

05-0340(L)-cv,

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

**United States Court of Appeals
for the
Second Circuit**

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

Plaintiffs-Appellees-Cross-Appellants,

(Caption Continued)

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

**BRIEF FOR *AMICI CURIAE* COUNCIL ON FOUNDATIONS, INC.,
INDEPENDENT SECTOR, AARP FOUNDATION, ALABAMA GIVING,
ALLIANCE FOR JUSTICE, AMERICAN CANCER SOCIETY, BERNARD F. &
ALVA B. GIMBEL FOUNDATION, CENTER FOR LOBBYING IN THE PUBLIC
INTEREST, CHARLES STEWART MOTT FOUNDATION, MICHIGAN
NONPROFIT ASSOCIATION, NATHAN CUMMINGS FOUNDATION,
NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, NATIONAL
COUNCIL OF NON-PROFIT ASSOCIATIONS, NONPROFIT COORDINATING
COMMITTEE OF NEW YORK, OMB WATCH, THE OPEN SOCIETY
INSTITUTE, ROCKEFELLER BROTHERS FUND, and Other Non-Profit
Organizations and Charitable Organizations and Foundations Supporting Plaintiffs**

(A complete listing of amici curiae is provided on reverse side of cover)

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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, organization 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,

Plaintiffs-Appellees-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,

Plaintiffs-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,

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,

(Caption Continued on Next Page)

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,

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Plaintiffs,

– v. –

LEGAL SERVICES CORPORATION,

Defendant-Appellant,

UNITED STATES OF AMERICA,

Intervenor-Defendant-Cross-Appellant.

**STATEMENT PURSUANT TO RULES 26.1 AND 29(c) OF THE FEDERAL
RULES OF APPELLATE PROCEDURE**

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, the undersigned for amici curiae certifies that the following amici have parent corporations: Focus Project, d/b/a OMB Watch, is the parent corporation of amicus OMB watch; and Genesee County Legal Aid Society, d/b/a Center for Civil Justice, is the parent corporation of amicus Center for Civil Justice. No other amicus has a parent corporation. None of the amici issues stock, so there are no publicly held companies holding 10% or more of their stock.

Dated: New York, New York

July 6, 2005

**GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.**

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INTEREST OF *AMICI CURIAE*¹

The foundations, non-profit organizations, and representatives of the larger philanthropic community participating in this case as amici curiae comprise a broad cross-section of the “third sector,” that part of American society which is distinct from government and business. Amici seek to advise the Court about the ways in which the Legal Service Corporation’s “program integrity” regulation jeopardizes the vitality of the third sector through the imposition of unnecessary and onerous restrictions on the First Amendment rights of both charitable funders of non-profit legal services programs and the non-profit legal services programs themselves.

Amici believe that the structure that Defendants seek to protect in this case -- which demands actual physical and personnel separation between certain publicly and privately funded activities of legal services programs -- could potentially wreak havoc across the third sector. Certainly, it is important that the government not abrogate its responsibility to provide needed services and rely solely on non-profits to fill the gap. However, as the government increasingly turns to public-private partnerships to provide those services, this Court’s ruling may well inform future analyses of whether, in a wide variety of contexts, the government has adequately justified conditions on the use of charitable donations by non-governmental entities that also receive federal funds. This case could, then, set the standard for determining under what circumstances Congress may encumber non-federal funds possessed by colleges and universities, museums, public

¹ The Independent Sector, Council on Foundations, Inc, American Cancer Society, AARP Foundation, Open Society Institute, and a wide variety of other organizations comprise the more than 130 amici participating in this case. Individual statements of interest of a number of amici are set forth in the Addendum to this brief.

broadcasters, social service providers, and a plethora of other institutions that rely on the public-private partnership model -- even to a limited degree -- in carrying out their work.

Accordingly, amici respectfully urge this Court to affirm the portion of the district court's decision invalidating the program integrity regulation and to modify that decision to eliminate all requirements of physical and personnel separation beyond those contained in the Clarified Proposal which was submitted by Plaintiffs but rejected by the Legal Services Corporation. Amici submit this brief with the parties' consent.

SUMMARY OF ARGUMENT

The "program integrity" regulation at issue here prohibits Legal Services Corporation ("LSC") non-profits from using non-federal funds to finance restricted forms of advocacy unless they establish an objectively separate legal program housed in a physically separate facility. 45 C.F.R. § 1610.8. Because it poses significant expenses, burdens, and obstacles, the program integrity regulation effectively prohibits philanthropies and other charitable donors, as well as the recipients of charitable funds – namely non-profit organizations – from dedicating their funds towards particular program goals and from freely choosing what to fund and how to fund it.² This infringement on classic First Amendment activity effectively prevents charitable donors and non-profit organizations from exercising

² The restricted forms of advocacy include: (1) participating in class actions, 45 C.F.R. § 1617.3; (2) claiming, or collecting and retaining, court ordered attorneys' fee awards, *id.* § 1642.3; (3) notifying prospective clients of their legal rights and then offering to represent them, *id.* § 1638.3; (4) communicating with policy-makers or legislators on a client's behalf, except under extremely narrow circumstances, *id.* § 1612.3; and (5) representing certain categories of aliens, including certain categories of lawfully admitted aliens. *Id.* § 1626.3.

their full potential to partner with government and to address social problems and enhance democracy. The program integrity regulation thus jeopardizes the effective public-private partnerships which have long characterized third sector activity and which have become increasingly important with the recent shift in favor of such partnerships over the straightforward delivery of government services.

