

05-0340-cv

05-0369-cv (Con), 05-0787-cv (Con), 05-0792-cv (Con), 05-0925-cv (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BROOKLYN LEGAL SERVICES CORP. B, LEGAL SERVICES FOR NEW
YORK CITY, FARMWORKERS LEGAL SERVICES OV NEW YORK, INC.

Plaintiff-Appellee-Cross-Appellants,

COMMUNITY SERVICE SOCIETY OF NEW YORK, INC., PEGGY EASTMAN,
LAUREN SHAPIRO, on behalf of each, and on behalf of all similarly situated
individuals,

namely, attorneys employed or ormerl employed by entities receiving funds from the
Legal Services Corporation who with to be free to represent indigent, ANDREW J.
CONNICK, NEW YORK FOUNDATION,

Plaintiff-Cross-Appellants

(Caption continued on inside front cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN
DISTRICT OF NEW YORK, THE HONORABLE FREDERIC BLOCK

BRIEF FOR INTERVENOR-APPELLANT UNITED STATES OF AMERICA

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CARMEN VELAZQUEZ, WEP WORKERS TOGETHER, NEW YORK CITY
COALITION

TO END LEAD POISONING, CENTRO INDEPENDIENTE DE TRABAJADORES
AGRICOLAS, GREATER N.Y. LABOR-RELIGION COALITION, LUCY A.
BILLINGS, OLIVE KAREN STAMM, JEANETTE ZELHOF, ELISABETH
BENJAMIN, JILL ANN BOSKEY, C. VIRGINIA FIELDS, Council Member,
GUILLERMO LINARES, Council Member, STANLEY MICHELS, Council Member,
ADAM CLAYTON POWELL, JR. IV, Council Member, LAWRENCE SEABROOK,
Senator, SCOTT M. STRINGER, Assemblyman, on behalf of themselves and all
similarly situated individuals; namely, individuals who have provided public or private
non-federal funding to entities that also receive funds from the Legal Services
Corporation, DAVID F. DOBBINS, LISA E. CLEARY, DAVID W. ICHEL, DAVID G.
KEYKO, MFY LEGAL SERVICES, BRONX LEGAL SERVICES, INC., on their own
behalf and on behalf of their clients,

Plaintiffs,

v.

LEGAL SERVICES CORPORATION,

Defendant-Appellant-Cross-Appellee,,

UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellant-Cross-

Appellee.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 05-0340, 05-0369, 05-0787, 05-0792, 05-09250

CARMEN VELAZQUEZ, ET AL.,

Plaintiffs-Appellees,

v.

LEGAL SERVICES CORPORATION,

Defendant-Appellant,

and

UNITED STATES OF AMERICA,

Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
THE HONORABLE FREDERIC BLOCK

BRIEF FOR INTERVENOR-APPELLANT UNITED STATES OF AMERICA

PRELIMINARY STATEMENT

The decisions appealed from were rendered by the Hon. Frederic Block, United States District Judge for the Eastern District of New York. The decisions are reported at 349 Supp. 2d 566 (S.D.N.Y. 2004) and 356 F. Supp. 2d 267 (S.D.N.Y. 2005).

JURISDICTIONAL STATEMENT

This appeal stems from the district court's decision granting in part plaintiffs' motion for a preliminary injunction preventing the Legal Services Corporation from enforcing portions of its program integrity regulation, 45 C.F.R. § 1610.8, against plaintiffs. The district court entered its injunction on December 20, 2004. The United States filed a notice of appeal (Case No. 05-0787) on February 17, 2004, within the 60-day period of Fed. R. App. P. 4(a)(1)(B). The district court entered an order amending its injunction on February 23, 2005, and the United States filed a notice of appeal from that order (Case No. 05-0792) on March 4, 2005. This Court's jurisdiction rests upon 28 U.S.C. § 1292(a)(1), which authorizes appeal from an order granting or denying an injunction.

STATEMENT OF THE ISSUE

Whether the district court erred by invalidating, on First Amendment grounds, the “program integrity” regulations issued by the Legal Services Corporation, which require recipients of federal funds to maintain “physical and financial separation” between the federally-funded entity and any affiliate that engages in restricted activity with non-federal funds.

STATEMENT OF THE CASE

These two consolidated cases present constitutional challenges to certain restrictions imposed by Congress on the lobbying and litigation activities in which a legal assistance program may engage if it receives funding from the Legal Services Corporation (“LSC”). The restrictions, which apply to non-federal as well as federal LSC funds, prohibit LSC grantees from engaging in litigation on certain topics (such as abortion, welfare reform, and redistricting), participating in class action suits, lobbying, seeking attorneys’ fees, soliciting clients, and (in certain circumstances) representing undocumented aliens and prisoners. LSC regulations permit grant recipients to create and control “affiliate” organizations that may engage in restricted activities, provided the two organizations maintain a degree of physical and financial separation under LSC's “program integrity” regulation, 45 C.F.R. § 1610.8.

Plaintiffs in the first action (*Velazquez v. LSC*) include lawyers, clients and donors of legal services organizations who allege that the restrictions impose unconstitutional conditions on the receipt of funds in violation of their First Amendment rights, and violate the Tenth Amendment, due process and equal protection principles. The district court denied their request for a preliminary injunction, and plaintiffs brought their facial challenge to this Court. This Court rejected plaintiffs' argument that the restrictions imposed “unconstitutional

conditions” upon the exercise of First Amendment rights, holding that Congress may impose burdens upon the recipients of federal funds as long as it leaves adequate alternative channels for protected expression. The Court held that plaintiffs' contention that LSC regulations make it too difficult to form affiliates to engage in restricted activities was insufficient to sustain a facial challenge. This Court also rejected plaintiffs' assertion that restrictions on lobbying and attempting to influence government action violate their First Amendment rights.

However, this Court held that, while a general restriction prohibiting grantees from participating in litigation with respect to welfare reform is valid, an exception to that rule permitting representation of a client seeking welfare benefits only if the relief does not involve an effort to change existing law is an impermissible viewpoint restriction. The Supreme Court affirmed that holding, and denied plaintiffs' petition for certiorari with respect to the rest of this Court's decision.

On remand, the *Velazquez* plaintiffs continued their facial challenge to several specific restrictions not addressed in the previous appeal, and pressed an “as applied” challenge to the program integrity regulation. Meanwhile, a new set of plaintiffs, including LSC grantees, former LSC grantees and private donors, brought an action (*Dobbins v. LSC*) challenging the restrictions. The two cases were consolidated.

