

# 05-0340-cv

05-0360-cv (Con), 05-0787-cv (Con), 05-0792-cv (Con),  
05-0925-cv (XAP)

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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BROOKLYN LEGAL SERVICES CORP. B and LEGAL SERVICES FOR  
NEW YORK CITY, on their own behalf and on behalf of their  
clients,

Plaintiff-Appellee-Cross-Appellants,

(continued)

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

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**BRIEF FOR PLAINTIFF-APPELLEE-CROSS-APPELLANTS AND  
PLAINTIFF-CROSS-APPELLANTS**

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(continued)

(caption continued)

FARMWORKERS LEGAL SERVICE OF NEW YORK, INC., on behalf of itself, and on behalf of all similarly situated not-for-profit legal services entities; namely, organizations who wish to be eligible to receive funds from the Legal Service Corporation, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub. L. 104-208,

Plaintiff-Appellee-Cross-Appellants,

COMMUNITY SERVICE SOCIETY OF NEW YORK, INC., and CENTRO INDEPENDIENTE DE TRABAJADORES AGRICOLAS, on behalf of all similarly situated individuals, organizations and their members, namely, individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy activity proscribed by Pub. L. 104-208,

PEGGY EARISMAN and LAUREN SHAPIRO, on behalf of each, and on behalf of all similarly situated individuals, namely, attorneys employed or formerly employed by entities receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub. L. 104-208,

ANDREW J. CONNICK, on behalf of himself 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, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208,

THE NEW YORK FOUNDATION,

Plaintiff-Cross-Appellants,

CARMEN VELAZQUEZ, WEP WORKERS TOGETHER, NEW YORK CITY COALITION TO END LEAD POISONING, GREATER N.Y. LABOR-RELIGION COALITION, on behalf of all similarly situated individuals, organizations and their members, namely, individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy by Pub. L. 104-208,

(continued)

(caption continued)

LUCY A. BILLINGS, OLIVE KAREN STAMM, JEANETTE ZELHOF, ELISABETH BENJAMIN, JILL ANN BOSKEY, on behalf of each, and on behalf of all similarly situated individuals, namely, attorneys employed or formerly employed entities receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub. L. 104-208,

C. VIRGINIA FIELDS, COUNCIL MEMBER, GUILLERMO LINARES, COUNCIL MEMBER, STANLEY MICHELS, COUNCIL MEMBER, ADAM CLAYTON POWELL 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, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208,

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,

UNITED STATES OF AMERICA,

Intervenor-Defendant-Cross-Appellant.

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## **CORPORATE DISCLOSURE STATEMENT**

Plaintiff-Appellee-Cross-Appellant South Brooklyn Legal Services<sup>1</sup> is a constituent corporation, of which Plaintiff-Appellee-Cross-Appellant Legal Services for New York City<sup>2</sup> is the sole member. Apart from South Brooklyn Legal Services, none of the other Plaintiff-Appellant-Cross-Appellants and Plaintiff-Cross-Appellants have parent corporations. None of the Plaintiff-Appellee-Cross-Appellants and Plaintiff-Cross-Appellants issue stock, so there are no publicly held companies holding 10% or more of their stock.

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<sup>1</sup> When the *Dobbins* litigation began, the formal name of this organization was Brooklyn Legal Services Corporation B. It has since changed to “South Brooklyn Legal Services,” which is the name used in this brief.

<sup>2</sup> The brief of Defendant-Appellant Legal Services Corporation incorrectly identifies this party as “Legal Services of New York.”

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## **REQUEST FOR ORAL ARGUMENT**

Plaintiff-Appellee-Cross-Appellants Legal Services for New York City (“LSNY”), South Brooklyn Legal Services, and Farmworker Legal Services of New York (“Farmworker Legal Services”), and Plaintiff-Cross-Appellants Community Service Society of New York, Inc., Centro Independiente de Trabajadores Agricolas, Peggy Earisman, Lauren Shapiro, Andrew Connick and the New York Foundation (collectively “plaintiffs”) respectfully request oral argument regarding this appeal.

## **THE ORDERS APPEALED FROM**

This consolidated proceeding consists of an appeal and several cross-appeals from a Memorandum and Order of the United States District Court for the Eastern District of New York (Frederic Block, J.), issued on December 20, 2004 and entered on December 21, 2004, and from a Supplemental Memorandum and Order of the same court and judge, issued on February 22, 2005 and entered on February 24, 2005. *See Velazquez v. Legal Services Corp.*, 349 F. Supp. 2d 566 (E.D.N.Y. 2004) (“Op.”) (JA-969 to 1066), *modified by* 356 F. Supp. 2d 267 (2005) (“Supp. Op.”) (JA-1083 to 1092).

Defendant-Appellant the Legal Services Corporation (“LSC”) and Intervenor-Defendant-Cross-Appellant the United States (collectively “defendants”) appeal from a preliminary injunction issued by the District Court on

December 20, 2004, and modified on February 22, 2005, restraining LSC from applying its “program integrity” regulation, 45 C.F.R. § 1610.8 (Special Appendix (“SPA”)-112), to require three legal services programs – LSNY, South Brooklyn Legal Services, and Farmworker Legal Services (collectively “the program plaintiffs”) – to maintain physically separate offices staffed by separate lawyers in order to use their non-federal funds<sup>3</sup> to provide a full range of constitutionally protected legal services to their indigent clients. *Op.* at 97 (JA-1065).

In granting preliminary injunctive relief, the District Court reasoned that, in light of the substantial fiscal, administrative and programmatic costs imposed on each program plaintiff by the need to establish and maintain redundant, physically separate offices staffed by separate personnel (with each office offering a different form of legal representation), the regulation imposed an “undue burden” on the ability of plaintiffs to use their non-federal funds to engage in constitutionally protected activity. *Id.* at 62-96 (JA-1030 to 1064).

Plaintiffs – three legal services programs, several legal services lawyers and their clients, and two private donors – cross appeal from the final order of the

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<sup>3</sup> LSC grantees derive non-federal funds from private contributions, grants by state and local governments, and grants from state IOLTA programs. While non-federal funds account for more than 50% of the funding available to legal services programs in New York City, Scherer Decl., Dec. 7, 2001, ¶ 6 (JA-445), in many areas of the country federal funds predominate.

District Court issued on December 20, 2004, dismissing plaintiffs' challenge, under Article III and the First and Tenth Amendments, to Congressional restrictions on the use of federal funds by LSC grantees to participate in class actions, accept court-awarded attorneys' fees, and notify prospective clients of their legal rights. *Op.* at 31-59 (JA-999 to 1027).

Plaintiffs also cross appeal from the dismissal of their Tenth Amendment challenge to the interference that the program integrity regulation works on the expenditure of funds from state and local governments. *Id.* at 27-30 (JA-995 to 998).

Finally, plaintiffs challenge two relatively minor but practically significant provisions in the preliminary injunction, as modified by the District Court on February 24, 2005, requiring each program plaintiff to maintain a redundant physically separate set of reception, waiting and conference rooms; and requiring the appointment of a new attorney if a case originating in an LSC grantee program is subsequently transferred to the non-LSC affiliate. *Id.* at 94 (JA-1062); *Supp. Op.* at 8-9 (JA-1090 to 1091).

### **JURISDICTIONAL STATEMENT**

The District Court possessed subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Defendant-Appellant LSC filed a timely notice of appeal from the preliminary injunction on January 21, 2005, and timely amended it

on February 25, 2005. JA-1081, 1097. Intervenor-Defendant-Cross-Appellant United States filed a timely notice of cross-appeal on February 17, 2005, and timely amended it on March 4, 2005. JA-1093, 1101. Plaintiffs' cross-appeal was timely filed on February 17, 2005, and timely amended on March 1, 2005. JA-1095, 1099. This Court has jurisdiction over the appeal and cross-appeals pursuant to 28 U.S.C. §§ 1291, 1292.

### **ISSUES PRESENTED FOR REVIEW**

1. Is LSC's "program integrity" regulation, 45 C.F.R. § 1610.8 (SPA-112), facially unconstitutional because it discriminates against secular speech by requiring legal services grantees to maintain an onerous and costly level of physical and personnel separation between federally and non-federally funded activities that far exceeds the requirements imposed on similarly situated "faith-based" organizations receiving comparable federal funding for secular programs?

The District Court did not rule on the issue.

2. Does LSC's application of its "program integrity" regulation, 45 C.F.R. § 1610.8, to require LSNY, South Brooklyn Legal Services and Farmworker Legal Services to maintain legal, physical and personnel separation between their federally funded legal work and their non-federally funded legal work impose an unconstitutional "undue burden" on their ability to deliver non-federally funded

legal services in violation of the First and Tenth Amendments and principles of federalism?

The District Court ruled in the affirmative with respect to plaintiffs' First Amendment challenge, but dismissed plaintiffs' Tenth Amendment and federalism challenges.

3. Do the restrictions contained in annual LSC appropriations acts and 45 C.F.R. §§ 1617, 1642, prohibiting federally funded legal services lawyers from using federal funds to participate in class actions, or to accept court-awarded attorneys' fees, violate Article III, the First and Tenth Amendments, and principles of federalism?

The District Court ruled in the negative, holding that these restrictions are viewpoint-neutral within the meaning of this Court's governing precedent.

4. Does the restriction contained in annual LSC appropriations acts and 45 C.F.R. part 1638, prohibiting federally funded legal services lawyers from representing clients after advising them to enforce their legal rights, violate the First Amendment?

The District Court ruled in the negative, holding that the restriction is viewpoint-neutral.

## STATEMENT OF THE CASE

### **I. Prior Proceedings**

#### **A. *Velazquez I***

This litigation has a long and complex procedural history. On January 14, 1997, the *Velazquez* plaintiffs – Farmworker Legal Services, together with several legal services lawyers, clients and funders – challenged the 1996 LSC appropriations act, which restricted the arguments and procedural techniques open to a federally funded LSC lawyer, as well as the clients such lawyers can represent.<sup>4</sup> The plaintiffs also challenged LSC’s first two sets of implementing regulations, which imposed an absolute ban on the use of non-federal funding by LSC grantees to offer the restricted forms of legal representation.<sup>5</sup> *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 760-61 (2d Cir. 1999) (“*Velazquez II*”), *aff’d in part on other grounds*, 531 U.S. 533, 541-43 (2001) (“*Velazquez III*”). One week

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<sup>4</sup> The “non-federal money restriction,” and the attorneys’ fee award, class action and public interest solicitation restrictions before this Court, were first contained in a rider enacted by Congress in connection with the 1996 appropriation for the Legal Services Corporation. *See* Omnibus Consol. Rescissions & Approps. Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53 to –56 (1996) (SPA-44 to 51). The restrictions have been re-enacted in substantially the same form in every subsequent LSC appropriations act, all of which are contained in the Special Appendix accompanying this brief at 44 to 83. The relevant LSC regulations are codified at 45 C.F.R. § 1600 *et seq.* (SPA-84 to 181).

<sup>5</sup> An amended complaint was filed on January 27, 1997. The United States joined as an intervening defendant on March 14, 1997.

later, plaintiffs moved for a preliminary injunction, arguing that LSC’s absolute ban on privately funded activities violated *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

In March 1997, faced with the likely invalidation of the absolute restrictions on private funds, *see Legal Aid Soc’y of Haw. v. Legal Servs. Corp.*, 961 F. Supp. 1402 1415-17 (D. Haw. 1997), LSC executed a 180-degree turn and promulgated a third set of regulations shortly before oral argument on plaintiffs’ application for preliminary injunctive relief. The new regulations permitted an LSC grantee to use its non-federal funds to deliver “restricted” legal services, but only if the grantee established an “objectively” separate legal program housed in a physically separate facility. 62 Fed. Reg. 12,101-01 (March 14, 1997). At oral argument, Judge Block criticized aspects of the new regulations. LSC responded with yet a fourth regulation – the existing “program integrity” regulation – drawn almost verbatim from the regulations that had been upheld by the Supreme Court in *Rust v. Sullivan*, 500 U.S. 173 (1991).<sup>6</sup> *See* 45 C.F.R. § 1610.8 (SPA-112). *See also* 62 Fed. Reg. 27,695-01 (May 21, 1997) (noting that LSC had promulgated the new regulation in response to litigation).

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<sup>6</sup> The *Rust* decision is discussed at length *infra* Argument, § II.A.

Confronted with a regulation drawn verbatim from *Rust*, the District Court deemed itself bound by *stare decisis* to deny plaintiffs' request for preliminary injunctive relief. *Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997) (“*Velazquez I*”).

**B. *Velazquez II***

On appeal, a panel of this Circuit distinguished *Rust*, and invalidated the viewpoint-based ban on using federal funds to challenge the constitutionality of a welfare statute.<sup>7</sup> *Velazquez II*, 164 F.3d at 769-72. The panel upheld the remainder of the ban on using federal funds to engage in welfare reform litigation, and also the ban on using federal funds to lobby, reasoning that they were viewpoint-neutral, since they applied regardless of the substantive arguments presented. *Id.* at 768.

As to the LSC restrictions on the use of non-federal funds, the panel questioned the controlling authority of *Rust*, noting the breadth of the LSC restrictions, and that the desire to avoid dilution of a governmental message, which underlay the *Rust* regulations, is absent in the legal services context. Nevertheless, the panel treated *Rust* as a relevant but not determinative precedent. Since the

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<sup>7</sup> The panel did not consider whether the class action, attorneys' fee award, or solicitation regulations currently before the Court were viewpoint discriminatory. *See Op.* at 39-40 (JA-1007 to 1008).

panel hypothesized that legal services programs might be able to reconfigure without undue difficulty, it declined to hold the LSC regulations facially unconstitutional on the then-existing record.<sup>8</sup> *Id.* at 766-67.