The district court properly found that the program integrity regulation unduly burdens the First Amendment rights of non-profit legal service programs, but did not address Plaintiffs' alternative contention that the regulation also violates the First Amendment rights of charitable donors. This Court need not address the claims of Plaintiff charitable donors if it affirms the decision below invalidating the program integrity regulation for the reasons stated by the district court. If, however, the Court rejects the claims of the legal services programs, it should affirm the district court's decision on the ground that the program integrity regulation violates the First Amendment rights of donor organizations.

ARGUMENT

THE PROGRAM INTEGRITY REGULATION INFRINGES ON THE FIRST AMENDMENT FREEDOMS OF CHARITABLE DONORS AND NON-PROFIT ORGANIZATIONS.

A. The First Amendment Protects the Right of Charitable Donors to Engage in Charitable Activities and of Non-profit Organizations to Use Their Private Funds in the Way They Choose.

The First Amendment protects charitable donors' freedom to engage in charitable giving in the manner they deem necessary and appropriate. So, too, does it protect the freedom of non-profit organizations to designate their non-federal funds in a manner necessary to carry out their missions. The "program integrity" regulation infringes on the First Amendment freedoms of both donors and recipients.

The Supreme Court has long-recognized the First Amendment freedom to solicit charitable funds. See Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 797 (1985); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633 (1980). See also McConnell v. Federal Election Committee, 540 U.S. 93, 139-40 (2003) (reaffirming "the reality that solicitation [by political parties] is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views") (quoting Village of Schaumburg, 444 U.S. at 632). And the Court has held that this guarantee protects the First Amendment freedoms of charitable donors as well. Specifically, the First Amendment protects charitable solicitations because such solicitations involve a variety of speech interests, including "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." Village of Schaumburg, 444 U.S. at

632. See also Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 959-60 (1984).

Charitable donations also involve free speech interests, and thus fall within the scope of these protections. As the Court noted in Cornelius, an individual’s “contribution in response to a request for funds functions as a general expression of support for the recipient and its views.” 473 U.S. at 799. Indeed, “[a] decision to contribute money . . . is a matter of First Amendment concern -- not because money is speech (it is not); but because it enables speech.” Nixon v. Shrink Missouri Gov’t PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (discussing First Amendment protections attaching to campaign contributions) (citing Buckley v. Valeo, 424 U.S. 1, 24-25 (1976)). Indeed, the Court has recognized that “[i]ndependent expenditures constitute expression at the core of our electoral process and of the First Amendment freedoms.” Federal Election Comm’n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 251 (1986) (internal quotations omitted). See also Riley v. National Fed’n of the Blind, 487 U.S. 781 (1988) (invalidating restrictions on charitable fundraising).

And, just as the First Amendment protects the asking for and making of charitable donations, so too does it protect the use of funds by a charitable organization. A charitable organization’s ability to use donated funds is essential to its “continuing ability to communicate its ideas” and achieve its goals. Cornelius, 473 U.S. at 799. As this Court previously held, restrictions on the use of non-federal funds, even short of an absolute ban, violate the First Amendment if they impose an “undue burden” on the free use of private funds by a recipient of governmental funding. Velazquez v. Legal Services Corporation, 164 F.3d 757, 767 (2nd Cir. 1999).³

³ The unconstitutional conditions doctrine has long-held that the government may not require parties to forego their constitutional rights as a condition of

Such restrictions likewise infringe upon the First Amendment right of charitable donors to target their contributions in the manner that they deem most appropriate unless they serve a compelling government interest that cannot be advanced by less drastic means. See, e.g., United States v. Playboy Entertainment Group, 529 U.S. 803, 812 (2000); Reno v. ACLU, 521 U.S. 844, 874-75 (1997); Massachusetts Citizens for Life, Inc., 479 U.S. at 256. Although the program integrity regulation does not wholly prohibit charitable donations to LSC grantees or the use of charitable donations by LSC grantees, the constitutional analysis is the same because of the onerous, burdensome nature of the physical separation requirement. Playboy Entertainment Group, 529 U.S. at 812; Massachusetts Citizens for Life, 479 U.S. at 263.

