

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

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CARMEN VELAZQUEZ, *et al.*, :
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 Plaintiffs, :
 : 97 Civ. 00182 (FB)
 v. :
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 LEGAL SERVICES CORPORATION, *et al.*, :
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 Defendants. :
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DAVID F. DOBBINS, *et al.*, :
 :
 Plaintiffs, :
 : 01 Civ. 8371 (FB)
 v. :
 :
 LEGAL SERVICES CORPORATION, *et al.*, :
 :
 Defendants. :
----- X

**SUPPLEMENTAL MEMORANDUM OF LAW IN CONNECTION WITH
THE ISSUANCE OF EXECUTIVE ORDER NO. 13279, DATED DECEMBER 12, 2002**

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ARGUMENT

I. The Differential Treatment of Secular and “Faith-Based” Activities

On December 12, 2002, President Bush issued Executive Order No. 13279, and an accompanying *Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government*, governing the ability of so-called “faith-based” organizations to utilize both federal and private funds to carry on their eleemosynary work.¹ Recognizing that the Establishment Clause forbids the direct federal funding of overtly religious activity, the Executive Order differentiates between overt religious activity, which must be privately funded, and secular activity, which may be funded by the federal government. Exec. Order § 2(e). Thus, just as the government claims that 45 C.F.R. § 1610.8, the Legal Services Corporation (“LSC”) regulation at issue in this case, was designed to ensure that the government neither funds nor endorses prohibited activities, Executive Order No. 13279 is designed to assure that the government neither funds nor endorses prohibited, indeed unconstitutional, uses.

However, unlike 45 C.F.R. § 1610.8, which puts severe limits on the secular activities in which recipients of LSC funding can engage with their private funding, Executive Order No. 13279 provides for a flexible and sympathetic regime that encourages recipients of federal funding to carry out both their federally funded and privately funded religious activities. Thus, for example, while 45 C.F.R. § 1610.8 requires recipients of federal funding to provide for

¹Executive Order No. 13279 is published at 67 Federal Register 77141. The *Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government* is attached as Exhibit B to the Declaration of Laura K. Abel dated March 6, 2003.

complete physical² and legal³ separation between their federally funded activities and many of their privately funded secular activities, Executive Order No. 13279 does not require such separation between federally funded and religious activities. Indeed, the Executive Order explicitly contemplates the use by faith-based recipients of shared physical facilities:

If, for example, [a] church receives Federal money to help unemployed people improve their job skills, [it] may conduct this program in a room in the church hall and still have a Bible study taking place in another room in the same hall (but no Federal money can be used to conduct the Bible study). Or a faith-based social service provider may conduct its programs in the same room that it uses to conduct religious activities, so long as its government-funded services and its religious activities are held at different times.

Guidance at 10.⁴ The Executive Order also contemplates that recipients of federal funding will be able to integrate their religious activities with their federally funded activities:

a church that receives direct government aid to provide shelter to homeless individuals may not require those individuals to attend a Bible study or participate in a prayer preceding a meal as part of

²See 45 C.F.R. § 1610.8 (requiring LSC grantees to maintain maintain physical and “objective” separation between their LSC-funded activities and the many “restricted” activities barred by the 1996 Congressional restrictions on LSC funding recipients); LSC, *Guidance in Applying the Program Integrity Standards 2* (LSC funding recipients must “be cautious about sharing space, equipment and facilities with another organization which engages in restricted activity . . .”), attached as Ex. 34 to Declaration of Laura K. Abel, dated December 14, 2001.

³See 45 C.F.R. § 1610.8(a)(1).

⁴The only constraint is that “[a] faith-based organization should take steps to ensure that its inherently religious activities, such as religious worship, instruction, or proselytization, are separate – in time or location – from the government funded services that it offers.” *Id.* The separation need not be substantial, however: federal funding recipients can engage in prayer before serving a federally funded meal, and they can pray next door to their federally funded activities. *Id.* at 7, 10.

the government-funded services they provide. But they may invite those individuals to join them, so long as they make clear that their participation is optional.

Id. at 7. And the Executive Order contemplates that in most instances federal funding recipients will not have to legally separate their federally funded and religious activities. *Guidance* at 10.

Nor does Executive Order No. 13279 require a significant level of personnel separation. Unlike 45 C.F.R. § 1610.8,⁵ the Executive Order governing “faith-based” organizations explicitly contemplates that any or all personnel may freely allocate time to carrying out both the federally funded and privately funded religious aspects of their programs. According to the *Guidance*, “[I]t is fine for a faith-based organization to employ someone on their staff to perform religious

⁵*See* LSC, *Guidance in Applying the Program Integrity Standards* at 2 (“Generally speaking, . . . the more staff ‘shared,’ or the greater the responsibilities of the staff who are employed by both organizations, the more danger that program integrity will be compromised. Sharing an executive director, for example, inappropriately tends to blur the organizational lines between the entities. Likewise, sharing a substantial number or proportion of recipient staff calls the recipient’s separateness into question.”); *id.* at 4 n.2 (“For larger organizations, 10% of the recipient’s attorney/paralegal staff should serve as a guide [as to whether a substantial portion of staff is shared between programs]. However, for recipients with smaller staffs, the program director should use his or her best judgement [*sic*] to determine whether part-time staff constitute a substantial proportion of the recipient’s legal workforce.”). *See also* LSC Office of Inspector General, *Review of Grantee’s Transfer of Funds and Compliance With Program Integrity Standards*, Lane County Legal Aid Service, Inc., attached as Ex. 26 to Declaration of Laura K. Abel dated Dec. 18, 2001 (requiring LSC grantee and non-LSC program to rescind policy allowing employees “to split their time between the two organizations”).

duties while also having that person administer part of a Federally-funded program.”⁶ *Guidance* at 9.