In view of the obvious impact of the LSC restrictions on constitutionally protected activity, however, the panel provided guidance in connection with almost inevitable future as-applied challenges:

We do not think *Rust* compels the conclusion that program integrity rules modeled on those governing Title X necessarily allow adequate avenues for protected expression in statutory or factual contexts where the burden on speech may be more significant or where the relationship between the burden and the government benefit may be more attenuated.

*Id.* Drawing on *League of Women Voters* and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), the panel held that future as-applied challenges were to be decided pursuant to a classic proportionality test, under which the “burden” on constitutionally protected speech could not be “undue,” which the panel defined as more onerous than reasonably necessary to advance the government’s asserted legitimate interests. *Id.* at 765-67.

### C. *Velazquez III*

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<sup>8</sup> In rejecting the facial challenge, the panel noted the absence of an evidentiary record. *Id.* at 767. In contrast, in this appeal as-applied challenges are mounted by three legal services programs on the basis of a full evidentiary record.

Both sides petitioned for certiorari. The Supreme Court granted LSC's petition, and affirmed the panel's holding that Congress's ban on using federal funds to challenge the constitutionality of a welfare statute violated the First Amendment. *Velazquez III*, 531 U.S. at 549. More importantly for the purposes of this appeal, the Supreme Court eviscerated the precedential significance of *Rust* as support for exiling non-federally funded unrestricted lawyers to a separate physical facility. *Id.* at 541-43. The Supreme Court ruled in *Velazquez III* that *Rust* applies only in settings where the government seeks to use federal funds to disseminate its own message. Since, noted the *Velazquez III* Court, legal services lawyers are not mouthpieces for the government, *Rust* is simply inapplicable to efforts to restrict the speech of legal services lawyers. *Id.*

In addition, the Court refined the definition of a viewpoint-based restriction on federally funded speech, noting that a restriction was unconstitutionally viewpoint-based if it distorted the proper functioning of the speech-forum in question. *Id.* at 547-49.

One week later, the Court denied certiorari in connection with the *Velazquez* plaintiffs' challenge to the constitutionality of the remaining restrictions. *Velazquez v. Legal Servs. Corp.*, 532 U.S. 903 (2001).<sup>9</sup>

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<sup>9</sup> The denial had no precedential value. *Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985).

#### **D. The Proceedings Below**

In December 2001, the *Velazquez* plaintiffs filed the as-applied challenge contemplated by the panel. They were joined by a set of new plaintiffs, including two LSC grantee programs and their private funders. Op. at 10 (JA-978). Both sets of plaintiffs moved for a preliminary injunction against the program integrity regulation as applied to them, and also against the restrictions barring LSC grantees from using their federal funding to accept attorneys' fee awards, participate in class actions, and represent clients after advising them to take legal action or obtain an attorney. *Id.* at 9-10 (JA-977 to 978). The District Court consolidated the two cases.

Plaintiffs filed numerous sworn declarations detailing and quantifying the onerous financial, programmatic and administrative burdens that compliance with the requirement of separate offices and separate personnel would impose upon them. For example, South Brooklyn Legal Services demonstrated that the financial cost of compliance would drain it of the resources needed to represent approximately 500 clients each year. *See discussion infra*, Argument, §§ II.C.1.a to c.

Although the District Court repeatedly offered defendants an opportunity to challenge plaintiffs' assessment of the actual costs of establishing a physically separate affiliate staffed by separate personnel, defendants declined to cross-

examine plaintiffs' sworn assertions, declined to submit rebuttal material,<sup>10</sup> and rejected the offer of a hearing. Op. at 78 (JA-1046). Instead, they argued that the challenge was procedurally flawed because they claimed that no formal application to reconfigure had been denied by LSC.

In light of LSC's procedural objections, the District Court took several thoughtful steps to ensure that the legal dispute was sharply defined, and presented on a precise record.<sup>11</sup>

Most importantly, the District Court encouraged plaintiffs to submit a new formal reconfiguration proposal to LSC in the hope that LSC would accept it and moot the litigation. Tr. of Arg., April 18, 2003, at 47-50 (JA-741 to 744). The program plaintiffs submitted an initial proposal, which LSC rejected. *See*

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<sup>10</sup> Although the defendants submitted several declarations, none address the burdens that the program integrity regulation imposes on the program plaintiffs. *See* Youells Decl., May 3, 2002 (JA-467); Cardona Decl., May 3, 2002 (JA-470); Tarantowicz Decl., May 3, 2002 (JA-473).

LSC's speculation that plaintiffs "declined to hold a hearing" because plaintiffs lacked confidence in their affiants' command of the facts is baseless and unwarranted. LSC Br. at 25. In fact, plaintiffs would have welcomed a hearing, but given the extraordinary detail of the record, and given LSC's repeated failure to challenge any factual assertion, the District Court was clearly correct in determining that a hearing was unnecessary.

<sup>11</sup> In addition to helping to shape the evidentiary record, the District Court heard three rounds of oral argument, and considered six rounds of briefing and seventeen letter briefs over the course of two and a half years. Op. at 5 n.1 (JA-973).

Configuration Proposal (JA-755); LSC External Op. No. Ex-2003-1008 (JA-775).

Plaintiffs then submitted a more detailed proposal – the so-called Clarified

Proposal – in an effort to resolve the matter. *See* Clarified Proposal (JA-804).

LSC rejected the Clarified Proposal, stating that it did not provide for the degree of physical and personnel separation required by the program integrity regulation.

*See* LSC External Op. No. Ex-2003-1009 (JA-812).

In the Clarified Proposal, the three program plaintiffs each offered to establish a legally separate affiliate that would receive no LSC funds and would, thus, be free to offer a full spectrum of legal representation to indigent clients. In order to accommodate the government’s interest in neither subsidizing nor appearing to endorse the activities of the non-LSC affiliate, plaintiffs closely modeled their Clarified Proposal on the provisions of the President’s Faith-Based Initiative, which is designed to ensure that religious institutions receiving funding for secular projects observe a degree of separation needed to avoid unconstitutional subsidization of religious activities and the appearance of government endorsement of religious activities.<sup>12</sup> *See Lee v. Weisman*, 505 U.S. 577, 609 (1992)

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<sup>12</sup> The Faith-Based Initiative encompasses a set of “charitable choice” statutes that Congress enacted beginning in 1996, which are compiled in the Special Appendix at 184 to 198. It also encompasses Executive Order 13279, 67 Fed. Reg. 77,141 (Dec. 16, 2002) (SPA-199), and an accompanying Guidance to Faith-Based and Community Organizations on Partnering With the Federal

(government may neither sponsor nor endorse religion); Executive Order 13279, § 2(e) (SPA-200); U.S. Br. at 44-45 (Faith-Based Initiative “seek[s] to avoid the appearance that the government endorses particular conduct”).

To ensure non-subsidization, both the Faith-Based Initiative and plaintiffs’ Clarified Proposal require compliance with generally accepted principles of accounting.<sup>13</sup> Plaintiffs also promised to comply with a variety of existing LSC requirements intended to ensure that recipients do not charge LSC for direct costs (e.g., salaries) and indirect costs (e.g., utilities and other overhead costs) that should be paid for by non-federal funders. Clarified Proposal at 2 (JA-805).

To prevent the appearance of endorsement, both the Faith-Based Initiative and plaintiffs’ Clarified Proposal require that federal grantees either conduct their non-federally funded religious or restricted representational activities in a different

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Government (Dec. 12, 2002) (SPA-203). The implementing regulations are compiled in the Special Appendix at 218 to 386.

<sup>13</sup> Clarified Proposal at 2 (JA-805); 42 U.S.C. § 604a(h)(1) (SPA-186); 42 U.S.C. § 300x-65(g) (SPA-192); Executive Order 13279 § 2(e) (SPA-200); Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government at 10 (SPA-214); 67 Fed. Reg. 77,368-01 (Dec. 17, 2002) (SPA-237); 67 Fed. Reg. 77,350-01, 77,358 to 77,360 (Dec. 17, 2002) (SPA-226 to 228); 68 Fed. Reg. 56,410, 56,411 (Sept. 30, 2003) (SPA-271); 45 C.F.R. § 260.34(h), 68 Fed. Reg. at 56,465 (SPA-374); 45 C.F.R. § 1050.3(f), 68 Fed. Reg. at 56,470 (SPA-386).

room, or at a different time, than their federally funded activities, although each may share the same physical premises and the same employees.<sup>14</sup>

Plaintiffs also offered to take additional steps above and beyond those required by the Faith-Based Initiative. For example, plaintiffs offered to maintain strict legal separation between their two entities, each of which would have easily distinguishable names. Clarified Proposal at 1-2 (JA-804 to 805). Plaintiffs offered to implement a careful system for monitoring staff time, adhering to guidelines LSC already has in place to ensure that LSC funding is spent only on LSC-approved cases. *Id.* at 2-3 (JA-805 to 806) (citing 45 C.F.R. § 1635). Finally, plaintiffs offered to display extensive signage and to provide written and oral disclaimers to inform all persons having contact with the entities that the separately named non-LSC entity is legally separate and does not receive any LSC funding. *Id.* at 3-4 (JA-806 to 807); First Configuration Proposal at 3 (JA-764).

LSC admitted that the Clarified Proposal responded to the governmental interests underlying the program integrity regulation. First, LSC admitted that,

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<sup>14</sup> Clarified Proposal at 5 (JA-808); Executive Order 13279 § 2(e) (SPA-200); Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government at 9-10 (SPA-213 to 214); 45 C.F.R. § 260.34, 67 Fed. Reg. 77,362-01, 77,365 to 77,366 (Dec. 17, 2002) (SPA-232 to 233); 45 C.F.R. § 1050.3, 67 Fed. Reg. 77,368-01, 77,369, 77371 (Dec. 17, 2002) (SPA-235, 237); 42 C.F.R. § 54a.4, 67 Fed. Reg. 77,350-01, 77,359 (Dec. 17, 2002) (SPA-227); 45 C.F.R. § 260.34(c), 68 Fed. Reg. at 56,465 (SPA-373).

under the Clarified Proposal, no LSC funds could be transferred to a non-LSC affiliate entity, and that the LSC funds could not be used to “indirectly” subsidize restricted activities because each non-LSC affiliate must pay its LSC grantee affiliate “‘fair market’ value” for the use of any shared resources. LSC External Op. No. EX-2003-1008 at 4 (JA-781); LSC External Op. No. EX-2003-1009, at 4, 9 (JA-817, 822); Op. at 16, 93 (JA-984, 1061). Moreover, LSC admitted that the names proposed “are indicative of separate legal, financial and programmatic status,” and the “signage and disclaimers would appear to indicate physical and financial separation.” LSC External Op. No. EX-2003-1009, at 5, 6 (JA-818, 819); Op. at 93 (JA-1061). Nevertheless, LSC formally rejected the Clarified Proposal on the tautological grounds that the Clarified Proposal did not comply with LSC’s regulation requiring physical and personnel separation. LSC External Op. No. EX-2003-1009, at 8-9 (JA-821 to 822).

After encouraging the parties to agree upon an elaborate set of stipulated facts incorporating plaintiffs’ assessment of the onerous financial burdens imposed on them by the degree of physical and personnel separation demanded by LSC, the District Court proceeded to a decision, finding that the level of physical and personnel separation required by LSC imposes an “undue burden” on the exercise of plaintiffs’ First Amendment rights. Op. at 90-96 (JA-1058 to 1064).

The District Court denied plaintiffs’ motion for a preliminary injunction against Congress’s restrictions on the use of federal funds, and dismissed plaintiffs’ challenge to those restrictions. *Id.* at 53-59 (JA-1021 to 1027).

## **II. The Factual Record**

### **A. The Program Plaintiffs**

The program plaintiffs are non-profit agencies that provide legal assistance to low-income New Yorkers. Some clients are families fighting eviction from their homes. Others are women seeking domestic violence restraining orders, low-income homeowners fighting predatory lending, or parents seeking subsistence benefits to feed their children. Stip. Facts ¶¶ 32, 53 (JA-904, 905); Gray Decl., Nov. 29, 2001, ¶ 2 (JA-412); Scherer Decl., Dec. 7, 2001, ¶ 4 (JA-444).

In order to respond to the overwhelming need for legal services to the poor, each of the program plaintiffs secures contributions from private foundations, individuals, the federal government, and state and local governments, including the state Interest on Lawyer Account (“IOLA”) program. LSNY has been serving indigent clients since 1967 – seven years before LSC was created. LSNY has a total budget of approximately \$32 million, approximately 60% of which is derived from non-LSC sources. LSNY expends some of its LSC and non-LSC funds to provide legal services directly to clients through its own neighborhood offices and through a city-wide elderly legal services office. LSNY transmits the rest of its

funds to other LSC recipients throughout New York City, including plaintiff South Brooklyn Legal Services. Stip. Facts ¶¶ 18-20, 36 (JA-902, 904); Scherer Decl., Dec. 7, 2001, ¶¶ 2, 7 (JA-445).

South Brooklyn Legal Services has been serving low-income clients in Brooklyn since 1968. Its total budget is approximately \$4.3 million, approximately 67% of which comes from sources other than LSC. Stip. Facts ¶¶ 32, 36 (JA-904); Gray Decl., Nov. 19, 2001, ¶¶ 3, 5 (JA-412).

Plaintiff Farmworker Legal Services provides legal assistance to migrant farmworkers throughout the state. It was an LSC grantee until 1996, when it surrendered its LSC funding because of the newly imposed restrictions on that funding, including the costs imposed by the program integrity regulation. If the District Court's preliminary injunction is upheld, Farmworker Legal Services will reapply for LSC funding. Stip. Facts ¶¶ 56, 69, 71 (JA-906 to 907); Schmidt Decl., Nov. 15, 2001, ¶ 5 (JA-455).