Amici thus believe that LSC's program integrity regulation violates the First Amendment rights of both charitable donors and non-profit organizations. This Court, however, need not address Plaintiff charitable donors' claims if it finds that the regulation unduly burdens the First Amendment rights of Plaintiff legal service providers. See infra Point C.2 (discussing undue burden test). But if the Court

receiving state funding or other assistance. See, e.g., Kathleen Sullivan, "Unconstitutional Conditions," 102 Harv. L. Rev. 1413, 1422 (1989). Simply put, the government may not do indirectly what it may not do directly. This doctrine, however, does not implicate the ability of government to legislate appropriately to regulate the use of public funds in a way that meets a compelling governmental interest, such as the eradication of invidious discrimination on, for example, grounds of race, gender, disability or age. See, e.g., United States v. Fordice, 505 U.S. 717, 732 (1992) (Title VI of the Civil Rights Act of 1964 imposes non-discrimination obligations consistent with the Fourteenth Amendment on recipients of federal funds). Thus, to the extent that the government has an interest rooted in legitimate national policy, such as adherence to the non-discrimination principle, it may require private non-profits acting in partnership with government to adhere to those specific legal requirements -- so long as they are consistent with constitutional limits discussed herein -- with regard to all of their funds, whether derived from sources federal or non-federal.

does not affirm the district court's decision invalidating the program integrity regulation on that ground, it should conclude that the regulation violates the First Amendment right of charitable donors to target their contributions in the manner that they deem most appropriate.⁴

While the present challenge arises in the context of legal services advocacy for the poor, its resolution may broadly impact every philanthropic and non-profit endeavor in which the government is a partner. Should the Court uphold the program integrity regulation, the First Amendment freedoms of all charitable donors and non-profit organizations will be threatened, and the causes and communities they serve will suffer as a result.

⁴ Plaintiffs have standing to challenge the program integrity regulation and their claims are ripe for review. See Velazquez v. Legal Services Corp., 349 F. Supp. 2d 566, 598 (E.D.N.Y. 2004) (citation omitted). Indeed, were Plaintiffs forced to actually attempt compliance with the restrictions before bringing an as-applied challenge, as LSC proposes, Brief for LSC at 35, then any non-profit organization seeking to challenge government restrictions would first have to undertake potentially futile, onerous, and expensive measures, thereby thwarting their ability to engage in precisely the restricted activities they wish to challenge. See Munson, 467 U.S. at 956 (discussing need to lessen the “prudential limitations on standing” when there is a danger of chilling free speech). Moreover, Plaintiff charitable donors have an independent basis for standing because the program integrity regulation threatens their freedom to make charitable donations in a cost- and programmatically effective manner. See, e.g., Meese v. Keene, 481 U.S. 465, 472 (1987) (“while the government action need not have a direct effect on the exercise of First Amendment rights . . . , it must have caused or must threaten to cause a direct injury to the plaintiffs”).

B. The Activities of the Third Sector Are at the Core of the First Amendment's Protected Freedoms.

The freedom of speech secured by the First Amendment “was fashioned to assure unfettered exchange of ideas to bring about political and social change.” New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (citation omitted). See also Pacific Gas & Elect. Co. v. Public Utilities Comm’n of Cal., 475 U.S. 1, 8 (1986) (First Amendment promotes the public's interest in receiving information and fosters its “discussion, debate, and [] dissemination”) (citation omitted). This freedom is given life and meaning through the activities of the “third sector,” that part of American society, including charitable donors and non-profit organizations, which is distinct from government and business. See generally John H. Filer, The Filer Commission Report; Report of the Commission of Private Philanthropy and Public Needs, in The Non-profit Organization: The Essential Readings 70, 79 (David L. Geis et al., eds. 1990). By introducing and developing new ideas for public policy and governance, strengthening communities, and supporting minority interests, these institutions perform functions that are central to the First Amendment and to a vibrant democratic society. However, the third sector's ability to perform these functions hinges on its ability to establish effective partnerships with government and business while remaining sufficiently free from unnecessary and overly burdensome government control. It is, therefore, vital to protect charitable donors' freedom to give money and to protect non-profit organizations' freedom to use their private funds in the manner that they both deem necessary and appropriate.

1. The third sector is uniquely able to pioneer new and effective solutions.

Because they need not generate profits, and because they are not subject to the constraints of politics or government bureaucracy, charitable donors and non-profits are free to experiment and innovate. See Penina Kessler Leiber, 1601-2001: An Anniversary of Note, 62 U. Pitt. L. Rev. 731, 735 (2001); see also Arnaud C. Marts, Philanthropy's Role in Civilization: Its Contribution to Human Freedom 50 (1991) (philanthropy has pioneered nearly every cultural advance for over three centuries). Charitable donors and non-profit organizations are thus able to bring new ideas into public consciousness, shape public policy, and spur moral and social reform. See, e.g., Dean Rusk, The Role of the Foundation in American Life 14 (1961) (noting specifically that private institutions set the standards for public performance in the area of higher education); The Report on the White House Conference on Philanthropy 20 (Oct. 1999), *at* <http://clinton4.nara.gov/media/pdf/philanthropyreport.pdf> (“Non-profits are uniquely able to identify problems and promote change at the community level.”); George W. Bush, Rallying the Armies of Compassion (2001), *at* <http://www.whitehouse.gov/news/reports/faithbased.html> (“In social policy, the non-profit sector -- secular and religiously affiliated providers, civic groups, foundations and other grant-givers -- has long been a vital and valued partner of government.”). The abolition of slavery, the clarification and protection of civil rights, the creation of public libraries, and the recognition of the need for equal opportunities for the disabled are all examples of reforms spurred by the organized efforts of the third sector. See Brian O’Connell, Philanthropy in Action 3 (1987); Marts, supra, at 55.