The district court granted the defendants' motion to dismiss plaintiffs' claims under the Tenth Amendment, as well as their facial challenges to the restrictions on class actions, attorneys' fees, and solicitation. However, the district court granted in part plaintiffs' motion for a preliminary injunction on their as-applied challenge to the program integrity regulation. Adopting an “undue burden” test that weighs the “nature of the right impacted” with the “significance of the Government's interests,” the district court held that the government's interests in preventing the indirect subsidization of restricted activities and the appearance of endorsement of those activities can be addressed through “simple timekeeping and accounting methods” and “simple prophylactic measures” such as disclaimers. The district court therefore held that LSC could not require grantees and their affiliates to use separate equipment and office space, with the exception of requiring separate areas open to the public (such as reception areas and conference rooms). The district court also enjoined LSC from prohibiting the sharing of lawyers between grantees and their affiliates.

STATEMENT OF THE FACTS

A. The Legal Services Corporation Statute And The Current Funding Restrictions.

In 1974, Congress enacted the Legal Services Corporation Act of 1974 ("LSC Act"), 42 U.S.C. §§ 2996, *et seq.*, creating the LSC as an independent, non-profit

corporation to provide funding "to qualified programs furnishing legal assistance to eligible clients." 42 U.S.C. § 2996e(a)(1)(A). The LSC distributes funds annually to organizations who submit applications describing their proposed legal services activities. *Id.* §§ 2996b(a), 2996e(a).

Programs that receive LSC funding have long been subject to restrictions on how the money could be spent. For instance, the 1974 Act prohibited recipients from using LSC funds to campaign for any candidate, to advocate or oppose any ballot measures, or to "support or conduct training programs for the purpose of advocating public policies or encouraging political activities." *Id.* §§ 2996e(d)(3), (d)(4), 2996e(b)(6). The 1974 Act also prohibited recipients from providing legal assistance in proceedings concerning nontherapeutic abortions, desegregation, or military desertion. *Id.* § 2996f(b)(8)-(10). In 1976, these restrictions were applied to privately-donated funds of the recipient, except for tribal and "interest on lawyers trust account" (IOLTA) funds. *See* 41 Fed. Reg. 25901 (1976); 45 C.F.R. § 1610 (1976). Since 1980, LSC authorization has continued through annual appropriations bills.

In 1996, facing threats to eliminate the LSC altogether, Congress adopted a compromise bill that expanded the scope of restrictions on the activities of LSC grantees. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996,

Pub. L. No. 104-134, 110 Stat. 1321, § 504(d)(1) ("1996 Act"). Congress reenacted the restrictions again in the Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, 110 Stat. 3009, § 502(a) ("1997 Act").

The acts restrict LSC grant recipients in a number of areas. First, LSC grantees may not engage in specified political activity, including: advocating or opposing any reapportionment of a legislative, judicial, or elective district on any level, 1996 Act, § 504(a)(1); influencing the "issuance, amendment, or revocation of any executive order," *id.* § 504(a)(2); attempting "to influence any part of any adjudicatory proceeding of any Federal, State, or local agency" if the proceeding is designed to formulate agency policy "of general applicability and future effect," *id.* § 504(a)(3); attempting to influence "the passage or defeat of any legislation, constitutional amendment, referendum, initiative * * * of Congress or a State or local legislative body," *id.* § 504(a)(4); and conducting a training program "for the purpose of advocating a particular public policy or encouraging political activity," *id.* § 504(a)(12). Congress made clear, however, that these restrictions should not be construed to prohibit a recipient from using non-LSC funds "to comment on public rulemaking or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body, or committee * * *." *Id.* § 504(e).

The acts also prohibit LSC grant recipients from representing certain parties in specified circumstances. Thus, recipients may not: represent undocumented aliens except in cases of domestic violence, *id.* § 504(a)(11); 1997 Act, § 502(a)(2)(c); "participat[e] in any litigation on behalf of a person incarcerated in any Federal, State, or local prison," 1996 Act, § 504(a)(15); or represent people allegedly engaged in illegal drug activity in public housing eviction proceedings, *id.* § 504(a)(17). Finally, the acts contain several litigation restrictions, which prohibit recipients from: initiating or participating in class action lawsuits, *id.*, § 504(a)(7); litigating or lobbying in an effort to reform the federal or state welfare laws or systems, *id.* § 504(a)(16); claiming or collecting attorney's fees, *id.* § 504(a)(13); participating "in any litigation with respect to abortion," *id.* § 504(a)(14); and representing or referring a client to another LSC grantee as a result of "in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action," *id.* § 504(a)(18).

Congress applied these prohibitions not only to recipients' use of LSC funds, but also to their use of non-federal funds from state and local governments and private donors. *See* 1996 Act, §§ 504(d)(1),(2), 110 Stat. at 1321-42, 1321-143. In addition, Congress also required recipients to notify any private party who provides

funds "that the funds may not be expended for any purpose prohibited" by the statute. *Id.* § 504(d)(1).

B. The LSC's Program Integrity Regulation.

Initial regulations issued by LSC, coupled with pre-existing "program integrity" regulations, prohibited LSC grantees from engaging in any restricted activity, even through legally distinct affiliates. 61 Fed. Reg. 63749, 63752 (1996). However, LSC amended the regulations a year later to address "constitutional concerns" raised by a district court in Hawaii. 62 Fed. Reg. 27696 (1997). Under the amended regulation, an affiliate of an LSC grantee may spend non-federal funds on restricted activities as long as the affiliate maintains its "objective integrity and independence" from the grantee. 45 C.F.R. § 1610.8(a). Objective integrity and independence is deemed to exist where (1) the affiliated organization is "legally separate" from the grantee; (2) the affiliate "receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities;" and (3) the affiliate is kept "physically and financially separate" from the grantee. *Id.* § 1610.8(a)(1)-(3).

According to the new regulations, "[w]hether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts." *Id.* § 1610.8(a)(3). The relevant factors include, "but are not limited to," (1) "the existence of separate personnel;" (2) "the existence of separate

accounting and timekeeping records;" (3) "the degree of separation from facilities in which the restricted activities occur, and the extent of such restricted activities;" and (4) "the extent to which signs and other forms of identification which distinguish the recipient from the [affiliated] organization are present." *Id.* § 1610.8(a)(3)(I)-(iv).

In the wake of the new regulation, the district court that had initially raised constitutional questions upheld the Acts, rejecting the contention that the restrictions impose unconstitutional conditions on the exercise of First Amendment rights. *Legal Aid Society of Hawaii v. Legal Services Corp.*, 981 F. Supp. 1288, 1293-98 (D. Haw. 1997). The Ninth Circuit (per Justice White, ret.) affirmed. *Legal Aid Society of Hawaii v. Legal Services Corp.*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 525 U.S. 1015 (1998) (*LASH*). Recognizing that "Congress has broad power to appropriate funds and define the limits of programs supported by public funds," the court of appeals held that "neither the congressional enactments nor the implementing regulations infringe on First Amendment rights." *Id.* at 1024.

