

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

**REPLY MEMORANDUM OF LAW DISCUSSING THE
COMBINED LEGAL EFFECT OF EXECUTIVE ORDER
13279 AND LSC’S “PROGRAM INTEGRITY”
REGULATIONS**

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Argument

Plaintiffs, including several legal services organizations that receive federal funding from the Legal Services Corporation (“LSC”), as well as from other instrumentalities of the federal government, argue that the combined impact of LSC’s “program integrity” regulations and the President’s so-called “faith-based initiative,” as set forth in Executive Order No. 13279 (referred to herein as the President’s Executive Order) and the accompanying *Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government*, as well as in several “charitable choice” regimes imposed by Congress since 1996,¹ discriminate in favor of religious speech in flagrant violation of the First Amendment.

Briefly, under guidelines governing the faith-based initiative, eleemosynary organizations receiving federal funding for secular activities are explicitly authorized to carry out privately-funded religious activities on the same physical premises as the federally-funded secular activities, and may use identical personnel and legal structure to carry out both sets of activities. The President’s Executive Order and charitable choice laws direct the federal government to rely solely on accounting and timekeeping rules and minimal physical or time separation (and, in some instances, on a requirement that recipients maintain separate bank accounts for their federal funding) to assure that government funds do not provide support for or appear to endorse overtly religious activities, which must, under the Establishment Clause, be free from direct government

¹The existing charitable choice regimes are described 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, dated June 19, 2002, at pages 32 to 33. Executive Order No. 13279, promulgated on December 12, 2002, is published at 67 Federal Register 77141. The relevant government guidelines for its implementation are attached as Exhibit B to the Declaration of Laura K. Abel dated March 6, 2003.

funding or endorsement.² *See* Pls.’ Supp. Mem. in Connection With Issuance of Executive Order No. 13279, dated Mar. 6, 2003, at 1-5; Pls.’ Mem. in Reply to Govt.’s Opp. to Mot. for a Prelim. Inj. & in Opp. to Govt.’s Mots. to Dismiss, dated June 19, 2002, at 32-33.

In contrast, eleemosynary organizations receiving federal funding through LSC must, under LSC’s “program integrity” regulations, establish and maintain burdensome and expensive physically separate legal programs staffed by separate personnel employed by separate legal entities in order to carry out analogous privately-funded secular First Amendment activities that go beyond the parameters of the federally-funded activities. Unlike the President’s faith-based initiative, LSC insists that careful accounting rules, supplemented by public disclaimers and the

²Federal agencies have hastened to carry out the faith-based initiative by proposing regulations that would implement both the Executive Order and the various charitable choice regimes passed by Congress since 1996. *See, e.g.*, 67 Fed. Reg. 77362-01, 77362 (Dec. 17, 2002) (explaining that proposed rules comport with both charitable choice provisions and the Bush Administration’s faith-based and community initiative); 67 Fed. Reg. 77368-01, 77368 (Dec. 17, 2002) (same). For example, on December 17, 2002, just five days after the Executive Order, the Department of Health and Human Services (“HHS”) published several proposed rules mirroring the non-separation provisions of the Executive Order. *See* 67 Fed. Reg. 77362-01, 77365 to 77366 (Dec. 17, 2002) (permitting recipients of federal Temporary Assistance to Needy Families (“TANF”) funding to use private funds for “inherently religious activities,” so long as the religious activities are conducted “separately, in time or location,” from TANF-funded services, and so long as the TANF recipients adhere to generally accepted accounting principles to ensure that no TANF funds are spent on religious activities); 67 Fed. Reg. 77368-01 (Dec. 17, 2002) (imposing similar requirements on recipients of federal Community Services Block Grant (“CSBG”) funds, and requiring them to segregate federal funds in a separate account); 67 Fed. Reg. 77350-01, 77358 to 77360 (Dec. 17, 2002) (imposing similar requirements on recipients of several streams of federal funding administered by HHS’ Substance Abuse and Mental Health Services Administration).