Current examples of third sector innovation abound. To name just a few, member organizations of amicus Independent Sector include a venture capital fund

for public education that has as its mission the improvement of school leadership and student achievement, as well as an organization that seeks to improve treatment for Traumatic Brain Injury through educating healthcare professionals. See <http://www.independentsector.org/members/ismembers.html>. Amicus the Charles Stewart Mott Foundation funds a variety of innovative programs to improve environmental quality and sustainable development in the United States and around the world. See <http://www.mott.org>.

The third sector's contributions to society are acknowledged across the political spectrum. Indeed, President Bush's Faith-Based Initiative has called for a partnership between government and charitable organizations and encouraged recipients of federal funding to carry out both federally funded and privately funded religious activities. See Executive Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002); Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government, *at* http://www.whitehouse.gov/government/fbci/guidance_document.pdf. Several federal agencies have subsequently promulgated "charitable choice" regulations implementing this order and authorizing organizations that receive federal funds to establish these partnerships. See, e.g., 68 Fed. Reg. 56466-01 (Sept. 30, 2003) (governing certain programs of the Department of Health and Human Services).⁵

The third sector's ability to advance innovative and creative solutions to social problems is at the heart of its protected First Amendment activity. However, unnecessary and overly burdensome restrictions on the third sector's autonomy and discretion undermine this ability to innovate and, consequently, frustrate a core purpose of the First Amendment.

⁵ Amici take no position on the constitutionality or efficacy of the President's Faith-Based Initiative and the implementing regulations.

2. The third sector enhances democracy.

By empowering individuals to participate in the civic culture and, in some instances, engaging in advocacy work directly, the third sector plays an essential role in another core First Amendment activity: shaping American democracy. The third sector “reflects an acceptance of responsibility by private individual citizens” and provides a “training ground” for democracy by allowing for direct citizen action. Rusk, *supra*, at 15. See also Eleanor L. Brilliant, Private Charity and Public Inquiry: A History of the Filer and Peterson Commissions 5 (2000). Charitable donors and non-profits provide the means for individuals, particularly disenfranchised groups, to come together in the community to “find answers and make democracy work.” Robert Matthews Johnson, The First Charity xvii (1988).

One important way in which the third sector enhances democracy is by engaging in advocacy. The advocacy and lobbying work of not-for-profits across the political spectrum ensures that more people have access to the political process. See J. Craig Jenkins, Non-profit Organizations and Policy Advocacy, in The Non-profit Sector 296, 302 (Walter W. Powell, ed., 1987). Although the efforts of non-profit groups are all in the public interest, the direct beneficiaries of their services - - such as the homeless, children, the elderly, and persons with disabilities -- are often shut out of the democratic process. Non-profit lobbying helps create a “civic balance” by “allowing the public interest to be incorporated into public policy.” See David Cohen, Being a Public Interest Lobbyist is Something to Write Home About, in The Non-profit Lobbying Guide 94 (Bob Smucker, ed., 1999).

Legal services programs contribute to democracy by protecting the rights of individuals and minority groups that might be powerless at the ballot box. See Alan W. Houseman, Civil Legal Assistance for Low-Income-Persons: Looking Back and Looking Forward, 29 *Fordham Urb. L.J.* 1213, 1223 (2002) (describing

the role of legal services attorneys in effectively enforcing basic rights that are “theoretically in existence but often not honored”). See also Morris B. Abram, Access to the Judicial Process, 6 Ga. L. Rev. 247, 259 (1972) (“Both voting and access to the courts are forms of enfranchisement, of participation in the political process.”). In addition to safeguarding rights directly through the courts, legal services attorneys further contribute to democracy by engaging in administrative and legislative advocacy and educating individuals about their rights.

In short, the third sector ensures diversity in the public and political fora by fostering increased participation by all segments of society and providing a voice for underrepresented communities. Brilliant, supra, at 156. It thus promotes democracy by “‘assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” Legal Services Corp. v. Velazquez, 531 U.S. 533, 548 (2001) (quoting Sullivan, 376 U.S. at 269). This free and unhindered debate on matters of public importance is a “core value” of the First Amendment. Pickering v. Bd. of Educ. of Tp. High Sch., 391 U.S. 563, 573 (1968). See also Mills v. Alabama, 384 U.S. 214, 218 (1966) (First Amendment “protect[s] the free discussion of governmental affairs”). To continue to preserve these fundamental First Amendment interests, however, the third sector must remain free of unnecessary and overly burdensome governmental controls.

C. The Program Integrity Regulation Infringes on the First Amendment Freedoms of Charitable Donors and Non-profit Organizations.

In order to realize its full potential, the third sector must retain sufficient freedom to utilize the resources of other sectors of society, particularly the government, while remaining free of unnecessary and onerous restrictions on its activity. The program integrity regulation underscores the harms that result when the government imposes unduly burdensome restrictions on private funds in violation of the First Amendment freedoms of charitable donors and non-profit organizations.