None of the program plaintiffs has nearly enough resources to meet the overwhelming need for legal services in the low-income communities they serve. As a result, each dollar they expend in meeting the substantial financial costs imposed by the requirement of physical and personnel separation diminishes their financial ability to serve an indigent client in need of legal representation. For this reason, they seek to expend their scarce resources and organize their programs as

efficiently as possible. Stip. Facts ¶¶ 14-15 (JA-902); Gray Decl., June 19, 2002, ¶ 23 (JA-587 to 588); Schmidt Decl., Nov. 15, 2001, ¶¶ 21, 23 (JA-459).

## **B. The 1996 Restrictions on Federal Funding**

In accordance with Congressional directives, LSC requires its grantees to refrain from using federal funds to provide a list of “restricted” legal services to the poor, such as participating in class actions on their behalf, representing clients after advising them to enforce their legal rights, and receiving court-awarded attorneys’ fees for services to indigent clients.<sup>15</sup> *See* discussion *infra* at 20-22.

Until 1996, respect for principles of federalism had led Congress to exempt from the federal restrictions funds received by legal services programs from state and local governments, including grants from state Interest on Lawyer Trust Account (“IOLTA”) programs. *See* discussion *infra*, Argument, § II.D. Thus, prior to 1996, LSC grantees were able to devote their federal funds exclusively to federally approved uses, while utilizing unrestricted grants from state and local

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<sup>15</sup> The idea of “restricted” legal services began in 1974 with a ban on the use of LSC funds to challenge, *inter alia*, allegedly unconstitutional racial segregation. 42 U.S.C. § 2996f(b)(9) (SPA-26). The list of restricted activities was expanded and updated in 1996 to include more contemporary ideological *bete noires*, like class actions and attorneys’ fees. *See* discussion *infra* at 20-22.

governments and state IOLTA programs to provide a full range of legal services to the poor.<sup>16</sup>

In 1996, Congress purported to extend the restrictions to an LSC grantee's non-federal funds, even when the non-federal funds were provided by a state or local government without restriction. In response to Congress's action, LSC initially forbade its grantees from using non-federal funds to provide "restricted" legal services to indigent clients under any circumstances. When it became clear that LSC's absolute prohibition approach faced almost certain constitutional invalidation,<sup>17</sup> LSC changed course and promulgated the "program integrity" regulation at issue in this appeal. *See* discussion *supra*, Statement of the Case, § I.A.

The 1996 restrictions are severe and far-reaching. *Velazquez II*, 164 F.3d at 766. They segregate into expensive, physically separate facilities all cases necessitating the use of modern litigation tools like class actions and attorneys' fee awards that lawyers generally consider to be an essential part of their arsenal.

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<sup>16</sup> The availability of adequate unrestricted state and local government funding made it unnecessary for LSC grantees to question the applicability of the federal restrictions to their privately donated funds.

<sup>17</sup> Federal courts quickly recognized that an absolute prohibition would violate *FCC v. League of Women Voters*, 468 U.S. 364 (1984). *See* discussion *infra* Statement of the Case, § I.A.

Many of the restricted techniques are central to the proper treatment of uncontroversial, mundane legal matters that the defendants claim fall within the core of LSC's mandate. *See* U.S. Br. at 39-40 (quoting House and Senate Reports calling for a focus on "basic legal representation"). For example, plaintiff South Brooklyn Legal Services has been required either to forego, or segregate in a physically and professionally separate setting, a class action on behalf of government-subsidized day care providers whom New York City was underpaying by using an incorrect reimbursement formula. *Stip. Facts* ¶ 50 (JA-905); *Gray Decl.*, Nov. 29, 2001, ¶ 16 (JA-416 to 417). Likewise, the programs LSNY funds have been required to forego accepting court-awarded attorneys' fees in New York City's Housing Court, even though such awards play an important role in deterring irresponsible strategic landlord behavior. *Earisman Decl.*, Nov. 16, 2001, ¶¶ 15-16 (JA-408 to 409).<sup>18</sup>

The restrictions also segregate all cases on behalf of certain types of clients, including many categories of immigrants legally in this country and possessing work authorization. *See* 45 C.F.R. pt. 1626. In New York City, where immigrants represent a large proportion of the low-income population, and in Farmworker Legal Services' migrant farmworker practice, the restrictions interfere with the

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<sup>18</sup> This declarant is a plaintiff in her own right and also administers LSNY's Manhattan office. *See Earisman Decl.*, March 6, 2003, ¶ 1 (JA-685).

plaintiffs' efforts to serve their communities. Earisman Decl., Nov. 16, 2001, ¶ 17 (JA-409); Gray Decl., Nov. 29, 2001, ¶ 18 (JA-418); Schmidt Decl., Nov. 15, 2001, ¶¶ 29-35 (JA-461 to 463).

### **C. The Program Integrity Regulation**

LSC's program integrity regulation governs the degree of separation the plaintiffs must maintain between their LSC-funded activities and the activities barred by the restrictions. Violation of the regulation may be punishable by defunding. 45 C.F.R. § 1606.3 (SPA-101).

Under the regulation, LSC grantees must be legally separate from entities that use non-federal funding to engage in activities subject to the 1996 restrictions; they must not transfer or use LSC funds to subsidize the affiliate's activities; and the recipient must be "physically and financially separate." 45 C.F.R. § 1610.8(a) (SPA-112). The regulation states that "[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.* The relevant factors "include but are not limited to" the following:

- (i) The existence of separate personnel;
- (ii) The existence of separate accounting and timekeeping records;
- (iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and

(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

*Id.*

Although the regulation states that “[t]he presence or absence of any one or more factors will not be determinative,” *id.*, there are in fact some things that the plaintiffs and other grantees may never do. For example, LSC has warned that grantees may not share an executive director with their non-LSC affiliates, and that “the greater the responsibilities of the staff who are employed by both organizations, the more danger that program integrity will be compromised.” Stip. Facts ¶ 5 (JA-899 to 900). Likewise, large organizations may not share more than 10% of their staff with their non-LSC affiliates, and smaller organizations may not share “a substantial proportion of the recipient’s legal workforce.”<sup>19</sup> *Id.*

Conversely, the fact that LSC has allowed certain programs to engage in some sorts of sharing does not mean that LSC will allow the plaintiff programs to do so. In rejecting the plaintiffs’ Clarified Proposal, LSC warned that the more sharing the programs have in one area (e.g., physical premises), the less they will

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<sup>19</sup> These LSC statements contradict the unsubstantiated assertions in LSC’s brief that LSC allows programs to share a significant amount of staff. *See, e.g.*, LSC Br. at 36. LSC does not point to any configurations it has approved where more than two employees are shared or where a shared employee is more senior than a staff attorney. Stip. Facts ¶ 12 (JA-901 to 902).

be allowed in another (e.g., staff).<sup>20</sup> This principle was clearly at work when, despite LSC’s general rule that large organizations may share up to 10% of their staff, the LSC Inspector General found grantee California Rural Legal Assistance – a very large grantee – in violation of the program integrity regulation for sharing a single employee with a legally distinct non-LSC program. *See* LSC Office of the Inspector General, Review of Grantee’s Transfer of Funds and Compliance With Program Integrity Standards (Dec. 2003) at 4 (Supplemental Joint Appendix (“SJA”)-13).

LSC has not established a formal procedure by which grantees can apply for approval of a particular configuration model under the program integrity regulation. *See* LSC Br. at 34 (“[A] grantee need not obtain LSC’s pre-approval to enter into an affiliate relationship.”). LSC grantees may, however, informally ask LSC whether a configuration complies with the regulation. This procedure does not provide grantees with information about what is the least burdensome configuration that LSC would view as complying with the regulation. *Stip. Facts* ¶ 8 (JA-900). Indeed, the regulation is a model of standardless discretion.

### **SUMMARY OF ARGUMENT**

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<sup>20</sup> *See* LSC Office of Legal Affairs, External Op. No. EX-2003-1009 (JA-820) (“As with other indicia discussed herein, relative staff composition is viewed in the overall context of the relationship.”).

## I.

LSC’s “program integrity” regulation, which requires LSC grantees to maintain legally separate affiliates located in physically separate premises staffed with separate personnel in order to use the grantees’ unrestricted non-federal funds to provide so-called “restricted” legal services to their indigent clients, is unconstitutional both facially and as applied to the three LSC grantees before the Court.

### A.

Although a panel of this Court sustained the facial constitutionality of the LSC regulation on the record then before it in *Velazquez II*, 164 F.3d at 766-67, Congress and the Executive have since developed an elaborate set of “faith-based” regulations governing the degree of physical and personnel separation required of federal grantees that also perform religious activities. The avowed purpose of the regulations is to assure that federal funds do not subsidize or appear to endorse religious activities in violation of the Establishment Clause. However, in order to avoid imposing undue burdens on the exercise of religious activities by federal grantees, the “faith-based” regulations explicitly permit the sharing of physical space and personnel between religious and non-religious activities as long as the two activities are conducted in separate rooms, or in the same room but at separate times. Despite the widespread implementation of the faith-based regulations by

agencies of the federal government, when the three program plaintiffs requested LSC to permit them to maintain levels of separation similar to the levels provided for in the faith-based regulations, in order to remove onerous burdens on the use of non-federal funds to provide a full range of legal services to the poor, LSC denied the request, ruling that Congress requires a greater degree of separation in connection with the delivery of “restricted” legal services than it does for the performance of religious activities. Such a double standard, which encourages religious speech by freeing it from onerous costs associated with physical and personnel separation, while simultaneously discouraging secular speech, by subjecting it to onerous fiscal, administrative and programmatic costs imposed by maintaining separate physical locations and personnel, violates the First Amendment on its face. The Supreme Court has unequivocally ruled that government may not discriminate against, or in favor of, religious speech. *See* discussion *infra*, Argument, § II.B; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

## B.

In addition, as the District Court found below, the regulation is unconstitutional as applied to the three program plaintiffs before the Court because it imposes an “undue burden” on their ability to use their non-federal funds to provide constitutionally protected legal services to indigent clients. Applying the

“undue burden” standard enunciated by this Court in *Velazquez II*, and derived from Supreme Court precedent, the District Court found, on a full evidentiary record, that the onerous fiscal, administrative and programmatic costs imposed on protected speech by requiring physical and personnel separation could not be justified by the government’s legitimate interests in avoiding subsidization and preventing the appearance of endorsement. *See* discussion *infra*, Argument, §§ II.C.1, II.C.2.

The District Court found that plaintiffs’ “Clarified Proposal,” providing for legal separation with readily distinguishable names, meticulously fair cost-sharing, intra-office physical and temporal separation identical to the requirements of the faith-based regulations, and extensive signage and disclaimers, satisfied all legitimate government interests. Accordingly, the District Court enjoined the imposition of any greater level of physical or personnel separation. The District Court’s assessment of the law and facts was clearly correct, with the exception of an aspect of its injunction requiring physically separate waiting and conference rooms, and requiring the appointment of new counsel in cases where a client’s best interest requires an unanticipated shift from the restricted LSC affiliate to the unrestricted affiliate. Plaintiffs believe that these two remaining highly burdensome restrictions cannot be squared with the logic of the District Court’s opinion. *See* discussion *infra*, Argument, §§ II.C.3, II.C.4.

The brief of the United States alleges that the program integrity regulation is motivated by yet another interest – a fear that LSC-funded lawyers will be adversely affected by virtue of their close proximity to the constitutionally protected delivery of a full range of non-federally funded legal services to indigent clients. Apart from the patent absurdity of treating the delivery of excellent legal services as a communicable disease that must be quarantined, the government’s concession makes it clear that the regulation is based on unsupported speculation that LSC-funded lawyers will be “distracted” unless the provision of restricted legal services is exiled to a physically separate setting. The government may not, however, burden the exercise of First Amendment rights on the basis of speculation about harms alleged to flow from their exercise. Indeed, the Supreme Court has repeatedly facially invalidated similar efforts to limit constitutionally protected First Amendment activity because of speculation concerning its allegedly harmful effect. *See* discussion *infra*, Argument, § II.C.3.c; *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811 (2000); *League of Women Voters*, 468 U.S. at 384 (warning that courts must be “particularly wary” of content-based regulation); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

### C.

If the preliminary injunction is upheld, plaintiffs believe that all remaining issues will become functionally moot because the ability to use non-federal funds

in an efficient manner to provide a full range of legal services in those settings where they are appropriate would appear to remove any immediate need to consider either alternative theories calling the program integrity regulation into question, or challenges to the constitutionality of limits on the use of federal funds. Under such circumstance, plaintiffs suggest that the rulings below on any such issues be vacated in accordance with *United States v. Munsingwear*, 340 U.S. 36 (1950). *See* discussion *infra*, Argument, §§ II.D, III.A.

#### D.

If it should become necessary to pass on the remaining issues, the program integrity regulation is unconstitutional because it limits the use of funds derived from state and local government in violation of principles of federalism. The United States has no legitimate interest in imposing onerous burdens on funds appropriated by state and local governments in order to provide for the efficient operation of state and local judicial systems by assuring the availability of a full range of legal services in all cases involving low-income litigants. *See* discussion *infra*, Argument, § II.D; *Printz v. United States*, 521 U.S. 898, 918 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991).

#### E.

Similarly, the program integrity regulation is unconstitutional because it limits the use of privately donated funds in violation of the First Amendment. The

United States has no legitimate interest in forcing private donors into the Hobson's choice of either limiting their contributions to restricted legal services or undergoing significant costs to permit the funds to provide a full range of legal services. *See* discussion *infra*, Argument, § II.D; *Riley v. National Fed'n for the Blind*, 487 U.S. 781 (1988); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799 (1985); *Buckley v. Valeo*, 424 U.S. 1 (1976).