C. The Velazquez Litigation and the Previous Appeal.

This case began in January 1997, when the *Velazquez* plaintiffs filed an action challenging the constitutionality of the LSC restrictions. The *Velazquez* plaintiffs include a former LSC grantee, several clients, lawyers employed by LSC grantees, and officials employed by state and local government entities that have provided non-

federal monies to LSC grantees. JA 77-95. They alleged that the statutory restrictions and the LSC's implementing regulation facially violate the First, Fifth and Tenth Amendments. JA 106-11.

In December 1997, the district court denied the *Velazquez* plaintiffs' motion for preliminary injunction. *Velazquez v. Legal Services Corporation*, 985 F. Supp. 323 (E.D.N.Y. 1997) ("*Velazquez I*"). The court held that the new LSC regulations provided for adequate alternative channels through which plaintiffs could engage in otherwise prohibited activity, and therefore did not impose unconstitutional conditions upon LSC grantees.

Plaintiffs appealed, pressing their challenge to the LSC program integrity rules as well as challenges to specific substantive restrictions. This Court affirmed in part and reversed in part. *Velazquez v. Legal Services Corporation*, 164 F.3d 757, 760 (2d Cir. 1999) ("*Velazquez II*"). The Court rejected plaintiffs' argument that the LSC restrictions create "unconstitutional conditions" by unreasonably burdening LSC grantees' use of nonfederal funds to engage in activity protected by the First Amendment. The Court held that "[j]ust as Congress is entitled to provide a limited range of medical services under Title IX [as in *Rust v. Sullivan*, 500 U.S. 173 (1991)], it is free to offer a limited menu of legal services under the LSCA." *Id.* at 765. And "Congress may burden the First Amendment rights of recipients of government

benefits if the recipients are left with adequate alternative channels for protected expression.” *Id.* at 766.

With respect to plaintiffs' contention that the creation of alternative channels of communication through an affiliate imposes “wasteful” and “extraordinary” burdens upon LSC grantees, the court of appeals concluded that these allegations “are insufficient to sustain a *facial* challenge.” *Id.* at 767 (emphasis in original). The court stated that “[i]t appears likely that LSC grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty.” *Ibid.* The court noted, however, that “[a]ny grantee capable of demonstrating that the 1996 restrictions in fact unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act.” *Ibid.*

Turning to plaintiffs' claims of viewpoint discrimination, the court of appeals rejected plaintiffs' assertion that the restrictions on lobbying and attempting to influence a rulemaking proceeding violate the First Amendment. *Id.* at 767-68. The court also held that the general provision prohibiting grantees from participating in litigation or lobbying with respect to welfare reform is viewpoint neutral. *Id.* at 768-69. However, the court held that an exception to that provision allowing representation of a client seeking benefits from a welfare agency only if the relief

does not involve an effort to amend or change existing law is an impermissible viewpoint restriction. *Id.* at 769-72.

The Supreme Court subsequently affirmed this Court's determination that the restriction on challenges to existing welfare reform law is invalid. *Velazquez v. Legal Services Corporation*, 531 U.S. 533 (2001). The Court then denied the plaintiffs' petition for certiorari challenging the Second Circuit's rejection of their additional claims. 532 U.S. 903 (2001).

D. Proceedings On Remand: The Dobbins Complaint, The Consolidation, And The As Applied Challenge.

After the Supreme Court's decision, the *Velazquez* plaintiffs filed a second motion for preliminary injunction in district court in which they argued that: (1) restricting the use of funds provided to LSC grantees by state and local governments violates the Tenth Amendment; (2) the statutory restrictions on litigation of class actions, claims for attorneys fees, and claims resulting from unsolicited advice to take legal action are facially invalid under the First Amendment; and (3) the LSC's program integrity regulation is invalid as-applied to these plaintiffs because it unduly burdens their First Amendment rights. At the same time, several other LSC grantees, former grantees, and private donors filed a separate action styled *Dobbins v. Legal Services Corporation*, No. 01-CV-8371 (E.D.N.Y.), JA 113-32, and joined in the

Velazquez plaintiffs' request for a preliminary injunction. The United States intervened in the *Dobbins* case to defend the constitutionality of the statute and regulations. The two actions subsequently were consolidated.

The LSC and the United States both moved to dismiss the plaintiffs' as-applied challenge to the program integrity regulation for lack of standing because, among other things, these plaintiffs had never sought approval of an affiliate arrangement. The district court subsequently directed three of the plaintiffs to submit proposals to create affiliates. After the LSC rejected the plaintiffs' initial proposal as merely "a generalized outline of a set of hypothetical affiliations," the plaintiffs submitted a new "Clarified Proposal." JA 755-65, 804-08. The three plaintiffs proposed to create "affiliates" that would occupy the same offices, and use the same attorneys, the same support staff, and the same equipment as the three LSC recipients. JA 804-08. As proposed, there would be "no physical separation beyond that degree of physical separation required of other non-profit federal grantees" by the President's Executive Order governing faith-based organizations. JA 808.

More specifically, plaintiffs proposed that the affiliate would "conduct its LSC-restricted activities either in a separate room from any room in which its LSC grantee affiliate is simultaneously conducting LSC-approved activities, or in the same room but at separate times." JA 808. The employees would also keep either records of

time spent working for the recipients and their affiliates or "personnel activity reports," and charge the cost to the appropriate entity. *Ibid.* Similarly, plaintiffs proposed to apportion the fair value of expenses between the recipients and their affiliates in accordance with generally accepted accounting principles. JA 805-06. LSC rejected the proposal, concluding that "the proposed 100% sharing of physical space, equipment and staffs, demonstrate that the proposal as a whole fails to provide physical and financial separation." *See* JA 821.

E. The District Court's Decision.

Both the LSC and the United States moved to dismiss all of the claims. Meanwhile, both the *Velazquez* and the *Dobbins* plaintiffs moved for preliminary injunctive relief. The district court granted the defendants' motion to dismiss the plaintiffs' claims under the Tenth Amendment, as well as their facial challenge to the class action, attorneys fees, and solicitation restrictions in the statute. JA 989-1027.

However, the court granted the plaintiffs' motion for preliminary injunction with respect to their as-applied First Amendment challenge to the program integrity regulation. The court held that the First Amendment prohibits the LSC from requiring more than "accounting and financial separation" between LSC grantees and their affiliates (with the exception of separate conference rooms and receptions areas).