1. The third sector must be able to act in partnership with the government, while remaining free of unnecessary, onerous restrictions like the program integrity regulation.

Philanthropies and other private donors have traditionally acted in concert with governmental programs and entities to provide critically needed services to the poor. See Alice Gresham Bullock, Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity, 6 Cornell J.L. Pub. Pol'y 325, 332 (1997); Lester M. Salamon, Partners in Public Service: The Scope and Theory of Government-Non-profit Relations, in The Non-profit Sector, *supra*, at 99. During the Colonial period, local governments provided funds to private charitable educational institutions, hospitals, and social service agencies, enabling those institutions to provide needed services to their communities. Salamon, Partners in Public Service, *supra*, at 100. Later, public officials relied heavily upon private non-profit agencies to address the social problems accompanying urbanization and industrialization. *Id.* at 100-01.

These public-private partnerships are even more important today. They have grown dramatically in recent years, and this trend is likely to continue in the future

given the increasing reliance on market-based solutions to public problems. See, e.g., Martha Minow, *Partners, Not Rivals: Privatization and the Public Good* 3 (2002). Private involvement in government activity has been particularly pronounced in social services programs as well as in medicine and in education. Id. at 7-8. The government thus increasingly collaborates with charitable funders and non-profits to devise and implement strategies for meeting needs in these and other areas.

The government-end of these public-private partnerships takes a “dizzying array” of forms: loans, loan guarantees, grants, contracts, insurance, tax expenditures, vouchers and more. Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 *Fordham Urb. L.J.* 1611, 1612 (2001). See also *Partnerships for a Stronger Civil Society, A Report to the President from the Interagency Task Force on Non-profits and Government* 6 (Dec. 2000). Government frequently partners with philanthropic entities to fund non-profit organizations for the delivery of services and for research. See Stanley N. Katz, *Philanthropy and Democracy: Which Comes First*, *Advancing Democracy* 3 (1994). For example, a key component of the federal welfare reform legislation enacted in 1996 was block grants, which enable states to allocate federal funds to a host of public, private, and non-profit entities for the delivery of social services, including for the creation of welfare-to-work programs. See, e.g., 42 U.S.C. § 603(a)(5). Private-public partnerships also play an important role in other areas like education and the arts. For example, the No Child Left Behind Act of 2001 provides state block grants for local educational agencies, community-based organizations, and other private or public entities to create opportunities for academic enrichment, youth development activities, art, music and recreation programs, and drug and violence prevention programs. *No Child Left Behind Act of 2001*, Pub. L. No. 107-110, Title VI, Part B, 115 Stat. 1425 (2002) (codified at

20 U.S.C. §§ 6301-6578). As government spending for social welfare and services declines, there is increasing pressure on charitable donors and non-profit organizations to address the unmet needs that invariably result.

From their inception, legal services organizations have been a classic and highly effective collaboration between the public, private and charitable sectors. An outgrowth of the charitable Legal Aid movement initiated by lawyers in the nineteenth century, Legal Aid societies were formed by leaders of the private bar to enable immigrants and other poor people to protect their rights. See Martha F. Davis, Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973, at 15-17 (1993). Later, private contributors partnered with philanthropic organizations and government agencies to create legal services organizations that provided new and experimental services to the poor. Plaintiff Legal Services of New York City (“LSNY”), for example, received funding from a variety of public and private sources for its innovative confederation of community-based legal services programs. Joint Appendix (“A.”) at 443. Congress, in turn, built upon these models when it created the legal services program in 1974, establishing a partnership between and among the federal, state and local governments, and the third sector.

While the federal government provides funds to LSC grantees, the day-to-day management of each LSC grantee, including ownership and control of the program’s real and personal property, and the hiring and supervising of staff lawyers, is left to the non-profit local grantee. See Velazquez, 531 U.S. at 536 (noting the private/public nature of the legal services partnership). The government, moreover, actively encourages private funding of LSC grantees by assessing an “applicant’s capacity to develop and increase non-Corporation resources” when awarding grants. 45 C.F.R. § 1634.9(a)(7). Those non-profits, in turn, have been highly successful in raising private funds. A. 389 (“LSC’s non-

profits leverage funds to raise \$299 million annually in other government and private funding”) (quoting LSC Press Kit). The budget cuts and restrictions of 1995 and 1996 have heightened the need for effective and efficient public-private collaboration.

As the case of legal services providers shows, the third sector’s ability to act in concert with government to maximize its expertise, creative potential, and resources depends precisely on the ability of each non-profit to remain independent from governmental control and to act in accordance with its respective organizational mandate and expertise.

If public recognition were to take the form of detailed and pervasive standards dictating the purposes and methods of operation of each charity, the cure might well be worse than the disease. The basic institutional values of philanthropy – freedom to try new and experimental programs, diversity of approaches, multiple centers of initiative – would probably be seriously diluted, if not destroyed.