## II.

Finally, if it becomes necessary to reach the issue, the restrictions on the use of federal funds are unconstitutional because they distort the proper functioning of the relevant speech forum. In *Velazquez III*, the Supreme Court held that speech-related restrictions on the use of federal funds become unconstitutional when they distort the proper functioning of the applicable forum. In this case, the restrictions on class actions, attorneys' fee awards, and advising potential clients to enforce their legal rights manifestly distort the proper functioning of the courts and are, therefore, unconstitutional. *See* discussion *infra*, Argument, § III.B.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

This Court reviews the grant or denial of a preliminary injunction for abuse of discretion. *Moore v. Consolidated Edison Co. of N.Y., Inc.*, -- F.3d --, 2005 WL 1301277, \*3 (2d Cir. June 2, 2005). This "is one of the most deferential standards

of review; it recognizes that the district court, which is intimately familiar with the nuances of the case, is in a far better position to make certain decisions than is an appellate court, which must work from a cold record.” *In re Bolar Pharmaceutical Co., Inc., Sec. Litig.*, 966 F.2d 731, 732 (2d Cir. 1992). Nevertheless, “[a] district court necessarily abuses its discretion if its conclusions are based on an erroneous determination of law . . . [or] on a clearly erroneous assessment of the evidence.” *Matthew Bender & Co., Inc. v. West Pub. Co.*, 240 F.3d 116, 121 (2d Cir. 2001) (citations and quotation marks omitted).

This Court reviews the grant or denial of a motion to dismiss de novo. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 89 (2d Cir. 2004). This Court “must accept the allegations contained in the petition as true, and draw all reasonable inferences in favor of the non-movant. . . . Dismissal is appropriate only where ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Still v. DeBuono*, 101 F.3d 888, 891 (2d Cir. 1996) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

## **II. LSC’S RESTRICTIONS ON THE USE OF NON-FEDERAL FUNDS VIOLATE THE FIRST AND TENTH AMENDMENTS, AND GENERAL PRINCIPLES OF FEDERALISM.**

### **A. Four Central Legal Issues Have Been Settled in Prior Proceedings.**

As the complex introductory material attests, this Court does not approach this appeal on a blank legal slate. Four significant aspects of the legal analysis have already been definitively resolved.

First, no doubt exists concerning the constitutionally protected nature of the “restricted” representational activities burdened by LSC’s regulation. The Supreme Court’s holding in *Velazquez III* rested on the fundamental premise that “[t]here can be little doubt that the LSC Act funds constitutionally protected expression.” 531 U.S. at 548. *See also NAACP v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978).

Second, Congress has made a wise and considered choice to use a network of autonomous non-governmental entities – many of which, like plaintiffs LSNY and South Brooklyn Legal Services, pre-date LSC – to deliver federally funded legal services to indigent persons in civil cases, rather than establish a government agency to carry out the task using government employees. *See Velazquez II*, 164 F.3d at 759. Moreover, Congress has wisely encouraged state and local governments and private donors to contribute substantial funds to the autonomous local entities. Thus, whatever Congress’s power to control the activities of federal

employees or agencies of the federal government, we deal here with an effort to limit the activities of autonomous non-governmental entities that derive their funds from non-federal, as well as federal, sources. *Compare Connick v. Myers*, 461 U.S. 138 (1983) (regulating employee speech), with *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996) (protecting rights of non-governmental speakers).

Third, the Supreme Court has made it clear that the federal government has no interest in using the legal services program to communicate a government message. *Velazquez III*, 531 U.S. at 542. Thus, whatever Congress's power to act to advance the government's own speech or to limit the speech of others that might garble the government's message, *Rust*, 500 U.S. 173; *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2060-62 (2005), we deal here with an effort to limit the non-federally funded First Amendment activities of non-governmental speakers.

Accordingly, in *Velazquez III*, the Supreme Court explained why *Rust v. Sullivan*, the linchpin of defendants' legal position, has nothing to do with this case. The *Velazquez III* Court explained that *Rust* involved a government decision to hire private doctors as surrogate government speakers in order to deliver a precise government message about birth control. Since the approved government message did not include abortion as a government-recommended form of birth control, to the extent the subsidized doctor wished to discuss abortion, his speech

might alter or garble the precise government message the doctor was hired to deliver. Under those narrow circumstances, explained the *Velazquez III* Court, the government was justified in insisting that non-federally funded speech about abortion be delivered in a physically separate setting. 531 U.S. at 541.

Since the *Velazquez III* Court held that federally funded legal services lawyers do not act as government mouthpieces, no risk exists that a government message will be garbled by the provision of a full spectrum of constitutionally protected non-federally funded legal services on a grantee's premises. Under the binding ground rules set down by the *Velazquez III* Court, *Rust* provides no support whatever for an unduly burdensome requirement of separate physical facilities staffed by separate lawyers.

Fourth, this Court's prior opinion in *Velazquez II* establishes the procedural ground rules for assessing whether LSC's effort to limit the use of plaintiffs' non-federal funds is unduly burdensome. *Velazquez II* recognized that an assessment of the burdens imposed by LSC's program integrity regulation must be tested by real-world standards in the context of an evidentiary record comparing the actual costs of compliance and the countervailing government interests. 164 F.3d at 767. In view of the District Court's insistence on a complete factual record detailing the fiscal, administrative and programmatic costs of compliance, and the District Court's careful assessment of the relationship between the real-world costs to

plaintiffs of complying with the regulation and any asserted legitimate government interests, the District Court's decision to enter a preliminary injunction protecting the use of plaintiffs' non-federal funds from unduly burdensome conditions is entitled to substantial deference.

**B. LSC's Program Integrity Regulation Is Facially Unconstitutional Because It Discriminates Against Secular Speech.**

In *Velazquez II*, this Court declined to find LSC's program integrity regulation facially unconstitutional. 164 F.3d at 766-67. The implementation of the Faith-Based Initiative in the intervening years, however, renders it appropriate to consider anew the issue of facial unconstitutionality.<sup>21</sup> Like the program integrity regulation, the Faith-Based Initiative was intended to ensure that the government neither subsidized nor appeared to endorse certain activities in which federal grantees engaged. However, in the Faith-Based Initiative the federal government chose to enable federal grantees to use their private funding to engage in constitutionally protected religious activities free from undue burdens, *see* discussion *supra* Statement of the Case, § I.D; Argument, § II.C.2.d, while through the program integrity regulation it imposed onerous burdens on federal grantees seeking to use their non-federal funding to engage in constitutionally protected

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<sup>21</sup> This initiative and its purposes is described in detail *supra*, Statement of the Case, § I.D.

attorney-client speech. The federal government thus discriminated according to the nature of the constitutionally protected speech grantees wish to undertake.

Those grantees who wish to engage in privately funded religious activities may do so in the same space and with the same personnel that they use to carry out their federally funded activities, so long as they comply with two non-onerous requirements: 1) they must conduct the two sets of activities in different rooms, or in the same room but at different times; and 2) they must adhere to generally accepted principles of accounting.

At the same time, the United States requires LSC grantees to maintain expensive and cumbersome physical and employee separation between their federally funded activities and disfavored non-federally funded, constitutionally protected attorney-client speech activities. *See* discussion *supra*, Statement of the Case §§ I.D, II.C.

Whether viewed through the lens of the First Amendment's ban on viewpoint discrimination, or as an Establishment Clause violation, such discriminatory treatment is unconstitutional.

The Supreme Court has made it clear that the First Amendment's ban on viewpoint discrimination prohibits government from treating religious speech *worse* than constitutionally protected secular speech. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (invalidating government regulatory

scheme prohibiting after-hours access to public school premises by religious groups); *Rosenberger*, 515 U.S. 819 (invalidating exclusion of religious organizations from direct subsidy of student publications). Conversely, the First Amendment forbids the government from treating religious speech *better* than similarly situated secular speech. For example, in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), the Court invalidated a Texas law granting a sales tax exemption for magazines with religious content, but requiring 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.<sup>22</sup> Both lines of cases make clear that when, as here, the government seeks to treat religious speech better than analogously situated secular speech, it violates the Constitution.

In the District Court, defendants argued that the two regimes are distinguishable because LSC does not participate in the Faith-Based Initiative.<sup>23</sup> In

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<sup>22</sup> See also *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (invalidating New York statute carving out unique school district for religious minority); *Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (invalidating Connecticut statute requiring employers to provide employees with a day off on their religious Sabbaths, but not on analogous secular days); *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).

<sup>23</sup> The United States also contends that the programs are distinguishable because the Faith-Based Initiative does not award funding, while the program

fact, plaintiffs are technically subject to both sets of regimes, because they receive funding from federal agencies that also participate in the Faith-Based Initiative. *See* Gray Decl., April 8, 2003, ¶¶ 3-5 (JA-692); Scherer Decl., April, 2003, ¶¶ 3-5 (JA-694). More importantly, both regimes ultimately derive from Congress, and, as evidenced by the intervention of the United States in this case, are enforced by the Executive. The federal government may not avoid a ban on unconstitutional discrimination by slicing discriminatory rules into bite-sized, separately administered units within which no intra-unit discrimination occurs. *See Bush v. Gore*, 531 U.S. 98 (2000) (refusing to measure discriminatory voting procedures on county-by-county basis; insisting on examining entire state).

The United States also argued below that the disparate treatment was permissible under *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987). In that case, the Supreme 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. Unlike the present case, however, in *Amos*

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integrity regulation does. U.S. Br. at 45-46. That is a distinction without a difference, because both are designed to regulate the way that federal grantees conduct privately funded activities.

the government did not simultaneously deter analogous, secular constitutionally protected activities. *Amos* offers no guidance in this case, where the disfavored secular activity is both constitutionally protected and affirmatively deterred by defendants.

The government may also point to the Supreme Court's recent opinion in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005). There, the Supreme Court upheld a provision of the Religious Land Use and Institutionalized Persons Act barring prisons receiving federal funding from substantially burdening prisoners' religious exercise unless the burden furthers a compelling government interest. However, *Cutter* did not consider a scheme in which the government imposed affirmative burdens on the exercise of secular rights. In this case, on the other hand, the federal government *has* simultaneously imposed significant burdens on secular speech, while removing burdens on similarly situated religious activities. Such differential treatment is impermissible.

**C. The District Court Correctly Enjoined LSC From Imposing an “Undue Burden” on the Use of Non-Federal Funds by the Program Plaintiffs to Provide a Full Spectrum of Legal Services to Indigent Clients.**

**1. The “Undue Burden” Standard Is Firmly Grounded in Supreme Court Jurisprudence.**

The “undue burden” standard described by this Court in *Velazquez II*, and applied by the District Court below, is firmly grounded in the Supreme Court's

extended consideration of the conditions that may be placed on the receipt of a government benefit. Lower courts had initially ruled that because government is under no duty to confer a benefit, it may force a recipient to choose between enjoyment of a constitutional right and enjoyment of a government benefit.

*McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (per Holmes, J.).

The lower courts reasoned that a citizen who chooses to forego a benefit in order to enjoy full constitutional protection is no worse off than if the government had simply chosen not to grant the benefit in the first place. *Id.* at 517-18. Although it has been discredited for almost fifty years, the “no worse off” argument underlies the government’s position in this case. *See* U.S. Br. at 31, 37; LSC Br. at 50.

In *Speiser v. Randall*, 357 U.S. 513 (1958), the Supreme Court explicitly rejected the “no worse off” reasoning of *McAuliffe*, and struck down a California law that conditioned receipt of a property tax exemption on a declaration that the recipient did not advocate the forcible overthrow of the government. The *Speiser* Court reasoned that denial of a government benefit as a penalty for exercising a First Amendment right violates the First Amendment.

The *Speiser* principle was refined in *Regan v. Taxation With Representation* (“*TWR*”), when a non-profit group seeking 501(c)(3) tax exempt status argued that receipt of the favorable tax status could not be conditioned on a waiver of a constitutional right to lobby Congress with tax-subsidized funds. The Supreme

Court, treating the favorable tax status as a form of government subsidy,<sup>24</sup> upheld the ban on lobbying with tax subsidized funds, but only because the organization was easily able to establish a legally separate 501(c)(4) affiliate to engage in lobbying with unsubsidized funds. The *TWR* Court repeatedly stressed that the burden established by the need to create a legally separate (c)(4) affiliate was *de minimis*.<sup>25</sup> As Justice Rehnquist, writing for the Court, noted: “The 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.*” 461 U.S. at 544 n.6 (emphasis added).

Indeed, Justices Blackmun, Brennan and Marshall concurred in *TWR* only because the burden was so minimal that it did not constitute a “significant restriction” on the ability of the group to lobby with its own funds.<sup>26</sup> *Id.* at 553.

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<sup>24</sup> A donee’s 501(c)(3) status permits a donor to deduct up to 30% of any gifts to the donee in calculating the donor’s taxable income.

<sup>25</sup> Justice Rehnquist’s opinion for the Court in *TWR* observed that, prior to the litigation, *TWR*’s predecessor had, in fact, operated successfully both a (c)(3) and a (c)(4) entity. 461 U.S. at 544.

<sup>26</sup> LSC’s attempt to distinguish the concurrence is unsuccessful. *See* LSC Br. at 43-44. Contrary to LSC’s contention, Justice Blackmun was not concerned solely with whether the 501(c)(3) would be able to control the 501(c)(4). Rather, his reference to the majority’s “undue burden” footnote makes clear that he, like the majority, rested his holding on the understanding that there were no “stringent requirements” unrelated to the asserted governmental interests. *See* 461 U.S. at 553 (citing *id.* at 544 n.6).

Given Justice Blackmun's careful concurrence, and the stress placed in the Court's opinion on the ease with which a (c)(4) affiliate could be established, it seems clear that if, as here, the *TWR* Court had been confronted with a scheme that made it prohibitively expensive, administratively difficult, and programmatically unwise to establish an unrestricted affiliate free to use its own funds to engage in First Amendment activity, the Supreme Court would have struck down the "unduly burdensome" restrictions as unconstitutional.

