded the chain of ownership in a great many cases. MERS made the industry billions in the short term by helping to avoid recording fees and facilitating shortcuts on the chain of assignment of mortgages, but these shortcuts are causing increasing problems for the industry.

Advocates from all over the State report problems with lenders filing foreclosure actions where they cannot properly document the chain of ownership of the mortgage note. There is also a growing body of decisions from NYS Supreme Court judges who are denying lenders the right to foreclose because they cannot produce proof of ownership. In New York and around the country, lenders’ inability to establish ownership of the note, and thus legally foreclose, appears more and more widespread as scrutiny increases.

We sincerely hope that the new investigative task force announced last week by President Obama, to be headed by Attorney General Schneiderman, will act aggressively to hold banks accountable for the litany of abuses in the origination, securitization, and servicing of mortgages. At this stage, a vigorous investigation by Schneiderman’s task force may be the best way to ensure comprehensive relief for homeowners and communities. Such an investigation must lead to enforceable servicing standards that compel servicers to do loan modifications wherever warranted, and that include systematic principal reduction.

Recommendations:

Both the City and State should maintain funding for legal services and counseling

The funding that the City Council and State Legislature have provided for the past three years for foreclosure prevention counseling and legal services has been absolutely invaluable to New Yorkers who were targeted by abusive loans, or who have been adversely affected by the economic crisis and recession.

Although the foreclosure crisis is acute, New Yorkers at least have a fighting chance because there is a strong and well-trained group of counselors and legal services attorneys throughout the City who are providing high quality and compassionate assistance to New Yorkers in need. This network has been helping large numbers of New Yorkers at risk of foreclosure to keep their homes, and owes its existence almost completely to the funding provided by the City Council and Legislature.

As the sponsors of proposed Resolution 872-A have recognized, if this funding is not renewed, most of the advocates and programs around the City that are helping at risk homeowners will be unable to sustain their work. It will be very difficult to hold the industry accountable, and to save homes, without continued funding.

Pass S.8174/ A.11465 to require lenders to establish ownership of the note and mortgage in order to foreclose

The legislature should pass S.8174/ A.11465, which would help resolve the problem of a wrongful party bringing a foreclosure action against a New York homeowner. In order for a foreclosing plaintiff to have standing to sue, the plaintiff must be the owner of the mortgage and the holder of the note. Homeowners know the name of their mortgage servicer, but typically do not know who owns their loan. Thus, when a foreclosure is filed, often in the name of a trustee of a securitization pool, neither the homeowner nor the court has any independent basis to know whether the plaintiff is the rightful party.

The proposed legislation would address this problem in several key ways. First, the legislation would change the existing common law that a foreclosing plaintiff must be the owner and holder of the subject mortgage and note. Second, the legislation provides that the plaintiff must affirmatively state in the complaint that they are the owner and holder, or have delegated authority to sue in foreclosure, and that they are in possession of the mortgage and note.

Most important, the proposed legislation seeks to avoid potential litigation regarding ownership of the loan with a simple requirement that upon filing a foreclosure, the plaintiff provide to the court copies of the mortgage, note, and proof of ownership, including endorsements, assignments and transfers.

Finally, the legislation provides that a homeowner does not waive the defense of lack of standing if it is not raised in a responsive pleading. At the time the answer is due, defendants typically lack information or reason to challenge whether the plaintiff is the rightful owner. Homeowners filing answers *pro se*, without the assistance of legal counsel, rarely have the wherewithal to challenge standing to sue in their answer. Cases have proceeded to sale in which the plaintiff did not even own and hold the mortgage and note, because the defendant did not have the awareness or information to raise a defense of standing up front – the proposed legislation would correct these injustices.

By requiring foreclosing plaintiffs to plead and demonstrate proof of ownership upon filing, the law would preclude the need for extensive litigation regarding ownership later in the foreclosure proceeding. Furthermore, as courts increasingly conduct their own queries regarding standing, providing validation of the foreclosing plaintiff's ownership interest with the filing will bring efficiency to the process and preserve courts' resources.

Codify by statute Chief Judge Lippman's 2010 court rule

To address the pervasive problems with foreclosure filings, the foreclosure mill law firms must be held accountable for the papers that they file. For too long, the foreclosure mills have been held to a different standard than other lawyers, and allowed to file cases, and obtain judgments, without even minimal verification that they have the basis to bring a case.

Chief Judge Lippman's October 2010 court rule, which requires that foreclosure counsel file an affidavit certifying that they have taken "reasonable steps" to verify the accuracy of documents filed in support of residential foreclosures, is a very positive step. The rule requires foreclosure counsel to carefully review papers in the case and make inquiries to the lender to ensure that foreclosures are not wrongly filed, and requires foreclosure counsel to actually perform due diligence about the chain of ownership and other key facts prior to filing.

As recommended by proposed Resolution 871-A, the legislature should codify this important court rule by statute, and prescribe specific penalties for attorneys who violate the statute.

