

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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DAVID F. DOBBINS, <u>et al.</u> ,	)	
	)	
	)	
Plaintiffs,	)	Civil Action No. 01-8371 (FB)
	)	
v.	)	
	)	
LEGAL SERVICES CORPORATION,	)	
	)	
Defendant.	)	

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**MEMORANDUM OF LAW OF INTERVENOR-DEFENDANT UNITED STATES  
OF AMERICA IN REPLY TO PLAINTIFFS' MEMORANDUM OF LAW IN  
OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS**

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## PRELIMINARY STATEMENT

This is a constitutional conditions case. Plaintiffs purport to bring an as applied challenge to the program integrity regulations, 45 C.F.R. § 1610.8, which require federally funded legal services organizations that wish to conduct legal services the federal government has chosen not to fund to do so with non-federal funds through an affiliate that maintains a degree of separation from these federally funded organizations. Because the Second Circuit has already held that the program integrity regulations leave recipients "with adequate alternative channels for protected expression," and thus are facially constitutional, Velazquez v. Legal Services Corp. ("Velazquez II"), 164 F.3d 757, 766 (2d Cir. 1999), to prevail on their as-applied challenge grantee plaintiffs now must "demonstrat[e]" that the regulations "in fact unduly burden [their] . . . capacity to engage in protected First Amendment activity," id. at 767.

Grantee plaintiffs here cannot make this showing because the program integrity regulations have never been applied to a single grantee plaintiff. Despite the Second Circuit's express guidance, not one grantee plaintiff has made any effort whatsoever either to affiliate with an existing organization that does not receive federal funds or to establish a new affiliate organization. Furthermore, the voluminous record plaintiffs have compiled is devoid of any disqualifying requirement or extraordinary circumstance demonstrating that it would be futile for any grantee plaintiff to attempt to comply with the program integrity regulations. Plaintiffs thus do not have standing to bring an as applied challenge.

Given the threshold nature of the standing question to their constitutional challenge and the redundancy of the merits arguments set forth in Plaintiffs' Memorandum of Law in Reply to the Government's Opposition to Motion for a Preliminary Injunction and in Opposition to the Government's Motions to Dismiss ("Reply"), the United States respectfully refers the Court to the

Memorandum of Law of Intervenor-Defendant United States of America in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Motion of Intervenor-Defendant United States of America to Dismiss Plaintiffs' Complaint ("United States' Memorandum" or "US Mem.") in reply to plaintiffs' merits arguments. Should the Court reach the merits, however, the United States briefly addresses plaintiffs' latest attempt to invoke strict scrutiny in the constitutional conditions context. Simply stated, even if grantee plaintiffs did have standing to assert an as applied challenge, there is no support for their insistence that this Court apply strict scrutiny to the program integrity regulations.

### **ARGUMENT**

#### **I. GRANTEE PLAINTIFFS DO NOT HAVE STANDING TO BRING AN AS APPLIED CHALLENGE TO THE PROGRAM INTEGRITY REGULATIONS.**

Grantee plaintiffs purport to bring an as applied challenge to the program integrity regulations. See Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction ("Plaintiffs' PI Memorandum" or "Pls.' PI Mem.") at 9; Reply at 1. The Supreme Court has pointed out that as applied challenges are inherently difficult and slow. See Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758 (1988). During the status conference held in this matter on June 26, 2001, the Court stated: "[W]e will need some briefing on the standing issue. It is a basic bedrock jurisdictional matter that we have to surmount before we go further in terms of as applied challenges." Transcript of Status Conference dated June 26, 2001, at 10, Velazquez v. Legal Services Corp., 985 F. Supp. 323 (E.D.N.Y. 1997) (No. 97-00182).

Responding to defendants' standing arguments, plaintiffs assert that they have standing to bring an as applied challenge to the program integrity regulations without submitting a proposal

to LSC, or making some attempt to establish an affiliate relationship, because of the "facially unconstitutional status of LSC's standardless licensing procedures." Reply at 8. In Velazquez v. Legal Services Corp. ("Velazquez I"), 985 F. Supp. 323 (E.D.N.Y. 1997), however, this Court ruled that "Plaintiffs' contention that the regulations which direct the LSC to make determinations of program integrity on a case-by-case basis and not place determinative weight on any one factor render them 'vague and unworkable' fails." Id. at 341.