The *Speiser* principle was firmly applied in *FCC v. League of Women Voters*, when the Court invalidated a Congressional statute that forbade publicly subsidized television stations from editorializing with their private funds. The Court held that the statute's regulation of the broadcast spectrum would be upheld if it was "narrowly tailored" to advance a "substantial governmental interest." 468 U.S. at 380. Contrary to defendants' assertions in this case, the Court explicitly noted that the "narrow tailoring/substantial governmental interest" test (which is virtually indistinguishable from the "undue burden" standard applied by the District Court in this case) was not the equivalent of "strict scrutiny." *Id.* Applying the "narrow tailoring" standard, the Court found that the ban on editorializing "far exceed[ed] what was necessary" to protect the asserted government interest. *Id.* at 394.

Moreover, the Court explicitly rejected a Spending Clause argument based on Congress's desire to withhold federal funding from editorials. The Court noted that, unlike in *TWR*, a public television station did not have the option of creating a separate affiliate to editorialize with private funds. Thus, the effect of the regulation was to ban the constitutionally protected use of private funds by a government grantee. *Id.* at 400. In words particularly applicable to this case, the Court noted that if Congress were to permit public television stations to “establish ‘affiliate’ organizations *which could then use the station’s facilities to editorialize with nonfederal funds,*” such a mechanism would be valid. *Id.* (emphasis added). Thus, if the government had permitted an affiliate to engage in privately funded editorializing, but had refused to permit the affiliate to “use the station’s facilities,” and had forced the affiliate to operate at an expensive and redundant separate physical location using separate employees, the unduly burdensome restrictions would almost certainly have been declared unconstitutional.

The Supreme Court applied the *Speiser* principle most recently in *United States v. American Library Association*, 539 U.S. 194 (2003), when the Court upheld a Congressional statute requiring libraries receiving federal assistance in securing Internet access to install filters designed to block access to material harmful to minors on all computers in the library. Chief Justice Rehnquist, writing for a four-member plurality, noted that since libraries traditionally impose controls

on minors' access to books, the filters were consistent with general library practice. The Chief Justice noted, as well, that an adult library patron could easily avoid the filter by the simple expedient of asking a librarian to disable it, rendering the real world burden on First Amendment activity *de minimis*. *Id.* at 209.

Justices Kennedy and Breyer provided the crucial fifth and sixth votes.

Justice Kennedy, concurring in words that control this case, stated:

If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without *significant* delay, there is little to this case. The Government represents that this is indeed the fact . . . . If some libraries do not have the capacity . . . to disable the filter or if it is shown that an adult user's election to view the Internet material *is burdened in some other substantial way*, that would be the subject for an as-applied challenge . . . . Given . . . the failure to show that the ability of adult library users to have access to the material *is burdened in any significant degree*, the statute is not unconstitutional on its face.

*Id.* at 214-15 (emphasis added).<sup>27</sup>

Justice Breyer's concurrence also precisely anticipated the thoughtful use of the "undue burden" analysis by the District Court in this case. In words that could have been drawn from the District Court's opinion, Justice Breyer noted that:

*the Court has asked whether the harm to speech-related interests is disproportionate in light of both the*

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<sup>27</sup> Justice Kennedy's opinion is controlling because it was decided on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

*justification and the potential alternatives. It has considered the legitimacy of the statute’s objective, the extent to which the statute will tend to achieve that objective, whether there are less restrictive ways of achieving that objective, and ultimately whether the statute works a speech-related harm that is out of proportion . . . . Given the comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm is disproportionate when considered in relation to the Act’s legitimate objectives.*

*Id.* at 217-18, 220 (emphasis added).

Justices Stevens, Souter and Ginsburg dissented, each arguing that the statute was unconstitutional because it imposed burdens on a library patron seeking access to blocked Internet material that were far more onerous than the *de minimis* burden described in the plurality and concurring opinions. *Id.* at 222 (Stevens, J., dissenting); *id.* at 231-34 (Stevens & Ginsburg, JJ., dissenting). Thus, five members of the Court – Justices Kennedy, Breyer, Stevens, Souter and Ginsburg<sup>28</sup> – would unquestionably have invalidated the restriction before the Court in *American Library Association* if it had imposed an “undue burden” on the exercise of First Amendment rights. Moreover, the remaining four members of the Court – the Chief Justice and Justices O’Connor, Scalia and Thomas – premised their plurality opinion on the assumption that the burden on First Amendment activity

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<sup>28</sup> Not coincidentally, the same five Justices were in the majority in *Velazquez III*.

was easily avoided. If, as here, a library patron were required to expend significant resources in moving to a physically separate library staffed by separate librarians, all nine members of the Supreme Court would almost certainly have invalidated the unduly burdensome restriction on the exercise of First Amendment rights.

The only Supreme Court case ever to uphold more than *de minimis* restrictions under the Spending Clause on the use of non-federal funds to engage in First Amendment activity is *Rust v. Sullivan*, on which defendants base virtually their entire legal position. However, as previously discussed, the program at issue in *Rust* was designed to expound a governmental message. Its holding regarding the amount of separation the government was entitled to require between a federally funded speaker delivering a government message and privately funded speakers delivering a message that might conflict with the government's message has no bearing on this case. *See* discussion *supra* Argument, § II.A.

Nonetheless, defendants, noting that LSC's requirement of physical and personnel separation is identical to the regulation upheld in *Rust*, argue that requiring physical and personnel separation as the price of exercising non-federally funded First Amendment rights is constitutional, even when the costs are extremely onerous and the burden on free speech is very substantial, as long as the creation of the separate program is not "effectively prohibited." *See* U.S. Br. at 36; LSC Br. at 50. Such an oppressive standard, which, as this case illustrates, invites

the government to use unnecessarily onerous conditions on the receipt of federal funds in order to deter disfavored non-federally funded First Amendment activity, cannot be squared with the Supreme Court’s analyses in *Speiser*, *TWR*, *League of Women Voters*, or *American Library Association*, all of which were prepared to invalidate a spending condition that materially interfered with the First Amendment use of a grantee’s non-federal funds. In fact, the “undue burden” standard used by the District Court is arguably more favorable to the government than the speech-protective standards used in those cases, which characterize the impermissible level of interference as “significant,” “substantial,” and “disproportionate.” *See American Library Ass’n*, 539 U.S. at 214-15 (Kennedy, J., concurring); *id.* at 217-18, 220 (Breyer, J., concurring); *League of Women Voters*, 468 U.S. at 380; *TWR*, 461 U.S. at 553 (Blackmun, J., concurring).

The stark choice is between defendants’ “effectively prohibits” standard, which invites the federal government to leverage its spending power into a device to deter disfavored First Amendment activity, and an “undue burden” standard that limits the federal government’s spending power over First Amendment activity to those settings where the restrictions are reasonably needed to advance legitimate governmental interests. In *Velazquez II*, this Court correctly recognized that the Supreme Court has already made the choice in favor of an “undue burden” standard. *See discussion supra*, Statement of the Case § I.B.

**2. The Fiscal, Administrative and Programmatic Costs of Complying With the Restriction Are Extremely Onerous.**

LSC’s application of the program integrity regulation to the plaintiffs imposes severe financial, programmatic and administrative burdens on each program plaintiff.

**a. Financial Costs**

As the District Court noted, South Brooklyn Legal Services determined that the difference between operating with the minimal separation contained in the Clarified Proposal and the greater separation required by the program integrity regulation “would cost the organization at least \$380,000, which is 8% of the budget.” Op. at 79-80 (JA-1047 to 1048) (quoting Stip. Facts ¶ 41).<sup>29</sup>

Queens Legal Services Corporation, which receives LSC funding through plaintiff LSNY, calculated that the difference between operating with the lack of separation contained in the Clarified Proposal and with the level of separation required by the program integrity regulation would “cost at least \$200,000 per year.” Op. at 79 (JA-1047).

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<sup>29</sup> The United States’ argument that the District Court “makes no mention of the costs of compliance to any particular grant recipient” ignores this portion of the opinion. U.S. Br. at 33. Moreover, the District Court’s summary of the financial burdens relies on the parties’ stipulated facts, *see* Op. at 78-81 (JA-1046 to 1049), and not, as LSC claims, on the plaintiffs’ declarations. *See* LSC Br. at 25.

Farmworker Legal Services calculated that the difference between operating with the level of separation in the Clarified Proposal and with the level of separation required by the program integrity regulation “would cost the organization at least \$130,000 in the first year and \$80,000 annually thereafter.” Op. at 80-81 (JA-1048 to 1049) (quoting Stip. Facts ¶ 63).

Although defendants attempt to make light of the fiscal cost of compliance by stressing the substantial non-federal resources available to the program plaintiffs, *see* U.S. Br. at 31, 37; LSC Br. at 50, they ignore the fact that the plaintiffs’ resources are grossly inadequate to meet the enormous need for legal representation in the low-income communities they serve. *See* discussion *supra*, Statement of the Case, § II.A. This gross disparity between available resources and high demand means that the duplicative staff, premises and equipment the program integrity regulation forces the plaintiffs to maintain immediately translates into fewer low-income people receiving representation.<sup>30</sup> Every wasted dollar means an unmet legal need. For example, compliance by South Brooklyn Legal

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<sup>30</sup> It is for this reason that the LSC Act and annual LSC appropriations acts require both LSC and its grantee programs to provide legal services in as efficient a manner as possible. *See* Abel Decl., Dec. 14, 2001, ¶¶ 7, 10 (JA-163, 164). It is also for this reason that LSC has required LSNY to change its governance structure, as part of a push to require grantees throughout the country to consolidate smaller programs into larger programs. *See* Stip. Facts ¶ 16 (JA-902); Abel Decl., Dec. 14, 2001, ¶¶ 6-10, 17-20 (JA-163 to 164, 167 to 168); Scherer Decl., Feb. 11, 2003, ¶ 4 (SJA-4).

Services would force the organization to forego representing approximately 500 clients each year. Op. at 79-80 (JA-1047 to 1048) (quoting Stip. Facts ¶ 41).

Defendants' attempts to undermine the accuracy and relevance of plaintiffs' calculations are unavailing. See LSC Br. at 35-36. To determine the costs of maintaining an affiliate, each program plaintiff used as a baseline the costs of operating with the minimal level of separation outlined in the Clarified Proposal.<sup>31</sup> Each program compared this to the costs of an affiliate with the much greater level of separation required by LSC's program integrity regulation.

Although LSC refuses to identify the precise level of sharing it permits the plaintiffs to maintain with their affiliates, see discussion *supra*, Statement of the Case § II.C, it nonetheless criticizes the District Court for failing to "consider the lesser burdens plaintiffs would suffer if they entered into affiliations with some sharing of space, equipment and personnel, as the rule permits." See LSC Br. at

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<sup>31</sup> South Brooklyn Legal Services and Queens Legal Services Corporation (which receives LSC funding through LSNY) both used as their baseline a configuration LSNY had proposed to LSC in 1997. Farmworker Legal Services of New York used as its baseline a proposal it submitted to LSC shortly after the program integrity regulation was implemented. Both configurations provided for sharing of all employees and all physical space, just as the Clarified Proposal does. LSC rejected both proposals. See Callendar Decl., June 19, 2002, ¶¶ 9-10, 11-16 (JA-559 to 561); Schmidt Decl., Nov. 15, 2001, ¶ 16 (JA-457 to 458); Stip. Facts ¶¶ 22-24, 66 (JA-903, 906); Letter from H. Richard Schumacher to John A. Tull, Aug. 12, 1997 (JA-379); Letter from John A. Tull to H. Richard Schumacher, Sept. 10, 1997 (JA-376).

25, 36. In fact, the configuration South Brooklyn Legal Services uses as a model for what the program integrity regulation requires involved the level of sharing LSC has permitted of a Virginia grantee and its non-LSC affiliate: one attorney who works for both on a part-time basis. The configuration Farmworker Legal Services uses as a model involves sharing a copier, fax machine, reception area and secretary with an affiliate in one location, and sharing a paralegal, an attorney, a secretary and a reception area in another location.<sup>32</sup> Stip. Facts ¶¶ 11-12, 63-64 (JA-901 to 902, 906); Gray Decl., June 19, 2002, ¶¶ 16-25 (JA-585 to 588); Gulotta Decl., June 19, 2002, ¶¶ 14-17 (JA-594 to 595).

**b. Programmatic Costs**

In addition to imposing severe financial burdens, the program integrity regulation interferes with the plaintiffs’ ability to provide high-quality legal assistance to their clients. Forcing groups of lawyers to work in isolation from one another is exactly the wrong way to structure an effective legal services program. Such programs depend upon a free flow of information, ideas and insights into the

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<sup>32</sup> Queens Legal Services Corporation assumed that it would be required to maintain entirely separate staffs and entirely separate physical premises. However, it stated that “[e]ven if it were possible to avoid one or more of these financial costs, the overall financial cost of establishing an objectively separate legal program housed in a physically separate facility would, in the opinion of QLSC leadership, use scarce financial resources that QLSC would prefer to devote directly to delivering legal services to the poor.” Callendar Decl., June 19, 2002, ¶ 21 (JA-563).

needs of the client communities and the legal techniques best suited to serve their legal needs. No responsible legal services official would voluntarily segregate lawyers in a manner that virtually prevents communication between and among them. *See* Gray Decl., Nov. 29, 2001, ¶¶ 12, 13 (JA-415 to 416); Scherer Decl., Nov. 29, 2001, ¶¶ 15-18 (JA-448 to 450).

The separation required by the program integrity regulation also impedes the ability of the plaintiff programs to make themselves accessible to clients. For example, the migrant workers whom Farmworker Legal Services assists generally live in isolated labor camps without access to mass transportation, and often without access to telephones. When workers overcome these obstacles and manage to reach a lawyer, only to be told that they must go to a different office to receive assistance, many will be simply unable to follow up on the referral. Schmidt Decl., Nov. 15, 2001, ¶¶ 18-20 (JA-458 to 459). *See also* Gray Decl., Nov. 29, 2001, ¶ 14 (JA-416).