Albert Sacks, “The Role of Philanthropy: An Institutional View,” in Foundations Under Fire 66, 73 (Thomas Reeves, ed. 1970). As a founder of amicus Independent Sector has noted, it is precisely because non-profits and charitable donors are free from the “leveling forces” of commerce and politics that they are able to “serve as the guardians of intellectual and artistic freedom.” O’Connell, supra, at 5. Indeed, President Bush’s Faith-Based Initiative emphasizes that government must build upon the important role that charitable and non-profit organizations play and warns against undermining their efforts “by over-regulation.” Rallying the Armies of Compassion, supra.

For non-profit organizations that rely upon a mix of public and private funding, a physical and personnel separation requirement is precisely the type of unnecessary and overly burdensome regulation that will stifle innovative and effective third sector activity. Imagine, for example, the impracticality of requiring a research institution that receives both foundation and government grants to

segregate its research facilities and faculties based on the origins of that funding. Or consider the obstacles that HIV/AIDS prevention programs which receive federal funds would face if they had to spend scarce resources to establish separate rooms for workshops and print separate brochures because some of their private or local government funds were spent on restricted activities. Practical and logistical difficulties aside, such arrangements would prevent the collaboration and coordination that is otherwise achieved by joining public and private resources.

In short, the third sector's ability to fulfill its critical -- and expected -- function in society hinges on its ability to do precisely what the program integrity regulation would prevent: to maintain its independence, and, therefore, its innovative and creative edge, while acting in partnership with government.

2. The program integrity regulation violates the First Amendment.

The government argues that the Court should assess only whether the program integrity regulation “effectively prohibit[s]” a legal service provider from engaging in protected First Amendment activity, Brief for the United States at 36, or provides no “alternative avenue for the restricted activity.” Brief for LSC at 45. See also Velazquez v. Legal Services Corp., 349 F. Supp. 2d 566, 599 (E.D.N.Y. 2004) (summarizing government's arguments). Amici believe that this standard not only misstates the law but, if adopted, would have potentially disastrous consequences for the third sector, opening the door to virtually *any* restriction that does not completely prevent a non-profit organization from engaging in a particular activity regardless of the relationship between that restriction and the purported governmental interest.

Amici therefore urge this Court to affirm the district court's decision rejecting the government's proposed standard in favor of an undue burden standard

that carefully weighs the burdens imposed on Plaintiffs by the challenged restrictions against the government's legitimate interest in applying those restrictions. 349 F. Supp. 2d at 601-02. The district court properly relied upon Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983), and F.C.C. v. League of Women Voters, 468 U.S. 364 (1984), in finding that the program integrity regulation unduly burdened the exercise of legal service providers' First Amendment rights. See Velazquez, 349 F. Supp. 2d at 605-07.⁶ If, however, the Court does not affirm the district court's decision on this ground, it should conclude that the regulation violates the First Amendment rights of Plaintiff donor organizations because it is not narrowly tailored to serve a compelling government interest. See supra Section A.

In applying the undue burden test, the district court determined that requiring physically separate facilities for LSC-funded activities would impose significant financial and programmatic costs on Plaintiffs. Velazquez, 349 F. Supp. 2d at 605-07 (creating physically separate affiliate would cost Queens Legal Services Corporation \$200,000 annually and would require Plaintiff South Brooklyn Legal Services to serve approximately 500 fewer clients). Plaintiff Farmworker Legal Services of New York declined LSC funding rather than spend approximately 15 per cent of its previous annual budget to comply with the

⁶ Specifically, the district court enjoined imposition of any greater level of physical or personnel separation than that contained in Plaintiffs' Clarified Proposal, with the exception of the court's requirement that Plaintiffs establish physically separate public areas, Velazquez, 349 F. Supp. 2d at 612, and appoint new counsel in cases where a client's best interest requires an unanticipated shift from the restricted LSC affiliate to the unrestricted affiliate. Velazquez v. Legal Services Corp., 356 F. Supp. 2d 267, 272 (E.D.N.Y. 2005). Amici respectfully disagree with the district court's imposition of these two burdensome restrictions because the extensive signage and disclaimers proposed by Plaintiffs are sufficient to avoid confusion and makes the restrictions unnecessary. See Brief for Plaintiffs at 65-67.

physical separation requirement. Id. at 606-07. In fact, the costs of “program integrity” are so high that no legal services program serving New York City has been able to develop a plan consistent with LSC’s interpretation of the regulation to establish objectively separate legal programs housed in physically separate offices to utilize private resources to deliver otherwise forbidden forms of legal representation to indigent clients. A. 444, 447. Moreover, in addition to the burdens described by the district court, the record demonstrates many other programmatic and administrative burdens unnecessarily imposed on legal services providers by the program integrity regulation. See, e.g., A. 415-16, 448-49 (detailing, *inter alia*, obstacles to effective client representation and to effective communication and coordination among staff).