Finally, unlike 45 C.F.R. § 1610.8, which requires LSC grantees to ensure that they are not identified with many of their privately funded secular activities,⁷ the Executive Order does not force recipients of federal funds to differentiate themselves in the public eye from their privately funded religious programs. Instead, the Executive Order explicitly encourages public understanding of the intimate connection between the federally funded and privately funded religious activities of a “faith-based” organization. For example, federal funding recipients can engage in religious activities in the same physical facilities in which they conduct their federally funded activities, “without removing or altering religious art, icons, scriptures, or other symbols from these facilities.” Exec. Order § 2(f). Additionally, an organization “may retain religious terms in its organization’s name, select its board members on a religious basis, and include religious references in its organization’s mission statements and other chartering or governing documents.” *Id.*

⁶The only constraints placed on the ability of an employee of a federal funding recipient to split his or her time between federally funded and religious activities are that the employee “must not engage in inherently religious activities while working on the Federally-funded portion of his or her job. And that part-time worker must also document that he met his time commitment to the government to the government-sponsored program by keeping careful time records of his activities.” *Guidance* at 9. These constraints also apply to all employees of LSC grantees who split their time between federally funded and privately funded secular “restricted” activities. See 45 C.F.R. § 1635.3 (LSC’s timekeeping regulation).

⁷See 62 Fed. Reg. 27695, 27698 (1997) (non-profit organizations that receive any LSC funding must “ensure that there is no identification of the recipient with restricted activities and that the other [privately funded] organization is not so closely identified with the [federal funding] recipient that there might be confusion or misunderstanding about the recipient’s involvement with or endorsement of prohibited activities”).

In short, Executive Order No. 13279 and the LSC regulation at issue herein establish diametrically different ground rules governing the use of federal and private funds by a single recipient. The government encourages the simultaneous performance of federally funded and privately funded religious activities, subject only to general accounting rules designed to prevent cross-subsidization, and to minimal restrictions on time and space needed to prevent direct federal funding of worship.⁸ Certain privately funded secular activities, such as the class actions and other restricted legal services activities at issue in this case, and the offering by public libraries of privately funded unfiltered internet access at issue in *American Library Association v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (three-judge court), *probable jurisdiction noted*, 123 S. Ct. 551 (2002),⁹ are subjected to a far harsher regime that is openly designed to discourage the performance of disfavored privately funded activities by forcing a level of physical, programmatic, and personnel separation that bears absolutely no resemblance to the favorable ground-rules applied to privately funded religious activities groups. Such differential treatment of religious and secular activities violates the fundamental command of the Establishment Clause to refrain from discriminating in favor of religion.

II. The Differential Treatment Violates the First Amendment

The core of the Establishment Clause of the First Amendment is a requirement of strict government neutrality in matters of religion. Thus, government may not discriminate among

⁸*See Guidance* at 5. *See also* discussion *supra* at 2.

⁹The statute at issue in that case requires that all libraries that receive certain federal subsidies use filtering software on all of their Internet-accessible computers, even those that receive no federal funding, unless they establish a physically separate library that receives no federal funding. *United States v. American Library Ass'n*, Br. for Petitioner United States, filed Jan. 10, 2003 (Docket No. 02-361), 2003 WL 145228 at *43.

religions, or in favor of religion generally. *E.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).¹⁰ It does not require a magnifying glass to discover the massive discrimination in favor of religion at work in the differential treatment of privately funded religious and secular activities by comparing Executive Order No. 13279 with the LSC regulation at issue herein. Faith-based groups are encouraged to seek federal funding of their secular activities comforted by the knowledge that they will be in a position to use private funds to continue their religious activities without requiring expensive and inefficient physical, legal, programmatic or personnel separation. Legal services groups (and public libraries) are told that if you seek to use private funding to engage in certain secular activities that go beyond the bounds of federal funding, you may do so only under circumstances that make it unduly expensive and inefficient to do so.

Whether one explains such differential treatment as a desire to encourage privately funded worship, as a belief that faith-based organizations are more law-abiding than are secular groups, or as a decision to discourage privately funded class actions and other legal services activities, the differential treatment cannot survive First Amendment scrutiny. Viewed as an effort to encourage religion, or as a judgment on the relative trustworthiness of religious and secular groups, the differential treatment clearly violates the Establishment Clause. Viewed as a desire to discourage class actions and other attorney-client activities protected by the First Amendment, the differential

¹⁰The Court's recent cases upholding government aid to religious schools emphasize this point, holding that a necessary requirement for such aid to be constitutional is that it neither favors nor advances religion. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 810 (2000); *id.* at 837-40 (O'Connor, J., concurring); *Agostini v. Felton*, 521 U.S. 203 (1997).

treatment is a classic content-based discrimination. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

The government simply cannot have it both ways. Either it is necessary to impose harsh separation requirements between all federally funded activities and all privately funded activities, in order to assure compliance with limitations on the use of federal funds; or it is possible to assure compliance as to all activities, including legal services lawyering and public library internet access, by insisting on careful accounting rules and minimal time and place rules. The one thing that government may not do is to impose harsh separation rules on disfavored secular activities, while permitting religious activities to enjoy a far more favorable regime.

CONCLUSION

For the reasons stated above and in plaintiffs' prior briefs in support of their motion for a preliminary injunction, plaintiffs respectfully request this Court to deny defendants' motions to dismiss and to grant plaintiffs' motions for a preliminary injunction.

Dated: New York, New York
March 6, 2003

Respectfully submitted,

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