Additionally, a number of federal agencies are establishing faith-based offices to implement the Administration’s faith-based initiative. *See* Exec. Order No.13198, 66 Fed. Reg. 8497 (Jan. 29, 2001) (establishing centers for faith-based and community initiatives in the Departments of Justice, Education, Labor, Health and Human Services, and Housing and Urban Development); Exec. Order No. 13280, 67 Fed. Reg. 77145 (Dec.12, 2002) (establishing Centers for Faith-Based and Community Initiatives at the Department of Agriculture and the Agency for International Development).

minimal time or space separation requirements imposed by the Executive Order and its accompanying *Guidance*, and the charitable choice laws, are inadequate to assure that LSC resources do not support or appear to endorse a recipient's privately-funded First Amendment activity that goes beyond the scope of the federally-funded program. 45 C.F.R. § 1610.8.

As applied to plaintiffs, the combined effect of the two different sets of regulations is to favor privately-funded religious speech over analogous privately-funded secular speech in violation of the First Amendment.³ For example, in addition to receiving federal funds from LSC, several plaintiffs also receive direct federal funding from the Department of Justice (“DoJ”), the Department of Health and Human Services, and other instrumentalities of the federal government.⁴ As grantees of instrumentalities of the federal government, plaintiffs fall within the literal coverage of the President's Executive Order and its accompanying guidance, as well as Congress' charitable choice initiatives, in connection with the use of private funds to carry out overtly religious activities (such as prayer or overtly religious counseling of clients); but

³The Department of Justice and LSC inaccurately characterize plaintiffs' Establishment Clause challenge as claiming discrimination against secular groups in general, as opposed to discrimination against constitutionally protected secular activities. And they are wrong to imply that “[p]laintiffs' claim is . . . reduced to the notion that, under the Establishment Clause, the government may not regulate any secular activity unless it imposes an equally stringent regulation on religious activities.” Reply of Intervenor-Def. U.S.A. to Pls.' Supp. Mem. Regarding Exec. Order 13279 (“DoJ Br.”) at 7. Rather, plaintiffs' claim is that the government may not regulate *secular activities protected by the First Amendment* more stringently than it chooses to regulate analogous religious activities.

⁴*See* Decl. of John C. Gray, dated April 8, 2003 (plaintiff South Brooklyn Legal Services receives federal funding from DoJ, the Internal Revenue Service, and the Department of Health and Human Services (including TANF funds), as well as from a program established by the Ryan White Comprehensive AIDS Resources Emergency Act); Decl. of Andrew Scherer, dated April 8, 2003 (plaintiff Legal Services for New York City receives federal funding from the same sources and from the Department of Housing and Urban Development).

fall within the LSC's program integrity regulation in connection with the use of private funds to carry out secular First Amendment activities on behalf of clients (such as litigation or lobbying). Thus, if plaintiffs were to shift their privately-funded First Amendment activities from secular efforts to help their poor clients through class action litigation and lobbying, to religious efforts aimed at fostering divine intervention on their clients' behalf, the President's Executive Order and the charitable choice initiatives would assure them the right to engage in privately-funded First Amendment activities without the substantial expense and programmatic dislocation associated with creating a wholly separate program staffed by separate personnel in a physically separate location. If, however, plaintiffs persist in using their private funds for secular First Amendment activities like litigation and lobbying instead of prayer or overtly religious counseling, they must establish and maintain burdensome and expensive physically and programmatically separate programs to carry out the secular activities.⁵ Such a governmentally imposed dual regime that tilts so dramatically in favor of religious over analogous secular speech cannot survive analysis under either the Religion or Speech Clauses of the First Amendment.