Moreover, plaintiffs' reliance on Watchtower Bible & Tract Soc'y v. Stratton, 122 S. Ct. 2080 (2002); Lakewood, 486 U.S. 750; Freedman v. Maryland, 380 U.S. 51 (1965); Staub v. Baxley, 355 U.S. 313 (1958); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1938); and Thomas v. Chicago Park Dist., 122 S. Ct. 775 (2002), see Reply at 7-8, for the proposition that they do not even need to submit a proposal to LSC before bringing an as applied challenge to the regulations is misplaced. These cases involved prohibitions on First Amendment activity that presented questions of either facial invalidity, see Watchtower, 122 S. Ct. at 2083; Lakewood, 486 U.S. at 755-60; Staub, 355 U.S. at 319; Lovell, 303 U.S. 451-53; Thomas, 112 S. Ct. 778; or prior restraint, see Freedman, 380 U.S. at 58-60; Cantwell, 310 U.S. at 305-07.

Unlike these cases, the case at bar is not one in which plaintiffs are asserting a facial challenge to a mandatory permit requirement.<sup>1</sup> Having already had their facial challenge rejected by both this Court and the Second Circuit, plaintiffs here purport to bring an as applied challenge

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<sup>1</sup> Nor is this a case in which plaintiffs are bringing a civil rights action under 42 U.S.C. § 1983. See Reply at 7 (citing Porter v. Nussle, 534 U.S. 516 (2002), for the proposition that they have standing to bring a First Amendment as applied challenge to the program integrity regulations).

to federal regulations that place conditions on the receipt of federal subsidies. See Reply at 1. Not one of the cases plaintiffs point to in any way supports their argument that they have standing to bring an as applied First Amendment challenge to these regulations without ever having taken any steps to comply with the regulations. In fact, none of the cases plaintiffs rely on involve recipients of federal funds seeking to bring an as applied challenge to regulations that have never been applied to the recipients.

Perhaps recognizing the weakness of their legal argument, plaintiffs contend that they have standing because they have submitted several proposals for LSC's review, which, they represent, have been rejected. See Reply at 3-4, 8-11. This argument is based on a mis-characterization of the facts in the record. Contrary to plaintiffs' assertion that LSC "rejected" a proposal submitted by Farmworker Legal Services of New York ("FLSNY"), Reply at 4, the declaration of FLSNY's Executive Director states unequivocally that FLSNY actually "withdrew" its proposal before LSC considered it. Declarations in Support of Plaintiffs' Motion for Consolidation and a Preliminary Injunction ("Pls.' PI Decl.") K, ¶ 16.<sup>2</sup>

LSC has rejected one proposal – that of Queens Legal Services Corporation ("QLSC"), which is not a plaintiff in either Dobbins or Velazquez. The record makes clear that plaintiff Legal Services of New York ("LSNY") merely forwarded QLSC's proposal to LSC for

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<sup>2</sup> After submitting a proposal to establish an affiliate with separate offices and equipment, FLSNY apparently telephoned LSC to determine whether the program integrity regulations would be satisfied if the organizations were not physically separate but maintained separate records and reports. See Pls. PI Decl. K, ¶¶ 9-16. During a telephone conversation, the contents of which are not in the record, an unidentified LSC employee allegedly indicated that separate record keeping alone "probably would not satisfy the program integrity requirement." Id. ¶ 16. FLSNY then "withdrew" its proposal. Id. This interaction is a far cry from plaintiffs' repeated representation that LSC "rejected" FLSNY's application. See, e.g., Reply at 4; id. at 11 n.9 (asserting that LSC "denied" FLSNY's application).

consideration. See Declarations in Support of Plaintiffs' Reply to Defendants' Opposition to Motion for a Preliminary Injunction and In Opposition to Defendants' Motion to Dismiss ("Pls.' Reply Decl.") D, ¶ 9 (declaration of QLSC's Project Director explaining that LSNY forwarded the proposal "on behalf of QLSC"); id. at R, ¶ 2 (declaration of LSNY's Executive Director and President explaining that LSNY submitted the proposal "on behalf of Queens Legal Services"). In its cover letter forwarding QLSC's proposal to LSC, LSNY specifically indicated that the proposal was that of QLSC and that LSNY was unable to inform QLSC whether the proposal satisfied the program integrity regulations. See Pls.' PI Decl. A, Ex. 28.