**c. Administrative Costs**

Operating separate legal programs providing different forms of legal representation in separate physical locations, with separate staff, is an administrative nightmare. Allocating personnel and resources between the two programs, deciding which cases are to be allocated to which program, and regulating contact between the lawyers employed by the separate programs are just

a few of the problems. The tasks are complicated by LSC's mandate that the two programs have different executive directors and other supervisory and administrative personnel with significant responsibilities. *See* discussion *supra*, Statement of the Case § II.C; Schmidt Decl., Nov. 15, 2001, ¶¶ 14-16 (JA-457 to 458). The tasks are made almost impossible by the lack of clear guidelines regarding how much sharing is allowed,<sup>33</sup> and by the fact that lawyers often do not know until "the midst of litigation proceedings" whether a case will require work subject to the restrictions. *Velazquez III*, 531 U.S. at 545. If the tasks are bungled, the organization's future is placed in jeopardy. *See* 45 C.F.R. § 1606.4 (SPA-101) (discussing debarment penalty for restrictions violations).

The administrative difficulties are particularly great in certain categories of cases in which the plaintiffs specialize. For example, in order for Farmworker Legal Services to represent all members of a client's family, or of a migrant work crew, it must often represent people with differing immigration statuses. Schmidt Decl., Nov. 29, 2001, ¶¶ 29-34. If some family members are eligible for representation by the LSC grantee, and some are not, to which office should the administrator assign the case? Must one lawyer from each program be assigned? Must they file separate cases on behalf of the LSC-eligible and non-LSC-eligible

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<sup>33</sup> *See* Statement of the Case, *supra*, § II.C.

clients, even though one case would be more cost-efficient and more factually and legally compelling? May the attorneys discuss and collaborate on their cases, or must they conduct separate discovery and file separate motions? These administrative difficulties, in combination with the tremendous financial and programmatic burdens, render the LSC regulation unconstitutional as applied to the plaintiffs.

**d. The Plaintiffs' Statements Regarding Burden Are Not Speculative.**

Although LSC derides the plaintiffs' statements regarding burden as speculative, LSC Br. at 35-36, they are in fact firmly based on the programs' many decades of experience. Each declarant has worked in legal services for several decades. Having made innumerable decisions during that time about where to locate offices, how to staff matters, and other relevant issues, they need not speculate about the costs of operating two physically separate offices in lieu of one – they know, from years of experience. Gray Decl., Nov. 29, 2001, ¶ 1 (JA-411 to 412); Scherer Decl., Dec. 7, 2001, ¶ 1 (JA-443); Schmidt Decl., Nov. 15, 2001, ¶ 2 (JA-454).

Moreover, the experiences of other programs corroborate the plaintiffs' statements.<sup>34</sup> LSC points to only a handful of grantees that have been able to establish a legally separate affiliate. Of those, many do not exercise board level control over the affiliate, rendering the two organizations wholly separate. *See* Stipulated Facts ¶¶ 11-12 (JA-900 to 902). The few grantees with board-level affiliations have found that compliance is financially costly and interferes with their ability to serve clients, in strikingly similar ways to the plaintiffs' statements that LSC dismisses. *See* Gulotta Decl. ¶¶ 19-25 (JA-595 to 597); Thornburgh Decl. ¶¶ 20-34 (JA-641 to 646); Savage Decl., ¶¶ 5-6 (JA-627 to 628); Levy Decl. ¶ 8 (JA-612); Barnes Decl., ¶¶ 5-6 (JA-551 to 552).

LSC's own statements demonstrate agreement that when legal services programs are forced to operate smaller, physically separate programs in lieu of a single larger program, the inevitable result is economic efficiency and compromised client services. That is why LSC has been forcing many of its grantees to consolidate smaller programs into larger programs, even when the local

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<sup>34</sup> LSC argued below that plaintiffs' challenge would not be as-applied if other programs suffered similarly to the plaintiffs. The United States echoes this argument in its brief. *See* U.S. Br. at 34-35. However, an as-applied challenge can involve consideration of the impact of the challenged regulation on both individual plaintiffs and on others in similar circumstances. *See Edenfield v. Fane*, 507 U.S. 761, 775-76 (1993); *Sanjour v. EPA*, 56 F.3d 85, 92 (D.C. Cir. 1995).

communities have vigorously protested the move. *See* Abel Decl., Dec. 14, 2001, ¶¶ 17-36 (JA-167 to 168).

Finally, in the course of implementing the Faith-Based Initiative, the federal government itself has made it clear it believes that, when federal grantees are forced to maintain physical separation between federally funded activities and privately funded activities, the grantees' private funds are unduly burdened. For example, the Department of Health and Human Services and the Department of Housing and Urban Development each explicitly rejected requiring their grantees to conduct privately financed religious activities in a physically separate location from government-funded secular activities, because requiring such a degree of physical separation would place an "unnecessarily harsh burden" on grantees. *See* 68 Fed. Reg. 56,396, 56,400 (Sept. 30, 2003) (SPA-247); 68 Fed. Reg. 56,449, 56,453 (Sept. 30, 2003) (SPA-345); 68 Fed. Reg. 56,466, 56,467 (Sept. 30, 2003) (SPA-379).

**3. The Substantial Separation LSC Requires the Plaintiffs to Maintain Is Far Greater Than Reasonably Necessary to Advance Any Legitimate Government Interest.**

Having quantified the onerous burden on the plaintiffs' non-federally funded First Amendment activities that would be imposed by compliance with LSC's regulation, the District Court turned to a consideration of whether the government's legitimate non-subsidization and non-endorsement interests could

justify such a substantial burden on the exercise of a non-governmental entity's First Amendment rights.

**a. Non-subsidization**

Under the Clarified Proposal, all agree that it is virtually impossible to expend federal funds on unauthorized tasks. *See* discussion *supra*, Statement of the Case, § I.D. Thus, improper subsidization, in the usual sense, cannot take place under the Clarified Proposal.

Instead, the defendants launch two exotic conceptions of “indirect” subsidization, neither of which constitutes a legitimate governmental interest. First, the United States argues that it has a legitimate interest in avoiding the “freeing up” of non-federal funds to permit the delivery of a full spectrum of legal representation to indigent clients. U.S. Br. at 39. However, since the government lacks any legitimate interest in deterring non-federally funded constitutionally protected activity, the fact that non-federal funds might become available to fund such activity is simply none of the government's business. Moreover, the District Court correctly dismissed such an alleged interest, because the physical and employee separation LSC demands does not affect the availability of non-federal funds. Only a concededly unconstitutional complete ban on the transfer of non-federal funding between the two organizations would do that.

Second, LSC argues that it possesses a legitimate interest in discouraging LSC affiliates from sharing facilities with non-LSC grantees in order to prevent non-LSC grantees from benefiting from economies of scale. *Op.* at 87 (JA-1055); LSC Br. at 55-56. The District Court correctly held, however, that the government has no cognizable interest in depriving the program plaintiffs of the ability to benefit from economies of scale, particularly when the economies of scale impose no cost whatsoever on the defendants, and, indeed, would provide a corresponding economic benefit to the federally funded LSC affiliates. *Id.* at 88-89 (JA-1056 to 1057). In fact, the claimed interest amounts to no more than a First Amendment “spite fence” designed to prevent the efficient expenditure of non-federal funds on protected speech. As this Circuit has warned, the government “cannot have a legitimate interest in discouraging the exercise of protected rights.” *Cullen v. Fliegner*, 18 F.3d 96, 104 (2d Cir. 1994).

Taken seriously, both of the defendants’ indirect subsidization arguments would authorize the government to regulate massive areas of private conduct merely because the conduct could be said to be indirectly facilitated by access to government-provided services, like parks, roads, utility wires, fire prevention, police protection and public education, even though the level of government expenditures remained wholly unaffected by the use.

In this case, not only does the government not spend a penny more to support activities it does not wish to subsidize, it actually receives a reciprocal economic benefit from the cost savings associated with the efficient use of fixed resources and personnel. The United States concedes, as it must, that this is an important government interest. U.S. Br. at 41. Defendants' insistence that the government wishes to incur a financial loss in an effort to prevent plaintiffs from being able to use their non-federal funds to engage in First Amendment activity is powerful proof that the defendants' real motive has nothing to do with subsidization, but everything to do with unconstitutionally deterring the protected activity.

**b. Non-endorsement**

As an initial matter, the District Court correctly applied the holdings of *Velazquez II* and *III* to eliminate any interest linked to protection of government speech.<sup>35</sup> Op. at 83 (JA-1051). It recognized, however, that the government has an interest in ensuring that members of the public are not confused about which activities the government funds and does not fund. *Id.* at 86-87 (JA-1054 to 1055).

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<sup>35</sup> The District Court did not, as LSC claims, fail to give adequate weight to the government's separate interest in avoiding confusion. *See* LSC Br. at 52. Rather, it carefully weighed that interest and found that the separation LSC requires is not reasonably necessary to satisfy that interest. Op. at 83-87, 92-96 (JA-1051 to 1055, 1061 to 1064).

Since the Clarified Proposal provides for legally separate affiliates with names that are readily distinguished from one another, and for elaborate notice and disclaimers providing the public with ample information concerning the scope of federal funding, the District Court properly found that personnel separation and physical separation in non-public areas was not necessary to advance the government's interest in avoiding public confusion. In case after case, the Supreme Court has stressed that disclaimers and signage adequately further any government interest in avoiding confusion. *See, e.g., Capitol Sq. Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 769 (1995); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 n.11 (1986); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

LSC attempts to distinguish *PruneYard*, in which the Supreme Court upheld a ruling allowing pamphleteering at a private shopping center, on the ground that there, the Court found that “the public would not likely attribute the pamphleteering to the owners.” LSC Br. at 55 n.14. In fact, that observation supports the District Court's ruling. In *PruneYard*, the Court noted that the premises at issue were “open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.” 447 U.S. at 87. Likewise, the program plaintiffs are independent, non-profit legal

services programs that receive a majority of their funding from sources other than LSC.

It is no more likely that members of the public will associate any of the plaintiffs' activities with LSC funding than it is that the public will associate the religious activities of federal grantees with federal funding.<sup>36</sup> The federal government's Faith-Based Initiative is premised on a belief that the public will not make such an association.<sup>37</sup> For example, the U.S. Department of Health and Human Services has declared that it is unnecessary to bar a grantee's employees who provide government-funded secular services from being involved in "offering" an inherently religious activity to federal program recipients, because "the act of offering is attributable to the organization and its own staff, not to the [government]." 68 Fed. Reg. at 56,454 (SPA-348) (internal quotation marks

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<sup>36</sup> LSC provides no support for its speculation that "[i]f LSC grantees and their unrestricted affiliates are composed of the same lawyers working out of the same offices, confusion will be rampant." LSC Br. at 53-54. On the contrary, members of the public are accustomed to solo practitioners who share a suite of offices but do not control each other, and to attorneys who handle multiple cases in the course of the same day, each for a different client. There is no reason to think that it is more difficult for clients to understand that different funders pay for different activities by the same lawyer, particularly in the presence of the extensive signage and disclaimers that the Clarified Proposal requires.

<sup>37</sup> Strikingly, LSC does not attempt to defend the difference between the amount of separation required in the Faith-Based Initiative and that required by the program integrity regulation.

omitted). Relying on this presumption, the government believes that it can fulfill the non-endorsement obligations mandated by the Establishment Clause without requiring physical separation, or even disclaimer obligations, of faith-based grantees. *See* discussion *supra*, Statement of the Case § I.D.

Moreover, the Faith-Based Initiative is only one of many contexts in which the government believes that the physical separation and other program integrity requirements are unnecessary to prevent endorsement of grantees' privately funded activities. For example, although the federal government wants to prohibit endorsement of any privately funded activities that its grantees (including LSC grantees) undertake to promote euthanasia, grantees remain free to use their non-federal funding to engage in the prohibited activities, and are not required to establish a physically and objectively separate entity in order to do so.<sup>38</sup> The government's failure to impose such requirements to avoid endorsement of the privately funded activities of faith-based grantees or of LSC grantees' euthanasia-related work demonstrates that the requirements are not reasonably necessary to avoid the appearance of endorsement.

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<sup>38</sup> *See* 45 C.F.R. §§ 1643.3, 1643.4(b) (SPA-180); Assisted Suicide Funding Restriction Act of 1997, Pub. Law 104-12 §§ 5, 9(o) (1997) (SPA-397, 400 to 401); Statement by President William J. Clinton Upon Signing H.R. 1003, 1997 U.S.C.C.A.N. 58 (1997) (federal government must not "endorse assisted suicide;" Act "will allow the Federal Government to speak with a clear voice in opposing these practices") (SPA-406).

**c. Non-distraction**

Apparently recognizing that the Faith-Based Initiative makes it impossible to defend the LSC regulation as a reasonable attempt to advance the non-subsidization and non-endorsement interests that it has asserted for the past seven years, the United States argues in its most recent brief that the delivery of restricted legal services with non-federal funds is like a communicable disease that must be quarantined in a separate physical location to prevent LSC-funded lawyers from being “distracted” from their “bread and butter” duties. U.S. Br. at 39-40. Thus, the United States now concedes that the restrictions are triggered by speculation about the harmful effect of the constitutionally protected activity itself – a classic content-based unconstitutional restriction on First Amendment activity. *See Playboy Entertainment Group, Inc.*, 529 U.S. at 811; *League of Women Voters*, 468 U.S. at 384 (warning that courts must be “particularly wary” of content-based regulation); *Brandenburg*, 395 U.S. at 447.<sup>39</sup> The Supreme Court has warned that such restrictions are almost always unconstitutional, and that the government must present “more than anecdote and supposition” as to the supposed harms the

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<sup>39</sup> The United States’ description of the activities it claims to want to prevent LSC grantees from engaging in as “political and controversial” is remarkably similar to the government’s description of the forbidden activities at stake in *League of Women Voters* as involving “controversial issues of public importance.” *Compare* U.S. Br. at 39-40; *League of Women Voters*, 468 U.S. at 381.

regulated speech will cause – it must prove that “an actual problem” exists. *Playboy Entertainment Group*, 529 U.S. at 822. See also *League of Women Voters*, 468 U.S. at 384-395 (carefully scrutinizing government’s assertion that content-based speech regulation will actually prevent asserted harms, and dismissing government’s assertions as “speculative at best”); *Carey v. Population Services, International*, 431 U.S. 678, 696 (1977) (when government burdens a fundamental right it must provide more than “a bare assertion, based on a conceded complete absence of supporting evidence” that the harms the government is trying to avoid will occur).