1. The Differential Treatment Violates the Establishment Clause

Under the differential legal regimes governing privately-funded speech imposed by LSC and the President's faith-based initiative, federally-funded organizations, including plaintiffs, are

⁵The substantial economic and programmatic costs associated with establishing and maintaining physically separate programs staffed by separate personnel are set forth in the declarations accompanying the following documents: Mem. Supp. Pls.' Mot. for Prelim. Inj., filed Dec. 2001; Pls.' Mem. in Reply to Govt.'s Opp. to Mot. for a Prelim. Inj. & in Opp. to Govt.'s Mots. to Dismiss, filed June 19, 2002; Ltr. from David S. Udell to Hon. Frederic Block, U.S.D.J., dated Feb. 11, 2003; Ltr. from David S. Udell to Hon. Frederic Block, U.S.D.J., dated Mar. 6, 2003.

encouraged to use private resources effectively and efficiently to advance religion, but are actively discouraged from using private resources to engage in analogous secular First Amendment activities that are disfavored by the government. Such a discriminatory tilt toward religion is barred by the Establishment Clause. *See, e.g., Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (invalidating sales tax exemption limited to religious periodicals); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (invalidating requirement of belief in God as condition for holding public office).

In *Texas Monthly*, the Court invalidated a Texas law that granted a sales tax exemption to magazines with religious content, but required secular magazines to bear the tax. The Court reasoned that such a differential treatment of analogous secular and religious First Amendment activity constituted an impermissible establishment of religion. The Court noted that “a tax exemption *limited* to the sale of religious literature . . . offends our most basic understanding of what the Establishment Clause is all about.” 489 U.S. at 28 (Blackmun and O’Connor, JJ, concurring) (emphasis in original).

In case after case, the Court has recognized the neutrality principle asserted in *Texas Monthly*. For example, in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), the Court invalidated a New York statute that carved out a unique special school district for a religious minority as a violation of the obligation of neutrality imposed by the Establishment Clause. Similarly, in *Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Court invalidated a Connecticut statute requiring employers to provide employees with a day off on their religious Sabbaths, but not on analogous secular days, as an unconstitutional discrimination in favor of religion. It is impossible to distinguish the discriminatory benefit conferred on

religious activities by the combined impact of the LSC and faith-based regulations from the discriminatory activity condemned in *Texas Monthly*, *Kiryas Joel*, and *Thornton*.

The DoJ seeks to defend the President’s Executive Order, and presumably the rest of the faith-based initiative, as a legitimate “accommodation” of religion required (or at least justified) by the Free Exercise Clause. DoJ Br. at 8. But, as *Kiryas Joel* and *Thornton* demonstrate, whatever the constitutionality of the President’s faith-based initiative standing alone, it is impossible to argue that the Free Exercise Clause mandates (or justifies) government discrimination in favor of religion. Whenever government has elected to treat religion generously in order to respect Free Exercise values, the Supreme Court has insisted that analogous secular interests receive equivalent treatment. *E.g. Walz v. Tax Comm’n*, 397 U.S. 664 (1970) (upholding exemption of church from real estate taxes because analogous secular institutions also exempted); *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S. Ct. 2468 (2002) (upholding vouchers redeemable for parochial school tuition because vouchers also available for secular schools).⁶ For example, once Congress elected to respect Free Exercise values by recognizing a religiously based conscientious objection to the draft, the Supreme Court required that analogous secular concerns receive equivalent treatment in order to avoid violating the Establishment Clause. *See United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Gillette v. United States*, 401 U.S. 437 (1971).

⁶Of particular importance to this case, the *Zelman* Court noted that there were no “financial incentives” in the Cleveland voucher plan that skewed its benefits toward religious activities. 536 U. S. at ___, 122 S. Ct. at 2468. It is, of course, precisely the “financial incentives” created by the differential treatment of private funds under the President’s faith-based initiative and LSC’s program integrity regulation that create the unconstitutional tilt toward religion.