Finally, plaintiffs assert that it would be futile to take steps either to affiliate with an existing organization that does not accept federal funds or to set up an affiliate to engage in restricted activities because "it is clear that LSC would deny the grantee plaintiffs permission to set up an affiliate with th[e] configuration" of their choosing. Reply at 11. Plaintiffs' certainty in this regard is based on the fact that each grantee plaintiff "desires to set up an affiliate entailing no more separation than in the proposals submitted by LSNY on behalf of QLSC and by FLSNY," id., which, in their estimation, would "allow the greatest possible exercise of their First Amendment rights consistent with the government's legitimate interests," id. at 12. Specifically, grantee plaintiffs state that the only affiliate relationship they "seek" is one "in which the affiliate may engage in the full range of legal services, with a shared Board, allowing the grantees to control the affiliates's activities, with shared personnel, and without physical separation." Id.; see also Pls.' Reply Decl. H, ¶¶ 2-15, M, ¶¶ 2-18, R, ¶¶ 2-12, S, ¶¶ 2-14 (outlining what each grantee plaintiff would accept in the way of an affiliate relationship). According to plaintiffs, it would be futile for them to submit a proposal to LSC because LSC has

never approved a relationship configured in this way. See Reply at 12. Plaintiffs are unwilling to submit a proposal similar to the many that LSC has approved because the configuration of these affiliate relationships does not comport with their desires. See id. at 12-13.

Plaintiffs misapprehend the futility exception to the standing doctrine. Plaintiffs' claim of futility does not excuse their failure to try. See, e.g., Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 57 (D.C. Cir. 1991) (explaining that a claim of "futility" generally does not "excuse [plaintiffs] . . . from the basic standing requirement of concrete, personal harm"). Futility is an objective, not a subjective test. It is determined not by an assertion of what plaintiffs desire to attempt based on their notion of what the First Amendment should tolerate, but instead by an analysis of the applicable regulations and any extraordinary circumstance that would prevent plaintiffs from applying. See id.; Prayze FM v. FCC, 214 F.3d 245, 251-52 (2d Cir. 2000) (considering the nature of the plaintiff, the nature of the governing regulations, and the nature of the application of the regulations to determine that applying would not be futile); Jackson-Bey v. Hanslmaier, 115 F.3d 1091, 1096 (2d Cir. 1997) (ruling that "an unsupported claim of futility is not enough to excuse a plaintiff's failure to apply"); Coulter v. Bronster, 57 F. Supp. 2d 1028, 1036 (D. Haw. 1999) ("While Plaintiff may believe that doing so would be futile, such a belief is not sufficient, by itself, to confer standing upon Plaintiff."), aff'd, 2001 WL 777549 (9th Cir. July 11, 2001).

Grantee plaintiffs here point to no "disqualifying statute or regulation" or other extraordinary circumstance, Albuquerque Indian Rights, 930 F.2d at 57, that has prevented them from submitting to the program integrity regulations. The record plaintiffs have set forth reveals the flexible nature of the program integrity regulations and LSC's flexible approach to the

regulations in reviewing affiliate structures. As more fully set forth in the United States' Memorandum, the program integrity regulations are highly flexible. See US Memo. at 12-16. The regulations indicate that no single factor will be "determinative" in determining sufficient separation and call for an evaluation based on the "totality of the facts." 45 C.F.R. § 1610.8(a)(3). The record also demonstrates that LSC has been very flexible in applying the program integrity regulations. See Pls.' PI Decl. 17-28 (documenting that LSC has rejected only one proposal to establish an affiliate relationship); see also US Mem. at 15-16 (same).

Nor does any grantee plaintiff point to an extraordinary circumstance or distinguishing feature that would render it unable to submit a proposal and establish an affiliate relationship. Plaintiffs simply assert that they "should not be expected to enter into wasteful and impractical configurations touted by the government." Reply at 15 (emphasis added). Plaintiffs apparently have made a determination as to what the First Amendment should tolerate in the way of separation, and are unwilling to go any further. See id. at 11-12 (stating that grantee plaintiffs "desire to set up an affiliate with no more separation than in the proposal[] submitted by LSNY on behalf of QLSC," which, they assert, would "allow the greatest possible exercise of their First Amendment rights"). Though grantee plaintiffs may not desire to do so, there is nothing in the record to support their assertion that it would be futile for them to attempt to "submit to the challenged policy." Prayze FM, 214 F.3d at 251 (internal quotation marks and citation omitted).