The program integrity regulation is thus significantly more burdensome than the mere separate incorporation and record-keeping requirements of a 501(c)(3) organization setting up a sister 501(c)(4) organization to engage in otherwise restricted lobbying activities. See Taxation with Representation, 461 U.S. at 544 n.6. Unlike those requirements, the program integrity regulation imposes a “significant restriction” on a non-profit organization’s ability to engage in protected third sector activity. Id. at 553 (Blackmun, J., concurring). See also League of Women Voters, 468 U.S. at 395 (ban on publicly subsidized television stations from editorializing with private funds “far exceeds what is necessary” to protect asserted government interest). As such, the challenged LSC restrictions are a grave threat not only to legal service providers but to the third sector generally.

Defendants seek to minimize the burdens of the program integrity regulation. Brief for LSC at 17-21; Brief for United States at 34, 37-38. But, as amici can attest, the regulation imposes severe costs on large and small non-profit organizations alike, significantly reducing their ability to engage in constitutionally protected third sector activity. For larger organizations like Plaintiff LSNY, the

question is not whether they can still provide the full-range of restricted services to clients, Brief for United States at 31; Brief for LSC at 17-18, but, rather, whether they face “serious difficulty” in doing so. Velazquez, 164 F.3d at 767. Surely, a legal services organization that is forced to turn away hundreds of clients in need whom it would otherwise have served faces serious difficulty in carrying out its mission. See Velazquez, 349 F. Supp. 2d at 606 (discussing impact of the program integrity regulation on Plaintiff South Brooklyn Legal Services).

Defendants together advance three arguments to justify these burdensome restrictions, but none is remotely persuasive. *First*, LSC and the United States argue that the program integrity regulation is necessary to ensure that government funds do not subsidize restricted activities. However, legal services programs can readily prevent federal funds from directly subsidizing restricted activities by keeping separate books in accordance with generally accepted principles of accounting and by publicly disclosing how funds are used, as is commonly done by members of the third sector. See Village of Schaumburg, 444 U.S. at 637-38 (“Efforts to promote disclosure of the finances of charitable organizations [] may assist in preventing fraud by informing the public of the ways in which their contributions will be employed.”).

The government’s arguments about “indirect subsidization,” Brief for LSC at 55-56, are likewise without merit. See Velazquez, 349 F. Supp. 2d at 609-10. Specifically, the government has no legitimate interest in frustrating a non-profit’s ability to create economies of scale by using the same administrative and other systems for its federally funded activities that it does for its charitably-funded activities. To the contrary, while the government may elect not to fund a particular activity, such as providing certain legal services, Brief for the United States at 41, it still has an overall interest in the ability of affected legal services organizations to operate effectively and efficiently. Legal service providers that take advantage

of economies of scale fulfill Congress's goal of efficiently providing legal services to the poor, even if Congress has chosen not to fund certain services directly. Velazquez, 349 F. Supp. 2d at 610. Indeed, LSC has acknowledged this governmental interest in efficiency by encouraging the consolidation of smaller legal services programs to maximize resources. A. 169-172 (citing examples); see also Legal Services Corp., Testimony Before the House Appropriations Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies (Apr. 1, 2004), at http://www.lsc.gov/pressr/pr_t_040104.pdf (commenting that President Bush's 2001 *Management Agenda* "directed all federal agencies to leverage resources to maximize the use of limited government funds").

Moreover, the government has elsewhere determined that it can contribute funds to a private-public partnership without indirectly funding certain private activities. For example, since 1984, federal grant rules have prohibited grantees from using federal funds, either directly or indirectly, for a variety of advocacy-related activities and costs. Neither physical nor organizational separation is required. Instead, the Office of Management and Budget's Circular A-122 defines unallowable costs and establishes clear procedures for allocating expenses. See OMB Circular A-122, Cost Principles for Non-Profit Organizations, Attachment B, Selected Items of Cost, No. 25, at <http://www.whitehouse.gov/omb/circulars/a122/a122.html>. One cost item, lobbying, is covered by the LSC restrictions at issue in this case. See id. (listing unallowable lobbying costs that apply to all grantees). For example, OMB Circular A-122 requires grantees to track and allocate direct costs so that unallowable costs are not charged to federal grants, and requires employees to use time sheets to track time spent lobbying, so that a portion of salary and related costs is not charged to the federal grant. In addition, the portion of administrative costs, known as "indirect costs," which supports lobbying, is determined and

subtracted from the costs charged to the federal grant. When the grantee submits its indirect cost proposal to the government, it must show that lobbying costs are not being charged to the grant, and must show where these costs have been charged. Id.

Federal restrictions on use of grant funds are enforced through grant audits pursuant to the Office of Management and Budget's Circular A-133, which applies to grants over \$25,000. See OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations, at <http://www.whitehouse.gov/omb/circulars/a133/a133.html>. Grant audits are more extensive than traditional audits in that they examine both financial and non-financial factors. For example, an A-133 audit looks at internal control procedures for complying with grant rules, program effectiveness, client eligibility, and efficiency of resource use. Id. In the case of grants of \$100,000 or more, the audit will examine the entire organization, not just the federally funded activity. Id. Clearly, then, Congress believes that it can keep federal funds separate from lobbying-related activities and costs by requiring organizations to adhere to generally accepted principles of accounting and by subjecting federal grantees to audits.