DoJ's effort to deploy *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), in defense of the discriminatory treatment of secular and religious speech is unavailing. In *Amos*, the Court upheld Congress's decision to exempt religious employers from aspects of Title VII dealing with religious discrimination in hiring, recognizing that it was virtually impossible to distinguish between employees who were engaged in core religious activities, and employees who were primarily engaged in peripheral secular activities. DoJ argues that because secular employers were not also exempted from Title VII, *Amos* stands for the proposition that government may treat religious entities more favorably than secular entities in order to "accommodate" religious needs. But, unlike the present case, there were no analogous secular interests at stake in *Amos*. No one argued in *Amos* that secular employers faced a dilemma similar to religious employers of distinguishing between core and peripheral employees. Indeed, no one argued in *Amos* that an equivalent secular moral opposition to complying with Title VII existed. However, where, as here, clearly analogous secular interests exist, the Supreme Court has made it abundantly clear in *Texas Monthly*, *Kiryas Joel*, *Thornton*, *Walz*, and *Zelman* that government may not rig its regulations to favor religious behavior without providing equivalent treatment to the analogous secular activity. Thus, government may, as in *Amos*, "accommodate" religion by acting to relieve religious groups of unique burdens not shared by secular actors. Government may, as in *Walz* and *Zelman*, accommodate religion by providing benefits to both secular and religious groups on non-discriminatory terms. But, under *Texas Monthly*, *Kiryas Joel* and *Thornton*, government may not, as here, erect a regulatory regime that treats religious activity generously, while simultaneously subjecting analogous First Amendment secular activity to expensive and burdensome regulations designed to discourage its performance.

2. The Differential Treatment Violates the Free Speech Clause

The combined effect of the dual regimes also unconstitutionally discriminates against secular speech. In fact, with the promulgation of the President's Executive Order in December, 2002, this case has been transformed into the precise converse of recent Supreme Court decisions invalidating government efforts to treat religious speech *worse* than secular speech. *E.g.*, *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

In both *Good News Club* and *Rosenberger*, the Supreme Court invalidated government regulatory schemes that encouraged secular speech, but that excluded religiously oriented speech from the government program. In *Good News Club*, the government program was after-hour access to public school premises by private groups wishing to sponsor events open to the general public. In *Rosenberger*, the government program was a direct subsidy of student publications at the University of Virginia. In both cases, secular speech was routinely assisted, while religiously-oriented speech was barred. The Court ruled in both cases that government regulatory schemes that treated secular speech better than religiously-oriented speech violate the First Amendment's ban on viewpoint discrimination. *See also* *Widmar v. Vincent*, 454 U.S. 263 (1981) (invalidating discriminatory access rules on college campus); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (invalidating discriminatory access to public school facilities).

In this case, government seeks to treat religious speech *better* than secular speech by permitting privately-funded religious speakers to function in close and economically efficient cooperation with their publicly funded colleagues (indeed, permitting a single speaker to perform

both secular and religious speech functions), while requiring identically situated secular speakers to cut themselves off from their publicly-funded colleagues by being forced to operate burdensome and expensive physically separate programs. Under *Good News Club* and *Rosenberger*, such an exercise in viewpoint-based discrimination is clearly unconstitutional.

Defendants, in response to plaintiffs' concerns over the combined impact of the faith-based initiative and LSC's program integrity regulation, make little or no effort to defend the differential legal treatment of privately-funded secular and religious speech on the merits; nor could they. It is hard to imagine a more flagrant violation of the religious neutrality requirements of the Establishment Clause, or a more dramatic example of viewpoint discrimination in violation of the Free Speech Clause. Instead, defendants rely exclusively on their contention that no differential treatment exists.

First, DoJ contends that the President's Executive Order and the LSC program integrity regulation do not constitute differential treatment because they each have different goals. In fact, however, each is deeply preoccupied with the same issue -- the appearance of government endorsement of privately-funded behavior.