The court reached this result by adopting an “undue burden” standard for determining whether adequate alternative channels exist for engaging in restricted activity, rejecting the argument of the LSC that the regulation is valid as long as it does not make it effectively impossible to engage in alternative channels of communication. JA 1030-33. The court reasoned that *dicta* in this Court's *Velazquez II* decision, which noted that a grantee who can show that the restrictions “unduly burden its capacity to engage in First Amendment protected activity remains free to bring an as-applied challenge” (164 F.3d at 767), was “obviously designed to guide the district court * * *.” JA 1033. The district court then examined “undue burden” standards adopted in cases involving abortion rights, the Commerce Clause, and ballot access, and concluded on the basis of those cases that the undue burden standard requires an examination of “the nature of the right impacted and the nature and significance of the Government's interests in burdening that right,” with the court weighing “one against the other to determine whether the balance has been properly struck * * *.” JA 1038.

The district court applied this balancing approach in light of a “heightened view of the nature of speech and the other constitutional precepts at the heart of lawyering.” JA 1044. With respect to the burdens of creating separate affiliates under the program integrity regulation, the district court asserted that the plaintiffs

“point out the obvious – that to require the duplication of programs, office space, equipment, personnel, and administrative structures,” would impose substantial financial burdens. JA 1044-45. The court also noted that the plaintiffs claimed that the restrictions would disrupt their ability to represent their clients by restricting communication and coordination among the staff of the separate entities. JA 1045.

The district court then found only “two legitimate justifications” for the LSC’s decision to adhere to its program integrity regulation: “preventing the appearance of endorsement and the indirect subsidization of restricted activities.” JA 1060. The court then proceeded to discount the government’s interests on both counts. First, the court reasoned that because, unlike the program at issue in *Rust*, the LSC program was designed to facilitate private speech, “the Government’s interest in preventing the appearance of endorsement is much less weighty here than it was in *Rust*.” JA 1051. The court noted that, in Establishment Clause cases, “the Supreme Court has noted that disclaimers may suffice” to address the government’s interest, and also pointed out that in the context of federal “charitable choice” programs funding religious organizations that perform social services, “Congress has required only minimal bookkeeping separation to satisfy its concern with preventing the appearance of an endorsement of religion.” JA 1052-54. The court held that “the Government has not explained why its interest in preventing the public appearance of endorsement is so

weighty, given that the LSC program was designed to facilitate private speech, that it cannot be accommodated by employing simple prophylactic measures.” JA 1055. The court then minimized the government's interest in avoiding indirect subsidization of restricted activities, holding that those interests can be accommodated “by simple timekeeping and accounting methods.” JA 1056-57.

Turning to the specific elements of the plaintiffs’ revised affiliate proposals, the district court concluded that there is “simply no legitimate justification” for requiring the use of separate equipment, since any indirect subsidization “can fully be addressed through accounting mechanisms.” JA 1061-62. The court agreed, however, that “some degree of separate physical premises is justified to avoid the appearance of endorsement,” but applied that reasoning only to areas open to the public (such as reception areas and conference rooms). JA 1062. With respect to non-public areas, the court held that there was no justification for requiring separation, noting that the sharing of costs “can readily be accommodated by simple timekeeping and accounting methods.” *Ibid.* The court then held that LSC could not prohibit the sharing of lawyers between grantees and their affiliates as long as they “keep accurate records of the time served and monies spent on each file so that their salaries and costs can be properly apportioned, and make the nature of their retention clear to their clients, adversaries and the courts.” JA 1062-63.

The court therefore enjoined the LSC "from withholding federal funds from plaintiff-grantees and from precluding plaintiff-grantees from forming affiliates with their non-federal funds, provided that the plaintiffs comply with the terms and conditions of their Clarified Proposal, as qualified by the Court." JA 1065.

In granting the preliminary injunction, the district court ordered the parties to notify the court of any reason the injunction would not be converted into a permanent injunction. JA 1066. Plaintiffs responded by stating that a permanent injunction should issue, but that the injunction should be modified to delete the requirement of separate reception areas and conference rooms, as well as the requirement that lawyers handling a case containing both restricted and non-restricted components identify themselves as lawyers for the affiliate and charge all time to the affiliate. LSC and the government objected to these proposed modifications, although they did not object to the consideration of a permanent injunction without further proceedings.

In a subsequent opinion, the district court declined to modify the injunction to delete the requirement of separate public areas, and also declined to enter a permanent injunction. JA 1087-96. However, the court clarified its order to make clear that a lawyer working for an LSC grantee must withdraw from representation if the client becomes ineligible or the case "comes to involve a restricted component" during the course of the litigation. JA 1095.

SUMMARY OF THE ARGUMENT

It is well settled that Congress may restrict a federal fund recipient's use of non-federal funds that are spent along with federal funds, as long as the recipient is left with adequate alternative channels of expression, such as the ability to form an “affiliate” organization to receive and spend non-federal funds without restriction. On the basis of this principle, this Court in *Velazquez II* rejected plaintiffs’ facial challenge to the LSC funding restrictions, including their challenge to the program integrity regulation, noting that LSC grant recipients can exercise their First Amendment rights by creating a separate affiliate that complies with the LSC’s program integrity regulation.

Having failed in their facial challenge, plaintiffs pressed their as-applied challenge, asserting, among other things, that it would be unduly burdensome to require them to engage in restricted litigation through affiliates that maintain physically and financially separate from the LSC grantee. Of course, many legal service providers, both large and small, have successfully formed affiliates in accordance with LSC's program integrity rules. There is little doubt that the plaintiff legal services organizations in this case have the resources to create and control affiliates that comply with the regulation; they have simply chosen not to. Instead, plaintiffs rest their as-applied challenge to the statute and regulation upon the

assertion that any expenditure of resources that goes beyond mere accounting separation is too burdensome to satisfy First Amendment requirements.

In granting plaintiffs' request for a preliminary injunction, the district court held that the First Amendment prohibits the LSC from requiring more than “accounting and financial separation” between LSC grantees and their affiliates (with the minor exceptions of conference rooms and reception areas). Under the district court's injunction, an LSC grantee may engage in activities otherwise restricted by the Act through an affiliate that shares the same staff, occupies the same offices, and uses the same equipment, operating very much like any full-service law firm whose attorneys maintain “accounting and financial separation” simply by billing clients separately for their time and the use of the firm's equipment and facilities. The district court reached this result by holding that all of the government's interests are fully addressed through mere paper separation – reasoning that applies regardless of the identity of the grantee, its resources, or its ability to comply with the program integrity regulation. This holding is fundamentally flawed and must be reversed.