Because no plaintiff here has "ever submitted any material for review. . . . [t]his case . . . simply does not raise any question of unconstitutional application of the Regulation[s] to any specific situation." Greer v. Spock, 424 U.S. 828, 840 (1976).

## II. STRICT SCRUTINY DOES NOT APPLY TO PLAINTIFFS' AS APPLIED CHALLENGE.

Plaintiffs assert for the first time that the Supreme Court's statement in Regan v. Taxation With Representation, 461 U.S. 540 (1983), that separate incorporation and careful record-keeping were not "unduly burdensome," id. at 544 n.6, somehow means that any separation requirement beyond distinct incorporation and careful record-keeping is presumptively unconstitutional and must be subject to strict scrutiny. See Reply at 16-20. As set forth more fully in the United States' Memorandum, see US Mem. at 19-21, there is no support for this argument. Plaintiffs point to no authority applying strict scrutiny in the constitutional conditions context, much less in the situation in which there is binding authority holding that the challenged provision is constitutional because it provides "adequate alternative channels for protected expression." Velazquez II, 164 F.3d at 766.

Plaintiffs' reliance on Rockefeller v. Powers, 917 F. Supp. 155 (E.D.N.Y.), aff'd, 78 F.3d 44 (2d Cir. 1996), see Reply at 18-19, is misplaced. The term "undue burden," as used in the ballot access context considered in Rockefeller, is a term of art modifying "heavily burdened," which has its genesis in the Supreme Court's holding that "the right to vote is 'heavily burdened' if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot." Id. at 159 (quoting Lubin v. Panish, 415 U.S. 709, 716 (1974)). As Chief Judge Korman pointed out in Rockefeller, the Supreme Court has articulated a now well-established three-step process to analyze "the validity of ballot access signature requirements to determine whether they unduly burden the right to vote." Id. at 159-60; see also Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). Plaintiffs' effort to apply an analysis

peculiar to the ballot access context, which incorporates both First and Fourteenth Amendment concerns unique to voters, to the constitutional conditions context, which involves restrictions on recipients of federal subsidies, is as unavailing as it is perplexing.<sup>3</sup>

As the Second Circuit explained in Velazquez II, this case is controlled by Taxation with Representation, FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984), and Rust v. Sullivan, 500 U.S. 173 (1991). Applying these cases to the program integrity regulations, the Second Circuit explained that the only question facing this Court is whether, as applied to grantee plaintiffs, the program integrity regulations fail to provide an adequate alternative channel for their protected expression because they unduly burden this expression. See Velazquez II, 164 F.3d at 767. There is no reason that the degree of separation requirement of the program integrity regulations, which is virtually identical to that upheld in Rust, see Velazquez II, 164 F.3d at 767 n.5, would now compel a court to radically change the analysis set forth in these three cases, and applied in Velazquez II, by interjecting strict scrutiny.<sup>4</sup>

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<sup>3</sup> Even in the ballot access context, the Supreme Court has stated that "when a state election law provision imposes only reasonable, non-discriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal quotation marks and citations omitted).

<sup>4</sup> Plaintiffs' invocation of Watchtower Bible, 2002 WL 1305851, for the proposition that "when the government burdens First Amendment activity it must demonstrate (a) an extremely important governmental interest; (b) that cannot be advanced by less drastic means," Reply at 20, is unavailing. Watchtower Bible did not involve restrictions on recipients of federal funds. In Velazquez II, the Second Circuit stated that "Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." 164 F.3d at 767. The Supreme Court denied plaintiffs' petition for certiorari challenging this portion of the Second Circuit's decision. See Velazquez v. Legal Services Corp., 532 U.S. 903 (2001).

**CONCLUSION**

For the foregoing reasons, as well as the reasons set forth in the United States' Memorandum, plaintiffs' Complaint should be dismissed.

Respectfully submitted,

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Dated: July 17, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2002, I caused a true and accurate copy of the foregoing Reply of Intervenor-Defendant United States of America in Support of Motion of Intervenor-Defendant United States of America to Dismiss Plaintiffs' Complaint to be served by Federal Express overnight delivery service on the following persons:

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