DoJ argues that the purpose of the LSC rules is merely to ensure that LSC funding recipients are not identified with restricted activity, while the Executive Order has no such concern. DoJ Br. at 5-7. However, such an argument ignores both the mandates of the Establishment Clause, and the understanding of both LSC itself and of this Court that the principal justification for LSC's program integrity regulation is to ensure that the federal government does not appear to endorse certain privately-funded First Amendment activities. *See, e.g.*, LSC Br. dated May, 2002, at 29 n.12, 30, 31; LSC Br. dated June, 2002, p. 13; Ltr. from

Alan Levine to J. Block, dated Sep. 26, 1997, at 2, attached as Ex. 2 to Abel Decl. dated June 19, 2002; *Velazquez v. LSC*, 985 F. Supp. 323, 339-42 (E.D.N.Y. 1997), *rev'd in part on other grounds*, 164 F.3d 757 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001). Thus, the no-identification provision of the program integrity regulation, 45 C.F.R. § 1610.8(a)(3)(iv), is, and must be, read as a means to that end -- preventing the appearance of government endorsement -- and not as an end in itself. Similarly, a principal preoccupation of the President's Executive Order must, under existing Establishment Clause doctrine, be whether the close coordination of the federally-funded and privately-funded activities gives rise to an unconstitutional appearance of government endorsement of religion. *See Lynch v. Donnelly*, 465 U.S. 668 (1984) (discussing improper endorsement of religion); *Capitol Sq. Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (disclaimers sufficient to preclude improper endorsement).

Whether the President's Executive Order, standing alone, encourages such a close connection between government and religion as to violate the Establishment Clause ban on government endorsement of religion is beyond the scope of this case. What is clear -- and clearly raised by this case -- is that both the LSC regulation and the President's Executive Order are intimately concerned with the concept of endorsement, but adopt diametrically opposite approaches to the problem. The President's Executive Order is content to rely on disclaimers, careful bookkeeping and minimal time or space restrictions to assure that unconstitutional government endorsement of religion does not occur. LSC, conversely, insists upon burdensome and expensive prophylactic physical and personnel separation to guard against endorsement. The

two regimes simply cannot be simultaneously applied without unconstitutionally favoring religious speech.⁷

Second, defendants seek to wall-off LSC's program integrity regulation from the President's Executive Order by arguing that as long as LSC is prepared to treat privately-funded religious and non-religious speech equally, the rest of the federal government may operate a regime that blatantly favors religious speech without causing LSC's regulations to violate the First Amendment. *See* DoJ Br. at 5; Ltr. from Stephen L. Ascher to Hon. Frederic Block, U.S.D.J., Mar. 19, 2003, at 2.

The short answer to defendants' effort to insulate LSC from the President's faith-based initiative is that LSC is not free to treat religious and non-religious speech equally. Since many LSC grantees, including plaintiffs, receive funds directly from the DoJ, the Department of Health and Human Services, and other instrumentalities of the federal government, the use of their private funds to advance overtly religious activities is governed squarely by the provisions of the President's Executive Order and the charitable choice initiatives. Thus, LSC has power to impose its harsh program integrity regulation only on plaintiffs' use of private funds to advance secular First Amendment purposes. In compliance with President's Executive Order and the charitable choice initiatives, LSC must allow its grantees to use their private funds in a

⁷The adoption of such a flexible approach to endorsement by the President's Executive Order also makes it impossible for LSC to argue that the rigid prophylactic stance adopted by its regulation is genuinely necessary to advance any legitimate government interest. Thus, entirely apart from the Establishment Clause issues raised by the President's Executive Order, its promulgation destroys the only justification offered by the government during this extended litigation. *See* Pls.' Mem. in Reply to Govt.'s Opp. to Mot. for Prelim. Inj. & in Opp. to Govt.'s Mots. to Dismiss at 32-35; Ltr. from David S. Udell to Hon. Frederic Block, U.S.D.J., dated Feb. 11, 2003, at 1-3.

convenient and efficient manner to fund religious speech. LSC continues, however, to insist that its grantees operate burdensome and expensive physically separate programs in order to use private funds to engage in secular speech. Such differential treatment of privately-funded religious and non-religious speech is a *per se* violation of the requirement of religious neutrality.