1. First, the district court erred in adopting an “undue burden” test that strays from the dispositive question at issue, namely, whether the burden of compliance is so great that it effectively precludes adequate alternate channels of expression. In place of that inquiry, the district court substituted a balancing test that weighs the

purported burden on the LSC grantee against the government's asserted interests. The court then proceeded to apply that inquiry without regard to the costs of compliance to any particular grant recipient – converting what should be an as-applied challenge into a ruling that invalidates much of the program integrity rule on its face.

The district court's approach thus renders meaningless this Court's observation in *Velazquez II* that it is “likely that LSC grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty.” 164 F.3d at 767. Under the district court's approach, however, a grantee's substantial non-federal resources mean nothing because the government's interests can be met through less restrictive alternatives. That approach not only incorrectly revives the compelling interest standard rejected by the Supreme Court and by this Court, but also loses site of the very nature of the inquiry – to determine whether a grantee has adequate alternative channels of expression.

The district court's approach is inconsistent with the Ninth Circuit's decision in *LASH*, 145 F.3d at 1026, which holds that the “proper constitutional test” focuses on “whether the regulations effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program.” Had the court

applied the correct standard, it would have had no choice but to reject plaintiffs' claims, since none of the plaintiffs have shown that compliance with the program integrity regulation effectively precludes the creation of an affiliate to engage in activity outside the scope of the LSC program.

2. In addition to misapplying the “undue burden” standard in general, the district court fundamentally misunderstood the nature of the government's interests furthered by the program integrity regulation. In concluding that accounting methods and billing practices would be sufficient to address any concerns regarding the indirect funding of restricted activities, the district court overlooked another important interest: ensuring that scarce federal resources are provided only to those legal service providers whose sole focus is on the provision of specified legal services to the poor.

Congress wished to fund law offices that would focus on the “core mission” of the program without the distractions of activities that it believed are inconsistent with, and detract from, that mission. That interest cannot be addressed solely through accounting mechanisms. Under the district court's holding, the LSC must provide funding for general law offices that engage in myriad activities, using the same office space, the same equipment and the same lawyers working on both on LSC-funded cases and restricted cases. However, it is not unconstitutional for Congress to take

precautions designed to ensure that lawyers working on LSC-funded cases maintain their primary focus on the enterprise for which they have agreed to work, so long as adequate alternative speech channels remain open.

ARGUMENT

THE DISTRICT COURT ERRED IN ENJOINING THE LSC'S PROGRAM INTEGRITY RULE

A. Introduction and Standard of Review.

The district court in this case granted a preliminary injunction that prevents LSC from enforcing the program integrity regulations issued pursuant to the Legal Services Corporation Act. This Court reviews the grant of a preliminary injunction for abuse of discretion. *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 (2d Cir. 2001). A district court abuses its discretion “when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision--though not necessarily the product of a legal error or a clearly erroneous factual finding--cannot be located within the range of permissible decisions.” *Id.* at 169

Obtaining a preliminary injunction normally requires a showing of irreparable harm and either (1) a probability of success on the merits or (2) sufficiently serious questions on the merits that make the case a fair ground for litigation and a balancing

of hardships decidedly in favor of the moving party. *Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 142 (2d Cir. 1997). Where a party seeks to enjoin the operation of a federal statute or regulation, however, a more rigorous standard applies. Because a preliminary injunction against enforcement of federal law "is in reality a suspension of an act," *Heart of Atlanta Motel v. United States*, 85 S. Ct. 1, 2 (1964) (Black, Circuit Justice), there is a presumption that a challenged statute "should remain in effect pending a final decision on the merits by th[e] Court." *Turner Broadcasting Sys. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, Circuit Justice).

Thus, "where a preliminary injunction is sought against the enforcement of governmental rules, the movant may not invoke the 'fair ground for litigation standard' but must show 'likelihood of success.'" *Velazquez II*, 164 F.3d at 763 (citation omitted). This more rigorous standard of review "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Able v. United States*, 44 F.3d 128, 130 (2d Cir. 1995) (per curiam).

As discussed below, the district court's decision granting a preliminary injunction cannot be squared with the precedents of the Supreme Court and of this

Court. While purporting to rule on plaintiffs’ “as applied” challenges, the district court in fact adopted an approach that facially invalidates the bulk of the program integrity regulation regardless of the circumstances facing any particular grant recipient. In the guise of applying an “undue burden” test, the district court in fact applied a “least restrictive alternative” approach that loses sight of the dispositive question governing the constitutionality of a program such as this: whether the program leaves “adequate alternative channels” for the exercise of First Amendment rights. And the district court went on to analyze that approach on the basis of a fundamental misunderstanding of the important government interests that support the LSC restrictions in general and the program integrity regulation in particular.

As a result of the district court's holding, legal services grant recipients can set up affiliates that (with the exception of conference rooms and reception areas) use the same offices, supplies, support staff, and attorneys. Instead of maintaining their primary focus on the core mission of the LSC program, grant recipients and their recipients will be free to operate much like any private boutique law firm, using “accounting” separation simply to distinguish LSC activities from activities outside the LSC program. As we discuss below, the district court's decision is fundamentally flawed and its injunction must be reversed.

B. Congress May Restrict The Use of Non-Federal Funds As Long As It Does Not Foreclose Alternate Channels for the Exercise of First Amendment Rights Through “Affiliate” Organizations.

It is clear that Congress has broad power to specify the purposes for which funds appropriated out of the Federal Treasury may be spent. *See* U.S. Const. Art. I, § 9, Cl.7; *see South Dakota v. Dole*, 483 U.S. 203, 206-07 & n.2 (1987). It is also well settled that Congress may provide that federal funds may not be used to support particular activities that also are supported by non-federal funds — even if the activities involved are of the sort that are fully protected by the First Amendment when engaged in solely by private parties — so long as the fund recipient is not prevented from creating an affiliate organization to receive and spend non-federal funds to engage in protected activities. *See, e.g., FCC v. League of Women Voters of California*, 468 U.S. 364, 400 (1984). Congress also may require that such an affiliate organization be kept "physically and financially separate" from the grantee organization. *Rust v. Sullivan*, 500 U.S. 173,180, 187-90 (1991).

In *Regan v. Taxation With Representation ("TWR")*, 461 U.S. 540 (1983), for instance, the Supreme Court rejected an "unconstitutional conditions" challenge to section 501(c)(3) of the Internal Revenue Code, which forbade tax-exempt organizations from engaging in lobbying. The Court held that the restriction on the ability of a tax-exempt organization to engage in lobbying activity did not place an

unconstitutional condition on free speech because the organization could create a separate affiliate to engage in lobbying activity. *Id.* at 544. The Court noted that "[t]he IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying. This is not unduly burdensome." *Id.* at 544-45 n.6.