The United States, which only speculates as to the harm the restricted speech would cause to lawyers who come into proximity with it, has not even attempted to meet that burden here. This speculation must fail, for at least two obvious reasons. First, the Clarified Proposal assures defendants the faithful performance of 100% of the authorized tasks contracted for by the federal government. The infusion of additional funds from other sources cannot adversely affect the duty to give the United States a full day’s work for a full day’s pay. Indeed, under the Clarified Proposal, the economies of scale so reviled by defendants will actually permit the federal government’s dollar to buy more “bread and butter” legal services.

Second, the restrictions obstruct many of the very same bread and butter activities on which the United States claims LSC grantees should focus. *See* discussion *supra*, Statement of the Case § II.B.

Finally, if exposure to types of practice and to activities that the government does not fund actually distracted legal services lawyers, the government would not permit them to engage in *any* activities in their offices other than the activities the government funds. In fact, however, the government permits the lawyers to use their same premises to engage in various high-profile types of legal practice that the government refuses to fund, such as promoting euthanasia and litigating school desegregation cases.<sup>40</sup> Finally, of course, communication between and among lawyers engaged in diverse practice leads to better, not worse, lawyering.

**4. The District Court Erred in Requiring Physically Separate Public Areas and a Change in Attorneys When a Restricted Component Unexpectedly Arises in What Initially Appeared to Be an Unrestricted Case.**

The District Court’s preliminary injunction deviates from the Clarified Proposal in two respects: 1) by imposing a “duplicate public areas requirement;” and 2) by imposing a “new attorney requirement” whenever plaintiffs transfer a

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<sup>40</sup> The euthanasia restriction is discussed *supra* at Argument, § II.C.3.b. The LSC Act bars recipients from using LSC and private funds for desegregation cases, but permits them to use public funds from state and local governments for those cases without requiring physical and objective separation. *See* 42 U.S.C. §§ 2996f(b)(9), 2996i(c) (SPA-26, 38); 45 C.F.R. § 1610.4(b) (SPA-111).

case from the LSC grantee to a non-federally funded affiliate because midway into a representation, a client's best interests appear to require delivery of a restricted form of representation. *See* Op. at 94 (JA-1062); Supp. Op. at 9 (JA-1091). Both burdensome requirements mark a departure from the otherwise sound logic of the District Court's analysis and cannot be justified by the government's interest in preventing public confusion.

The duplicate public areas requirement imposes unique burdens on the cash-strapped plaintiffs, who already operate under cramped conditions in an effort to devote as much of their scarce funding as possible to client services. *See* Scherer Decl., Jan. 19, 2005, ¶¶ 3-21 (JA-1068 to 1076); Schmidt Decl., Jan. 19, 2005, ¶¶ 6-12 (JA-1078 to 1080).<sup>41</sup> As these uncontested, sworn declarations describe in great detail, many of the plaintiffs' offices have no spare rooms to devote to the creation of duplicate reception areas and conference rooms. *See id.* In fact, some offices are so pressed for space that they operate without any reception area at all, much less two separate rooms, and, at most, a single conference room. *See* Scherer

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<sup>41</sup> The District Court observed that the facts contained in these declarations were not the subject of the parties' stipulated facts and concluded that "if plaintiffs choose to pursue their litigation, they will have the burden of establishing these facts." Supp. Op. at 7 (JA-1089). However, since defendants did not submit any evidence contesting plaintiffs' sworn statements, the facts were established and should have been relied upon to modify the preliminary injunction. *See Herbert Rosenthal Jewelry v. Grossbardt*, 428 F.2d 551, 554-55 (2d Cir. 1970).

Decl., Jan. 19, 2005, ¶¶ 12-18 (JA-1072 to 1075); Schmidt Decl., Jan. 19, 2005, ¶¶ 8-9, 11 (JA-1079 to 1080).

The burdensome duplicate public areas requirement is not supported by any legitimate government interest. As the District Court noted, the Supreme Court has repeatedly held that signage can provide the public with full disclosure without requiring expensive and administratively burdensome separate rooms. Op. at 84-85 (JA-1052 to 1053). *See also* discussion *supra*, Argument, § II.C.3.b. The extensive signage and disclaimers anticipated by the Clarified Proposal, combined with plaintiffs' offer to use separate rooms and/or the same rooms at different times to conduct their respective restricted and unrestricted activities, is more than adequate to guard against an appearance of endorsement. *See* Clarified Proposal ¶¶ 6, 8 (JA-806, 808).

Similarly, the new attorney requirement goes far beyond what is necessary to prevent government endorsement of restricted activities. Upon learning that a case that was originally LSC-funded contains a restricted element, plaintiffs must transfer it to the unrestricted affiliate, which will use extensive signage and disclaimers to ensure that everyone associated with the case knows that it is no longer government-funded. These actions alone are sufficient to avoid confusion as to who is funding the restricted activities. Requiring the transfer to a new attorney midway through a representation is both disruptive and unnecessary.

**D. Alternative Federalism and First Amendment Grounds Exist for Upholding the Preliminary Injunction.**

If this Court affirms the District Court's issuance of a preliminary injunction on First Amendment grounds, it need not reach plaintiffs' federalism-based challenge to that regulation. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (the First Amendment does not require "invalidation of a statute further than necessary to dispose of the case before it"). Thus, if this Court affirms the entry of a preliminary injunction, plaintiffs suggest that the District Court's resolution of that challenge be vacated as moot under the doctrine of *United States v. Munsingwear*, requiring vacature of opinions that become moot after a district court has ruled. *Munsingwear*, 340 U.S. at 39-40. See *Associated Gen'l Contractors v. City of New Haven*, 41 F.3d 62, 67 (2d Cir. 1994). Vacature "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381, 382 (2d Cir. 1993) (quoting *Munsingwear*, 340 U.S. at 39-40).

If, however, the Circuit reverses the District Court's First Amendment ruling, it must reach the plaintiffs' federalism-based challenge to that regulation.

After exempting state and local funds from LSC restrictions for more than twenty years in accordance with fundamental principles of federalism, Congress

shifted course in 1996.<sup>42</sup> By interfering with the ability of New York State (“the State”) and New York City (“the City”) to fund LSC grantees for purposes that they deem important to the functioning of state courts, unless they do so through a duplicative and cumbersome separate entity, Congress has intruded unacceptably on state sovereignty.

Together, the State, the City, and the state-authorized Interest on Lawyer Account Fund of New York (“IOLA Fund”) provide plaintiff LSNY with approximately \$13.7 million dollars, or 43% of its budget – a greater proportion than LSC contributes. Scherer Decl., Dec. 7, 2001, ¶ 6 (JA-445). These funders also commit significant funding to plaintiffs South Brooklyn Legal Services and Farmworker Legal Services. Gray Decl., Nov. 29, 2001, ¶ 3 (JA-412); Schmidt Decl., Nov. 15, 2001, ¶ 5 (JA-455). They do so because state courts function more efficiently and fairly when judges have the benefit of argument by counsel. *See, e.g.*, N.Y. Finance Law § 97-v (McKinney), Historical & Statutory Notes (IOLA Fund established because “the availability of civil legal services to poor persons is essential to the due administration of justice”).

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<sup>42</sup> Under the 1974 LSC Act, state and local funds were exempted from restrictions. 42 U.S.C. § 2996i(c) (SPA-38). The restrictions now encumber approximately \$156 million in funding from state and local governments and state-managed IOLTA programs. LSC, Actual Revenue Report, 1999 (JA-387).

When, however, state and local grants are subjected to the program integrity restrictions, state and local goals are thwarted. For example, LSC’s restriction on “representing a client as a result of in-person unsolicited advice,” 45 C.F.R. § 1638.3 (SPA-168), has interfered with the State’s ability to fund lawyers of its choice to conduct outreach to the homeless and domestic violence victims, as mandated by N.Y. Social Services Law §§ 50, 459-c.

On the other hand, if the plaintiffs establish a physically separate program to deliver the otherwise “restricted” legal services, they will be forced to waste scarce resources, shoulder impossible administrative burdens, and accept a structure in which the legal representation may be less effective.<sup>43</sup> *See* discussion *supra*, Argument § II.C.2. Such an option flies in the face of the State’s interest in ensuring that its funding is used in the most effective and efficient manner. *See, e.g.,* N.Y. Soc. Serv. Law § 50 (seeking to “maximize” impact of state homelessness prevention funding); N.Y. State Finance Law § 97-v (delivery of legal services under IOLA fund should be “economical” and “high quality”).

The State and City are not relieved of this Hobson’s choice by the option of establishing “their own mechanisms for rendering legal services to the poor.” *Op.*

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<sup>43</sup> The damage is, thus, far greater than the “economic” impact that the Supreme Court found permissible in *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 292 n.33 (1981), which the District Court cited. *Op.* at 28 (JA-996).

at 29 (JA-997). Such a choice would deny them the ability to fund the plaintiffs, who have decades of experience with the communities they serve, making them uniquely suited to deliver high-quality legal services. *See, e.g.*, Gray Decl., Nov. 29, 2001, ¶ 13 (JA-415).

“It is uncontestable that the Constitution established a system of ‘dual sovereignty,’” *Printz*, 521 U.S. at 918 (quoting *Gregory*, 501 U.S. at 457), in which the states “retain[ ] ‘a residuary and inviolable sovereignty.’” *Id.* (quoting *The Federalist* No. 39, at 245 (C. Rossiter ed. 1961) (James Madison)). Within this system, the federal government has the power in enumerated settings to regulate private behavior, but it lacks the power to direct a state on how to exercise sovereign functions. *See id.* at 935; *New York v. United States*, 505 U.S. 144, 162 (1992) (Congress cannot “require the States to govern according to Congress’s instructions”).

The District Court’s dismissal of these precedents as “inapposite” amounts to no more than an observation that the federal government has never before attempted to intrude on state sovereignty in precisely the way it is doing here. Op. at 29 (JA-997). Federal interference with state control over the proper functioning of state court systems clearly implicates the tenets of federalism. For example, a state’s choice of qualifications for state court judges “is a decision of the most fundamental sort for a sovereign entity,” so that a federal attempt to constrain it

would pose “a constitutional problem.” *Gregory*, 501 U.S. at 460, 464. State sovereignty is also affected when federal courts intervene in a state’s exercise of disciplinary authority over lawyers practicing in state court. *Nix v. Whiteside*, 475 U.S. 157, 165 (1986). Finally, although a state court adjudicating federal rights must apply federal procedures that form part of the substance of those rights, *Dice v. Akron, Canton & Youngstown RR*, 342 U.S. 359 (1952), at all other times states exercise sole control over state court procedure. *See Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931); *Mondou v. New York*, 223 U.S. 1, 56 (1912).

The ability of state and local governments to assure that the lawyers they fund can represent clients effectively in order to enhance the administration of justice in their courts is just as important to state sovereignty as are selecting judges, regulating attorney ethics, or setting court procedures. Accordingly, the restrictions violate fundamental principles of federalism.<sup>44</sup>

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<sup>44</sup> Similarly, the program integrity regulation is unconstitutional because it limits the use of privately donated funds in violation of the First Amendment. *See Riley*, 487 U.S. 781; *Cornelius*, 473 U.S. at 799; *Buckley*, 424 U.S. 1. The United States has no legitimate interest in forcing private donors into the Hobson’s choice of limiting their contributions to restricted legal services or undergoing significant costs to permit the funds to provide a full range of legal services.

**E. The Constitutional Issues Raised by LSC’s Denial of Plaintiffs’ Application to Reconfigure in Accordance With Their Clarified Proposal Are Clearly Ripe for Judicial Consideration.**

Despite the District Court’s careful efforts to ensure that LSC’s standing and ripeness concerns were met, LSC continues to claim that a lack of standing and ripeness precludes judicial review of its decision to reject the so-called “Clarified Proposal” submitted by plaintiffs.

Although the program plaintiffs had previously sought permission from LSC to operate an affiliate on several occasions, and been denied,<sup>45</sup> the District Court suggested that the plaintiffs apply yet again to assure that LSC would have a concrete proposal before it. The plaintiffs did so. After LSC rejected the proposal, the plaintiffs modified it in an effort to gain approval.<sup>46</sup> LSC considered both the initial proposal and the Clarified Proposal and rejected both, stating that neither proposal manifested the requisite level of physical and personnel separation required by the standardless program integrity regulation. *See discussion supra*,

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<sup>45</sup> LSNY had applied in 1997 for permission for Queens Legal Services Corporation, to which LSNY distributes LSC funds, to operate in a configuration containing essentially the same elements as the Clarified Proposal. Farmworker Legal Services had applied in 1997 to operate in a similar configuration. LSC denied both applications. *See discussion supra* p. 53 n.31.

<sup>46</sup> The case is thus distinguishable from the cases LSC cites involving plaintiffs who failed to submit any application to personnel with authority to speak for the agency.

Statement of the Case, § I.D. At that point (if not before), as the District Court correctly ruled, Op. at 59-61 (JA-1027 to 1029), the legal and factual contours of the dispute were clear, and LSC had done the “wrestling” with its regulation that it claims is a necessary prerequisite to ripeness and standing. *See* LSC Br. at 34-35 n.7.