Moreover, even if LSC were free to ignore the President's Executive Order and the charitable choice initiatives within the four corners of its own turf, the appropriate baseline for determining whether discriminatory government speech regulation is taking place is not the four corners of a given program, but across the entire federal government. Otherwise, government could avoid any ban on discrimination by slicing a discriminatory program into bite-sized, separately administered units within which no discrimination occurs, even though, viewed as a whole, discrimination is present in the government. In fact, whenever allegations of unlawful discrimination are at issue, the Supreme Court has refused to permit the inquiry to be frozen at an artificial boundary line erected to insulate discriminatory treatment from judicial scrutiny. Instead, the Court has insisted that the relevant baseline be the government as a whole. *E.g.*, *Bush v. Gore* 531 U.S. 98 (2000) (refusing to measure discriminatory voting procedures on county-by-county basis; insisting on treating entire state as baseline).

Since the Supreme Court has unequivocally ruled that LSC is a federal government actor for the purpose of First Amendment review,⁸ its regulations may not be viewed in isolation from parallel regulation of analogous activity elsewhere in the federal government for the purpose of

⁸ *See, generally, LSC v. Velazquez*, 531 U.S. 533 (2001). *See also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995) (ruling that the Amtrak system is subject to the First Amendment).

measuring whether the federal government is engaged in unconstitutionally discriminatory speech regulation.

When LSC's regulations are viewed in the larger context of the federal government's approach to the issue of regulating privately-funded speech by federal grantees, the unconstitutionally discriminatory pattern is readily apparent. The issue of privately-funded speech by federal grantees has arisen in three contexts in the recent past. In the context of privately-funded religious speech, the federal government has enunciated a generous set of rules codified in the President's Executive Order and the charitable choice initiatives. In the context of privately-funded legal services, the federal government, acting through Congress and LSC, has enunciated an extremely onerous set of rules codified in LSC's program integrity regulation. In the context of privately-funded library services, the federal government has enunciated equally burdensome rules requiring libraries to operate privately-funded unrestricted Internet access terminals in a separate physical facility from federally-funded restricted Internet terminals.⁹

The pattern is starkly discriminatory. The federal government treats privately-funded religious speech by its grantees far more favorably than privately-funded secular speech, both because the government apparently seeks to favor religion, and because the government seeks to

⁹The constitutionality of the government's effort to condition financial support to libraries on their agreement to restrict access to the Internet is currently pending before the Supreme Court. *American Library Ass'n v. United States*, 201 F. Supp. 2d 401 *E.D. Pa. 2002) (three-judge court), *probably jurisdiction noted*, 123 S. Ct. 551 (2002). Privately-funded unrestricted Internet terminals must, under the federal legislation, be placed in a separate physical location from the federally-funded restricted Internet terminals. *See 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. The parties do not appear to have raised the discriminatory treatment of privately-funded religious speech under the President's Executive Order.

handicap privately-funded secular speech that it does not like. Such a regime of viewpoint-based discriminatory speech control cannot survive First Amendment analysis.

Conclusion

For the above-cited reasons, the Court should enter a declaratory judgment ruling that the combined application to plaintiffs of the President's Executive Order, the charitable choice initiatives, and the LSC program integrity regulation violates the First Amendment. While the Court would be empowered immediately to enjoin the application of the LSC regulations to plaintiffs, plaintiffs suggest that the government be given an opportunity to resolve the discriminatory treatment within a reasonable period of time, either by amending the President's Executive Order to impose greater restrictions on privately-funded religious speech, or amending the LSC regulations to permit greater flexibility for privately-funded secular speech. If the federal government persists in maintaining an unconstitutional dual system that favors religion, the Court should enjoin one or both of the offending regulations.

Dated: New York, New York
April 10, 2003

Respectfully submitted,

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