Codify by statute a duty of loss mitigation and duty of good faith and fair dealing for servicers, as well as other key provision of the Banking Department's recent Business Conduct Rules for Mortgage Servicing

The NYS Department of Financial Services has introduced Business Conduct Rules for Mortgage Servicing, which contain several strong provisions, including a duty of good faith and fair dealing, and a duty of loss

mitigation, which would require servicers to attempt to modify a borrower's loan through HAMP or a HAMP-like test before proceeding to foreclosure. The rules contain other strong provisions, such as a prohibition on excessive fees. The rules are some of the strongest state rules in the country.

The legislature should codify by statute the two servicer duties, as well as other key provisions of the Business Conduct Rules. The statute should provide that material violations of the statute will give borrowers a defense to foreclosure, and should result a civil penalty, as well as actual and statutory damages for borrowers.

Prohibit the collection of deficiencies and deficiency judgments after a foreclosure sale

Many New York borrowers are under water in their mortgages— they owe more on their mortgage loan or loans than their property is worth. After a foreclosure, the lender on a first or second mortgage is able to collect a deficiency, which is the amount above what the lender was able to recover in the foreclosure sale. Lenders can collect these deficiencies through wage garnishment or other methods that cause great economic hardship for people who have already lost their homes in foreclosure.

California has a statute that prohibits the collection of deficiencies post-sale. In addition to protecting vulnerable residents, it greatly increases the leverage that borrowers have in negotiating a short, reasonable payoff on a mortgage (usually a second mortgage) that is underwater, since the lender will not be able to collect anything post-foreclosure. A similar statute in New York would help prevent foreclosures by incentivizing more settlements on second liens, and would provide economic protection for vulnerable New Yorkers who have just lost their homes.

Thank you again for the opportunity to testify.

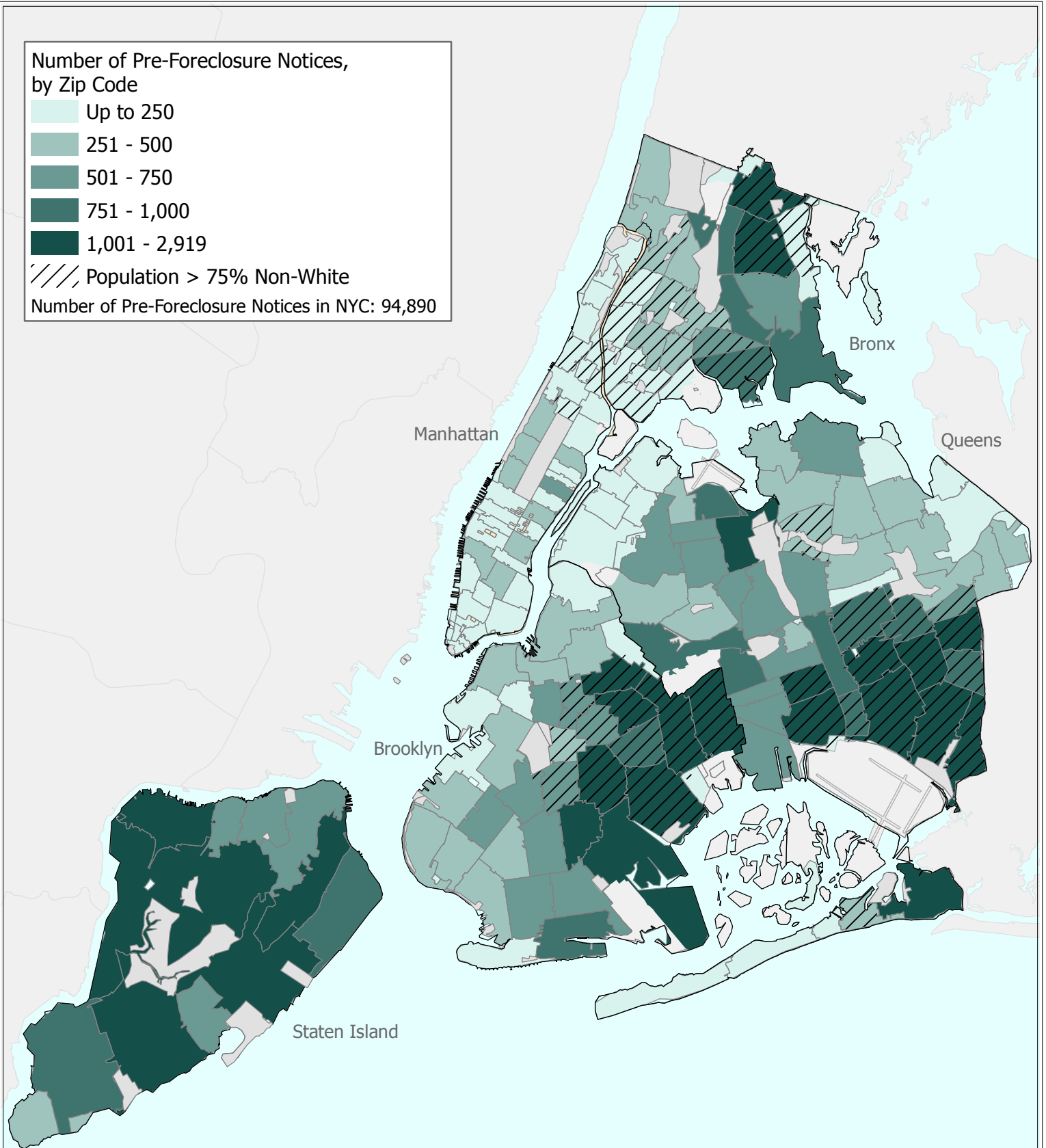
90-Day Pre-Foreclosure Notices New York City, 2011