Although LSC contends that plaintiffs’ application was somehow inadequate, governing precedent – including the opinions LSC cites – does not support that proposition. On the contrary, the case law demonstrates that by submitting a carefully contoured Clarified Proposal that proposed to safeguard the government’s interest, plaintiffs satisfied even the most stringent version of the administrative exhaustion and ripeness doctrines.<sup>47</sup>

LSC’s effort to avoid judicial review is particularly unpersuasive in this case because it is well established that in the First Amendment context, exhaustion of administrative remedies is not required before seeking injunctive relief, particularly where, as here, the administrative procedure is explicitly optional and purposefully standardless. *Watchtower Bible & Tract Soc’y v. Village of Stratton*, 536 U.S. 150 (2002); *Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 755-60,

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<sup>47</sup> Although LSC admits that “[t]he doctrine of exhaustion is not technically relevant here because a grantee need not obtain LSC’s pre-approval to enter into an affiliate relationship,” LSC Br. at 34 n.7, its “failure to apply” argument is a classic exhaustion claim.

769-72 (1988).<sup>48</sup> Ignoring both the First Amendment nature of this case, and the explicitly optional nature of LSC's application procedure, *see* discussion *supra*, Statement of the Case, § II.C, LSC relies heavily on cases involving takings claims and prison regulations, where the ripeness and exhaustion doctrines are applied with particular severity, and where the application procedure is mandatory. Even under those severe standards, plaintiffs' careful submission of the Clarified Proposal, followed by LSC's formal rejection, would render this dispute ripe for judicial review. Under the First Amendment standards that govern this proceeding, the issue is not even close.

Moreover, even in non-First Amendment cases where administrative exhaustion may be required, there is an exception whenever, as here, an application would be futile. *Bach v. Pataki*, 408 F.3d 75, 82-83 (2d Cir. 2005) (plaintiff who was statutorily ineligible to carry a handgun did not have to apply for handgun license before challenging licensing scheme). When it rejected the plaintiffs' Clarified Proposal, LSC refused to allow plaintiffs to reconfigure in a manner that would allow them to exercise their First Amendment rights free from undue

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<sup>48</sup> The manifest procedural inadequacy of the LSC system constitutes an independent ground for enjoining enforcement of the program integrity regulation. Where, as here, government imposes a substantial restriction on First Amendment activities, but fails to provide timely review procedures governed by precise, objective standards, the entire licensing scheme is facially invalid. *See Plain Dealer Publ'g Co.*, 486 U.S. at 772.

burdens, while fully respecting the government's legitimate interests. Since plaintiffs continue to assert that requiring greater separation than that provided in the Clarified Proposal would be unconstitutional, additional rounds of application and rejection would simply be futile.<sup>49</sup>

### **III. THE LSC RESTRICTIONS ON THE USE OF FEDERAL FUNDS ARE UNCONSTITUTIONAL.**

#### **A. The Constitutionality of Restrictions on the Use of Federal Funds Is Properly Before the Court Only if the District Court's Injunction Protecting the Use of Non-Federal Funds Is Reversed.**

If this Court affirms the District Court's issuance of a preliminary injunction, it should vacate the District Court's order granting the defendants' motions to dismiss the plaintiffs' claims regarding the class action, attorneys' fee award and public interest solicitation restrictions. As long as the preliminary injunction remains in place, and the plaintiffs continue to have sufficient non-federal funding to cover all cases barred by these restrictions, they are unlikely to suffer an injury in fact as a result of the restriction on the use of federal funds.

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<sup>49</sup> Plaintiffs agree with LSC that their claims would undoubtedly be ripe if they established an affiliate and then LSC took action against them by cutting off their federal funds for violating the program integrity regulation. *See* LSC Br. at 38. However, plaintiffs seeking to enforce their First Amendment rights are never *required* to risk adverse government action before doing so. *Button*, 371 U.S. at 432-33. Indeed, it would be irresponsible for plaintiffs to risk the best interests of their indigent clients by subjecting them to a risk that their federally funded lawyer might be removed in the midst of the representation by a punitive funding cut-off.

Accordingly, vacatur is required by Article III of the Constitution, as well as by time-honored principles of judicial restraint.

It is precisely this understanding that led the District Court to reject the plaintiffs' as-applied challenges to the class action, attorneys' fee award and public interest solicitation restrictions, writing that these claims are "subsumed in their as-applied challenges to the program integrity rules." Op. at 31 n.10 (JA-999). The opinion references a colloquy in which plaintiffs' counsel said that the class action challenge "implicates the rest of the conversation about the affiliate programs," and the District Court responded that "as long as there's an alternative channel," there is no real issue as to the constitutionality of the class action restriction. *Id.* (citing Nov. 15, 2004 Tr. at 52 (JA-962)).

Thus, as soon as the District Court issued the preliminary injunction, the constitutionality of those three restrictions on the use of federal funds was no longer ripe for determination. A case lacks ripeness when, as here, it "involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all." *AMSAT Cable Ltd. v. Cablevision of Connecticut Ltd. P'ship*, 6 F.3d 867 (2d Cir. 1993) (quoting 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3532.2, at 137 (2d ed. 1984)).

Vacatur would also be appropriate in light of the *Munsingwear* doctrine, which requires the Circuit to vacate opinions that become moot after a District Court has ruled. *See* discussion *supra*, Argument § II.D.

**B. Alternatively, the Court Should Declare the Class Action, Attorneys Fee Award and Solicitation Restrictions Unconstitutional.**

If it becomes necessary to rule on the constitutionality of the bans on the use of federal funds, the Court should declare the bans unconstitutional because they are viewpoint-based within the definition of the term as used in *Velazquez III*. There, the Supreme Court explained that it has intervened where the government has acted “to suppress speech inherent in the nature of the medium,” whenever the integrity of the medium has separation of powers or federalism ramifications. 531 U.S. at 543. Focusing on the “welfare reform restriction,” the Court explained that “[r]estricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys in much the same way broadcast systems or student publication networks were changed in the limited forum cases we have cited.” *Id.* at 544. The Court explained that “[Congress] may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.” *Id.*

**1. The Class Action Restriction Causes Severe Impairment of the Judicial Function.**

The class action restriction wrests control of the courtroom away from the judge. The choice between an individual action or a class action is not merely a lawyer's tactic. It is a fundamental decision about the allocation of scarce judicial resources and the proper structuring of a remedial system. Under the Congressional restriction, however, a judge cannot receive information or argument on the relative merits of proceeding individually or collectively. For example, a judge cannot learn from plaintiff South Brooklyn Legal Services that its representation of individual day care entrepreneurs can proceed far more effectively and efficiently as a class action. *See* Stip. Facts ¶ 50 (JA-905); Gray Decl., Nov. 29, 2001, ¶ 16 (JA-416 to 417).

Second, the restriction prevents the judge from ordering relief that would be in the interest of justice. For example, plaintiff South Brooklyn Legal Services can represent a single day care entrepreneur, but the judge hearing her case is barred, as a practical matter, from requiring the City of New York to provide relief to the hundreds of similarly situated persons denied thousands of dollars as a consequence of the same unlawful action by the City. *See* Facts ¶ 50 (JA-905); Gray Decl., Nov. 29, 2001, ¶ 16 (JA-416 to 417).

Third, the restriction prevents the judge from ruling on a complete record. Because a single litigant is unlikely to secure discovery as broad as can be secured

by a certified class, the full scope of a party's unlawful actions may remain invisible, leading to inaccurate final adjudications and/or negotiated settlements. In the case of the day care entrepreneurs represented by South Brooklyn Legal Services, information about the full scope of the City's practice could alter the outcome on an individual's claim against the City. *See* Facts ¶ 50 (JA-905); Gray Decl., Nov. 29, 2001, ¶ 16 (JA-416 to 417).

Finally, the restriction prevents judges from learning of some controversies altogether in settings where parties may succeed in insulating their unlawful actions from judicial scrutiny by mooting the claims of individual litigants. Thus, while South Brooklyn Legal Services has secured a multi-thousand dollar settlement on behalf of a single day care entrepreneur, to this day the City has successfully avoided its duty to provide relief to hundreds of other similarly situated individuals. *See* Facts ¶ 50 (JA-905); Gray Decl., Nov. 29, 2001, ¶ 16 (JA-416 to 417).

**2. The Attorneys' Fee Award Restriction Causes Severe Impairment of the Judicial Function.**

The attorneys' fee restriction denies a judge the ability to deter inefficient conduct by both parties and counsel by awarding attorneys' fees to prevailing

parties.<sup>50</sup> *See A.G. Ship Maintenance Corp. v. Lezak*, 503 N.E.2d 681, 682-83 (N.Y. 1986) (discussing usefulness of fee awards). For example, in New York, the restriction undermines the power granted to judges to require landlords to pay fees pursuant to the state’s Real Property Law § 234, which is designed to “discourage landlords from engaging in frivolous litigation in an effort to harass tenants, particularly tenants without the resources to resist legal action, into terminating legal occupancy.” *Duell v. Condon*, 647 N.E.2d 96, 98 (N.Y. 1995); *see also Maplewood Mgmt., Inc. v. Best*, 533 N.Y.S.2d 612 (N.Y. App. Div. 1988). The law “provides an incentive to resolve disputes quickly and without undue expense” on the part of the court and litigants. *Duell*, 647 N.E.2d at 98.

When tenants represented by legal services lawyers cannot claim a fee award, the court’s authority is undermined and cases drag on unnecessarily. In a case in which plaintiff Peggy Earisman represented a tenant, the judge warned the landlord, who had already conceded that the tenant was entitled to reoccupy the

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<sup>50</sup> The restriction prohibits “claiming, or collecting and retaining,” fee awards made “pursuant to common law or Federal or State law permitting or requiring the awarding of such fees,” 45 C.F.R. § 1642.2(a) (SPA-179). It bars contempt sanctions issued under the court’s inherent powers, although it allows LSC grantees to claim a fee award in Rule 11-type cases. 45 C.F.R. § 1642.2(b)(3) (SPA-179). In housing litigation, it bars fee awards resulting from a statute, but permits those that result solely from operation of a lease. *See* LSC External Op. # 2003-1014 (Oct. 27, 2003), *available at* [http://www.lsc.gov/FOIA/olaeo/03\\_n1014.htm](http://www.lsc.gov/FOIA/olaeo/03_n1014.htm).

apartment, that if the landlord wasted judicial time by proceeding to trial on the remaining subsidiary issues he would be liable for his opponent's fees. Earisman Decl., Nov. 16, 2001, ¶ 15 (JA-408). After Ms. Earisman informed the court that the attorneys' fee restriction barred her from claiming a fee award, the resolution of the case was delayed.

Because the restriction interferes with the court's ability to manage its docket, affects the outcome of cases, and applies exclusively to individuals who are represented by legal services lawyers, it interferes with the judicial function in much the same way as the ban on challenging welfare reform laws that was overturned in *Velazquez III*. The restriction thus violates both the First Amendment and fundamental principles of federalism.

### **3. The Public Interest Solicitation Restriction Is Viewpoint Discriminatory.**

Congress has forbidden LSC-funded lawyers from representing individuals to whom they have provided "in-person unsolicited advice" to take legal action and retain counsel. Omnibus Consol. Rescissions & Approps. Act of 1996, Pub. L. No. 104-134, § 504(a)(18), 110 Stat. 1321 (SPA-50); 45 C.F.R. pt. 1638 (SPA-168). This is classic viewpoint discrimination prohibited by the Supreme Court's opinion in *Velazquez III*.

*Velazquez III* made clear that when the government funds private speech, as it does in the legal services context, it may not discriminate on the basis of

viewpoint. 531 U.S. at 547-48. *See also Rosenberger*, 515 U.S. 819 (university could not deny subsidies to student publications because of their religious orientation). The *Velazquez III* Court was particularly disturbed by the way the welfare challenge ban at issue micromanaged attorney speech regarding potential legal claims. Under that provision, an LSC-funded attorney could represent a client in a welfare claim but could not undertake representation if he or she would be called upon to advise the client regarding the unconstitutionality of welfare statutes. 531 U.S. at 544. Nor could attorneys answer a question from a judge regarding the constitutionality of a welfare law. *Id.* at 545.

The public interest solicitation ban muzzles attorneys in a nearly identical, viewpoint-based way. An LSC grantee may represent an individual to whom the lawyer has previously said nothing, and may represent an individual to whom the grantee has previously said, “I think you should not pursue this matter in the courts,” but the restriction prohibits the grantee from representing that same person if the lawyer has first said, “Your rights are being violated and you should retain a lawyer to protect those rights.” 45 C.F.R. pt. 1638 (SPA-168).<sup>51</sup> The result is that an LSC-funded grantee may represent a client only if the lawyer has abstained

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<sup>51</sup> Without such outreach and education, many clients whom legal services programs serve would face tremendous obstacles in learning about and enforcing their rights under the law. *See Schmidt Decl.*, Nov. 15, 2001 ¶ 36 (JA-463).

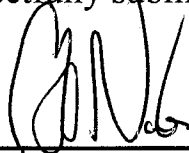
from advising that client to enforce his legal rights. This is classic viewpoint discrimination, and the Constitution bars the government from using its money in this way to prevent lawyers from engaging in this highly protected form of speech.

## CONCLUSION

For the above-described reasons, LSC's program integrity regulation should be declared facially unconstitutional or, in the alternative, unconstitutional as applied to the program plaintiffs. The District Court's grant of a preliminary injunction should be affirmed, but modified to eliminate all requirements of physical and personnel separation beyond those contained in the Clarified Proposal.

Since it would be inappropriate to pass on the remaining issues before the Court, the decision of the District Court with respect to those issues should be vacated as moot.

Respectfully submitted,



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REQUIREMENTS**

1. This brief contains 19,210 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). On June 23, 2004, this Court granted the motion of Plaintiff-Appellee-Cross-Appellants and Plaintiff-Cross-Appellants for leave to file an brief of up to 21,000 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word (part of the MS Office 2000 SR-1 Premium package) in Times New Roman 14-point font.



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