In *League of Women Voters*, 468 U.S. at 381-89, the Court struck down a statute that prohibited federally subsidized radio stations from broadcasting editorial opinions, in part because a station "is not able to segregate its activities according to the source of funding" and has "no way of limiting the use of its federal funds to all noneditorializing activities * * *." *Id.* at 400. The Court recognized, however, that "if Congress were to adopt a revised version of [the statute] that permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations that could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid * * *." *Ibid.* Under such a statute, a station "would be free, in the same way that the charitable organization in *Taxation With Representation* was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities." *Ibid.*

Finally, in *Rust*, the Supreme Court upheld regulations implementing Title X of the Public Health Service Act, which prohibited the use of federal funds "in programs where abortion is a method of family planning." 500 U.S. at 178. The regulations prohibited Title X projects from, among other things: counseling patients regarding abortion, referring patients to abortion providers, lobbying for legislation to increase the availability of abortion, and using legal action to make abortion available. *See id.* at 180-81. The regulations also required that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion activities. Under this rule, the federally funded project had to have "objective integrity and independence" from prohibited activities, beyond mere bookkeeping separation. *Id.* at 180-81.

The Court held that the regulations did not place an unconstitutional condition on the exercise of First Amendment rights. In particular, the Court stated that "[b]y requiring that a Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan*, not denied it the right to engage in abortion-related activities." *Id.* at 198. Rather, "Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree

of separation from the Title X project to ensure the integrity of the federally funded program." *Ibid.*

This Court applied these principles in *Velazquez II*, rejecting plaintiffs' facial challenge to the LSC funding restrictions, including their challenge to the program integrity regulation. The Court first held that plaintiffs had no basis to question the validity of the decision to limit funding for legal services to specific areas and activities, stating that Congress "is free to offer a limited menu of legal services under the LSCA. We think it clear, for example, that Congress could fund a legal aid office but limit its practice to specific services such as representing the indigent in landlord-tenant disputes or in consumer fraud cases. The limitations of the 1996 Act are no more suspect simply because they are defined in terms of representations that are prohibited rather than those that are permitted." 164 F.3d at 765.

And, taking its lead from *Rust*, *TWR*, and *League of Women Voters*, this Court held that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Id.* at 766. The Ninth Circuit adopted the same principle in *LASH II*, 145 F.3d at 1026, concluding that the LSC statute and regulations do not violate the First Amendment because "[a] recipient of LSC funds may engage in conduct protected by the First Amendment outside the scope of the

federally funded program if, as in *Rust*, the recipient sets up a separate entity that complies with the program integrity regulations.”

Thus, in *Velazquez II*, this Court – like the Ninth Circuit in *LASH* – rejected plaintiffs' facial challenge to the program integrity regulation. But the Court noted that a grantee who could show that the restrictions “unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act.” 164 F.3d at 767. The Court noted, however, that “[i]t appears likely that LSC grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty.” *Ibid.*

C. The District Court Erred in Holding That The Program Integrity Regulation Violates The First Amendment Because It Would Pose An “Undue Burden” On Plaintiffs' Ability to Create Affiliate Organizations.

Many LSC grant recipients – of varying sizes and resources – have successfully created affiliates that comply with the LSC's program integrity regulation. *See* JA 900-02. There is little question that the plaintiff legal services organizations could do so as well. Indeed, plaintiffs have candidly admitted as much, and have even provided cost estimates that demonstrate that creating affiliates with separate offices and personnel would not put a sizable dent in their overall budgets. *See* JA 902-07.

At bottom, plaintiffs assert that any expenditure that goes beyond mere accounting separation is too burdensome to satisfy First Amendment requirements.

The district court agreed, holding that the First Amendment prohibits the LSC from requiring more than “accounting and financial separation” between LSC grantees and their affiliates (with the minor exceptions of conference rooms and reception areas). Under the district court's injunction, an LSC grantee may engage in activities otherwise restricted by the Act through an affiliate that shares the same staff, occupies the same offices, and uses the same equipment, operating very much like any full-service law firm whose attorneys maintain “accounting and financial separation” simply by billing clients separately for their time and the use of the firm's equipment and facilities. The district court reached this result by holding that all of the government's interests are fully addressed through mere paper separation – reasoning that applies regardless of the identity of the grantee, its resources, or its ability to comply with the program integrity regulation. The district court's holding is flawed on a number of grounds.

- 1. The District Court's “Undue Burden” Standard Incorrectly Fails To Ask Whether The Regulation “Effectively Prohibits” The Creation of Affiliates To Engage In Restricted Activity.**

The first significant flaw in the district court's decision is its application of the so-called “undue burden” standard. We have no quarrel with the notion that the

courts may inquire whether the burden of compliance is so severe that it deprives the recipient of “adequate alternative channels” for private expression. The existence of adequate alternative channels is, after all, the linchpin of the constitutionality in this context.

But the district court in this case strayed from such an inquiry. Rather than ask whether the burden of establishing an affiliate prevents the recipient from engaging in restricted activities – that is, whether adequate alternative channels exist – the district court adopted a balancing test in which the purported burden is weighed against the government's asserted interests. JA 1038. And in applying that balancing test, the court never sought to determine whether a particular grantee maintaining an as-applied challenge actually could create an affiliate that could operate under the existing program integrity regulation. Instead, the court merely determined that it would cost a substantial amount of money to create such an affiliate, and then determined that the government's asserted interests were insufficient to warrant the imposition of certain restrictions – regardless of the identity or resources of the grantee.

Thus, the district court's application of its purported balancing test (JA 1058-63) makes no mention of the costs of compliance to any particular grant recipient. The court appears to have concluded that, with respect to such matters as the use of

separate equipment (JA 1061-62), separate premises (JA 1062), and employee time (JA 1062-63), any burden on the grantee is sufficient to render the program integrity regulation invalid.

The district court therefore has converted what should be an as-applied challenge into a ruling that, as a practical matter, invalidates the regulation's physical separation requirement on its face. That approach renders meaningless this Court's observation in *Velazquez II* that it is “likely that LSC grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty.” 164 F.3d at 767. Plaintiff Legal Services of New York (LSNY) would appear to epitomize the type of recipient envisioned by the Court when it made this statement. That organization receives \$12 million annually in LSC funds – five percent of the total LSC funds distributed annually. JA 902, *see* JA 899. But even that significant amount is less than forty percent of LSNY's total annual budget of \$32 million. JA 902. With non-LSC income of \$20 million annually, LSNY plainly constitutes an organization with “substantial non-federal funding” that can provide services through an affiliate “without serious difficulty.” *Velazquez II*, 164 F.3d at 767.