Number of Pre-Foreclosure Notices,
by Zip Code

- Up to 250
- 251 - 500
- 501 - 750
- 751 - 1,000
- 1,001 - 2,919

Population > 75% Non-White

Number of Pre-Foreclosure Notices in NYC: 94,890



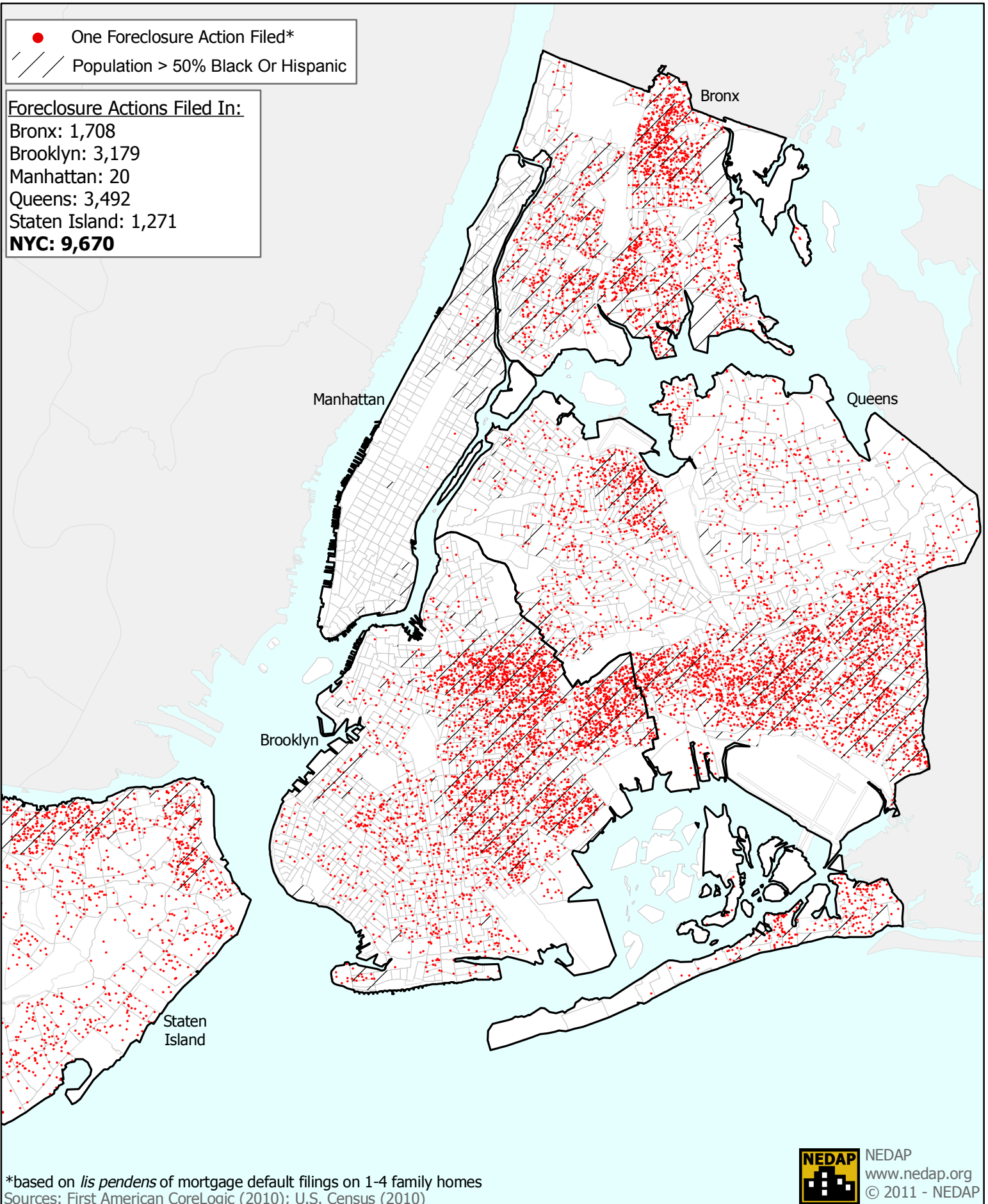
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This map displays 90 day pre-foreclosure notices on 1-4 family homes, co-ops, and condos (duplicate notices excluded).

Sources: New York State Department of Financial Services (2011); U.S. Census (2010)

Foreclosure Patterns - 2010

New York City



*based on *lis pendens* of mortgage default filings on 1-4 family homes
Sources: First American CoreLogic (2010); U.S. Census (2010)