Under the district court's reasoning, however, LSNY's substantial resources mean nothing because the government's interests can be met with less restrictive

alternatives such as “accounting mechanisms” and “disclaimers” (JA 1053-58, 1061-62). Under this analysis, however, even a legal service provider with unlimited resources would face an “undue burden.” The result is a *de facto* facial invalidation of the statute.

In addition, the district court's approach, focusing on less restrictive alternatives in response to the government's asserted interests, incorrectly revives the compelling interest standard rejected on numerous occasions by the courts in the context of unconstitutional conditions claims. Neither *TWR*, *League of Women Voters*, nor *Rust* applied strict scrutiny; indeed, this Court noted that *TWR* applied “minimal scrutiny.” *Velazquez II*, 164 F.3d at 765.¹ And the Ninth Circuit explicitly rejected the contention that the compelling interest test applies to a challenge to the LSC statute and regulations. *LASH*, 145 F.3d at 1028-29.

On a more fundamental level, the district court's balancing approach is flawed because it loses sight of the very nature of the inquiry – to determine whether a grant recipient could effectively establish an affiliate to engage in restricted activity. Because the focus must be on whether the program leaves adequate alternative channels for protected activities, the regulation unduly burdens protected activities

¹ The district court's earlier decision in *Velazquez* in fact expressly rejected the contention that strict scrutiny governs here. *See Velazquez v. LSC*, 985 F. Supp. 323, 340 (E.D.N.Y. 1997).

only if, as a practical matter, it prevents the use of alternative channels. That is precisely the test articulated by Justice White (ret.), sitting by designation in *LASH*, which held that the “proper constitutional test” focuses on “whether the regulations 'effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program.’” 145 F.3d at 1026 (quoting *Rust*, 500 U.S. at 197).

The district court thus never asked the central question – whether the program integrity regulation “effectively prohibits” the plaintiffs from engaging in restricted activities with private funds, thereby indicating that the statutory and regulatory scheme does not provide adequate alternative channels for the exercise of First Amendment rights. Instead, the district court treated the program integrity regulation as if it were a direct restriction on speech, applying cases governing restrictions on commerce, voting rights, and abortion. *See* JA 1035-38. But resort to the standards governing those areas is unnecessary. This case is governed by a line of unconstitutional conditions cases – from *TWR* and *League of Women Voters* to *Rust*, as implemented by *Velazquez II* and *LASH* – that establish the central inquiry, namely, whether the program at issue leaves open adequate alternative mechanisms for engaging in First Amendment activity.

Had the district court applied the correct standard, it would have had little choice but to conclude that plaintiffs' claims must fail. There are adequate alternative avenues of speech here, and nothing in plaintiffs' voluminous affidavits and pleadings demonstrated that they are effectively precluded by the program integrity regulation from establishing affiliates. As discussed above (pp. 34-35, *supra*), LSNY is precisely the sort of organization envisioned by this Court when it observed that grant recipients with “substantial nonfederal funds” likely would have little trouble creating affiliates. 164 F.3d at 767. And plaintiff South Bronx Legal Services (SBLS) receives two-thirds of its funds from non-LSC sources. JA 904. Moreover, even if one accepts uncritically its estimate that creating an affiliate would cost approximately 8 percent of SBLS' budget, JA 904, that plainly would not “effectively prohibit” it from creating such an affiliate.

Plaintiff Farmworkers Legal Service of New York (FWLS) does not receive LSC funds. JA 907. However, assuming its estimate of \$80,000 in yearly expenses to operate an affiliate is correct, creating such an affiliate and receiving LSC funding of approximately \$200,000 annually would result in a substantial net gain.² As with

² FWLS states that it declined approximately \$106,000 in federal funding for the second half of 1996. JA 907.

the other plaintiffs, FWLS cannot demonstrate that it is effectively precluded from operating an affiliate to engage in restricted activity.

In sum, plaintiffs have not demonstrated that they cannot form affiliates to engage in the full range of non-LSC funded legal services. They simply do not wish to do so under the current program integrity rule because they do not wish to bear the cost, and because they believe that the required degree of physical separation will be less efficient. It is true that creation of an affiliate structure in accordance with the program integrity regulation may not be the most efficient or ideal way to engage in activities outside the scope of the LSC program. But the law requires only “adequate alternative channels” – not the most effective or efficient channels one might desire. The fact that plaintiffs “do[] not have as much money as [they] want[]” to exercise their First Amendment rights “does not confer an entitlement to such funds as may be necessary to realize all of the advantages of that freedom.” *Regan*, 461 U.S. at 550 (quoting *Harris v. McRae*, 448 U.S. 297, 318 (1980)).

2. The District Court Misunderstood The Nature of the Government's Interests

In addition to misapplying the “undue burden” standard in general, the district court fundamentally misunderstood the nature of the government's interests furthered by the program integrity regulation. In addition to the interest in avoiding the

appearance that the government is funding activities Congress did not wish to fund, the district court discussed the government's interest in avoiding the indirect subsidization of restricted activities. JA 1050-58. The court then concluded that accounting methods and billing practices would be sufficient to address any concerns regarding the indirect funding of restricted activities.

The district court's holding ignores an important aspect of the government's interest. While there is no question that Congress wished to avoid the indirect subsidization of restricted activities, *see, e.g.*, S. Rep. No. 104-392, 104th Cong., 2d Sess. 6 (1996) ("many legal services grantees currently receive funds from both public and private sources. Since the money is basically fungible, it would be difficult if not impossible to place restrictions only on the Federal funds"), Congress sought to further a more fundamental interest: ensuring that scarce federal resources are provided only to those legal service providers whose sole focus is on the provision of specified legal services to the poor.

That is, Congress believed that the objective of the legal services program could best be achieved if federal resources were directed to those organizations willing to devote all of their resources to providing specified services to low-income clients. The House Report, for instance, noted that the restrictions were designed to cover "political and controversial activities which do not serve the core function of

providing basic legal representation to poor individuals. * * * The Committee believes that it is inappropriate for Federal resources to be used to support directly or indirectly those activities. Such activities only further drain much needed resources from the program's core mission – to provide basic legal aid to poor individuals.” H.R. Rep. No. 104-196, 104th Cong., 1st Sess. 121 (July 19, 1995). The Senate Report likewise noted that if LSC is to survive, it must “remain focused on its primary mission, which is to provide basic legal assistance to low-income Americans.” S. Rep. No. 104-392, at 7.

This Court made clear in *Velazquez II* that “Congress could fund a legal aid office but limit the scope of its practice to specific services such as representing the indigent in landlord-tenant disputes or in consumer fraud cases.” 164 F.3d at 765. That is precisely what Congress sought to do here. Congress wished to fund law offices that would focus on the “core mission” of the program without the distractions of activities that it believed are inconsistent with, and detract from, that mission.

That interest cannot be addressed solely through accounting mechanisms. Under the district court's holding, the LSC must provide funding for general law offices that engage in myriad activities, using the same office space, the same equipment and the same lawyers working on both on LSC-funded cases and restricted cases. While one might conclude that requiring both entities (which would exist

almost solely on paper) to share the cost of the equipment and offices would avoid indirect subsidization, it plainly does not address the important interest of funding only entities that agree to focus exclusively on providing basic legal services to the poor.

Moreover, the district court's reasoning that the program integrity rule negatively impacts the government's "countervailing interest in ensuring that indigent legal-services clients receive efficient and effective representation" (JA 1057), is flawed. The interest at stake here is the efficient performance of LSC funded legal services. Congress determined that restricted activities detract from the ability of LSC grantees to "remain focused on their primary mission, which is to provide basic legal assistance to low-income Americans." S. Rep. No. 104-392, at 7. The need to create a separate affiliate undoubtedly will require an expenditure of funds, and thus result in some loss of efficiency. But obligations to procure office space and purchase office equipment are not *imposed* by the government; they are merely incidental to the normal practice of law.

As we have discussed, the district court's decision would result in grantee/affiliate structures that are virtually indistinguishable from private boutique law firms. Like associates in law firms, legal services lawyers working at the same desk and using the same equipment will simply bill different clients for their work on

different matters – engaging in LSC-funded activity one moment and outside activity the next. Indeed, under the district court’s reasoning, even a large law firm could compete for LSC funds by creating a separate paper entity to handle its occasional pro bono undertakings.

In either case, a particular lawyer performing LSC-funded work may, for instance, be forced to set aside an LSC-funded matter to deal with a pressing issue in an important class action. Or the attorney may be interrupted in the course of representing a client in an LSC-funded case by repeated telephone calls concerning a non-LSC matter. In each case the attorney will never leave his or her office, but will simply set aside LSC work to deal with work that may be deemed more important (or more profitable) to the integrated entity that controls both affiliates. Rather than maintaining a primary focus on the core mission of LSC, the attorney might be repeatedly distracted by non-LSC matters – in contravention of the express intent of Congress. It is not unconstitutional for Congress to take precautions designed to ensure that lawyers working on LSC-funded cases maintain their primary focus on the enterprise for which they have agreed to work, so long as adequate alternative speech channels remain open.

3. Plaintiffs' Reliance On Rules Governing Faith-Based Organizations' Receipt of Federal Funds Is Misplaced.

Plaintiffs in this case proposed to establish affiliate arrangements that complied not with the LSC's program integrity regulations, but with the requirements governing faith-based institutions' receipt of federal grant monies as set forth in several “charitable choice” statutes and in Executive Order 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002).³ And the district court justified its decision in part by noting that “for federal ‘charitable choice’ programs, which fund religious organizations to perform secular social services activities, Congress has required only minimal bookkeeping separation to satisfy its concern with preventing the appearance of endorsement of religion.” JA 1053; *see* 42 U.S.C. § 604a(j); *id.* § 9920(c), (d); *id.* § 300x-65.

Reliance upon the standards governing faith-based organizations and “charitable choice” programs is wholly misplaced in the context of LSC’s program integrity regulation. Charitable choice programs are designed to ensure that “all eligible organizations, including faith-based organizations, are able to compete *on an*

³ Indeed, plaintiffs even attempted (in a supplemental filing in the district court) to maintain an argument that the LSC regulations violate the Establishment Clause by requiring separate entities for legal services providers but not for faith-based institutions. The district court did not rule on this belated claim. In any event, plaintiffs' claim of disparate treatment is unfounded, since all recipients of LSC funds – whether faith-based organizations or not – must comply with the program integrity rules.

equal footing for Federal financial assistance used to support social programs.” E.O. 13279, § ¶ 2(b) (emphasis supplied). In that context, separation requirements serve the limited purpose of ensuring that government does not fund inherently religious activity in violation of the Establishment Clause of the First Amendment.

In the context of charitable choice, the Establishment Clause sets the constitutional “floor” – that is, it sets minimum requirements. In that context, bookkeeping separation is sufficient to avoid violation of the Establishment Clause, especially since imposing additional requirements would undermine the primary purpose of charitable choice programs to eliminate discrimination against religious organizations and permit those organizations to participate equally in federal programs.

The fact that certain requirements are sufficient to avoid violation of the Establishment Clause does not mean that anything that goes beyond those requirements violates the Free Speech or Free Exercise Clauses. There is “room for play in the joints” between those clauses, such that actions permitted by one are not required of the other. *See Locke v. Davey*, 540 U.S. 712, 718-19 (2004) (citations omitted). Congress (in certain charitable choice statutes) and the President (in the Executive Order) could have chosen to impose more stringent restrictions, but the fact that stricter rules were not deemed necessary in that context in no way suggests that

the Constitution forbids stricter rules to achieve other purposes in other contexts. Indeed, the government has greater, not less, constitutional latitude when it fashions criteria to determine how best to distribute federal dollars. *See, e.g., United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 211-12 (2003). Simply stated, plaintiffs' effort to convert the constitutional floor under the Establishment Clause into a rigid constitutional ceiling under the Free Speech Clause should be rejected.

The differences in the requirements governing programs for which faith-based groups are eligible and those governing the LSC program reflect nothing more than their different objectives. Charitable choice laws and regulations are designed to lift the ban on faith-based organizations' participation in federally assisted programs due to the incorrect perception that any such participation violated the Establishment Clause. These laws and regulations do not themselves award federal money, but merely ensure that faith-based groups will be able to compete on an equal basis for federal grant money under individual programs. The LSC program integrity regulation, by contrast, is designed to implement a specific federal grant program, ensuring that funds are spent only to support the activities Congress wished to fund and to ensure that those who receive LSC funds maintain their "primary focus" on a stated "core mission." While both sets of guidelines seek to avoid the appearance that the government endorses particular conduct, the fundamental differences in the

objective of these regulations demonstrates that what suffices for one program cannot be used to impose requirements on the other.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

I hereby certify that the Brief for Intervenor-Appellant United States of America complies with the Type-Volume requirements of Fed. R. App. P. 32(a)(7)(B) in the following manner:

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