Second, LSC argues that it needs to prevent the public perception that government funding is being spent on prohibited activities. This argument, however, ignores the basic fact that legal services lawyers speak for their clients and not for the government. See Velazquez, 531 U.S. at 542-43 (“The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept.”). Thus, physical and personnel separation is not necessary to prevent public confusion about a governmental message. Instead, as is the case with countless third sector activities which utilize public-private partnerships, from

conducting scientific research to improving the quality of education, government is not the speaker. Id. Where the government is not conveying a message but, rather, is facilitating speech by funding a type of activity or service, its interest in preventing public confusion is a very weak justification for rules that interrupt public-private partnerships at a fundamental level. As the district court concluded, LSC grantees are able to deploy appropriate signage to prevent public confusion and protect the government's claimed interest. See Velazquez, 349 F. Supp. 2d at 609 (“simple prophylactic measures” can prevent the public appearance of government endorsement). The government cannot, then, justify a separation scheme that deeply harms important third sector functions when such a simple solution is readily available.

The President’s recent Faith-Based Initiative further undermines LSC’s public perception argument. Faith-based organizations that receive federal funding are not required to establish physical and personnel separation to conduct their privately financed religious activities, even though the government is constitutionally barred under the Establishment Clause of the First Amendment from endorsing or subsidizing the faith-based activities of federal grantees. See Guidance, supra, at 10. See generally Lee v. Weisman, 505 U.S. 577, 609 (1992). To the contrary, the government concedes that only the most minimal separation between an organization’s federally-funded and faith-based activities is necessary, and insists that this separation can be achieved simply by conducting those activities in different rooms or at different times of day. Guidance, supra, at 11. While amici express no view about the degree of physical and personnel separation that is constitutionally required for faith-based activities, amici believe that the government cannot plausibly take this position with respect to the Faith-Based Initiative and also maintain that legal services organizations cannot ensure

sufficient separation of their federally-funded and non-federally funded activities without implementing the program integrity regulation.

Third, the United States argues that the program integrity regulation is necessary to prevent legal services organizations from becoming distracted from their “primary mission” of providing legal assistance to the poor. Brief for United States at 41 (citation omitted). This argument is both troubling and misguided. If the government can impose a physical separation requirement on legal services programs to avoid “distracting” them from what the government wants their mission to be, then it can impose similar requirements on all other non-profits that receive any government funding, undermining the public-private partnerships at the heart of the third sector. The government cautions against creating “grantee/affiliate structures that are virtually indistinguishable from private boutique law firms.” Brief for the United States at 41. Yet, such grantee/affiliate structures enhance the ability of non-profit organizations to engage in *both* restricted and non-restricted activities. Legal services providers, for example, can better fulfill their “primary mission” of providing high quality bread-and-butter legal services if they are not subject to a burdensome and inefficient physical and personnel separation requirement.

In sum, whatever interests the government may have in ensuring that the funding it contributes to legal services is not spent on or publicly perceived as being spent on prohibited activities are easily met by significantly less onerous restrictions than those imposed here. See, e.g., League of Women Voters, 468 U.S. at 400 (governmental concern about prohibiting the mixing of government funds with private sources met by requiring separate accounting arrangement, such as that currently permitted between section 501(c)(3) and 501(c)(4) organizations, but not by regulations that effectively prohibit the protected activity); Taxation with Representation, 461 U.S. at 544-45 (government’s interest in not subsidizing

certain activities met by requiring bookkeeping and legal separation between government-subsidized activities and the constitutionally protected activities that the government does not want to subsidize). Thus, there is no legitimate justification for the burdensome restriction on charitable donors and non-profit organizations' First Amendment rights that would result from the program integrity regulation. Were this Court to uphold this regulation based upon the governmental interests asserted here, it would undermine the basic legal framework governing the third sector's constitutionally protected activities and jeopardize the vitality of the public-private partnerships which have enabled the third sector to play such an important role in society.

CONCLUSION

For the foregoing reasons, and those stated by Plaintiffs in this action, amici curiae respectfully urge the Court to affirm the portion of the district court's decision invalidating the program integrity regulation and to modify that decision to eliminate all requirements of physical and personnel separation beyond those contained in the Clarified Proposal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO F.R.A.P. 32(a)(7)(C)

I hereby certify that this brief complies with the type-volume limitations under Fed. R. App. P. 32(a)(7)(C) and contains 6,999 words, exclusive of this certificate.

Dated: New York, New York
 July 6, 2005

Jonathan L. Hafetz, Esq.

**ADDENDUM:
STATEMENTS OF INTEREST OF INDIVIDUAL AMICI CURIAE**

The following individual statements of interest represent a sample of the many organizations participating as amici curiae in this case.

AARP Foundation

The AARP Foundation is a non-profit, 501(c)(3) tax exempt, non-partisan organization that is affiliated with AARP and administers educational, employment, advocacy and community service programs funded by federal and private sources. AARP is a non-profit social welfare membership organization of more than 35 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. In recognition of the significant need of the low income older population for legal representation, AARP and the AARP Foundation have consistently supported LSC programs and opposed the imposition of unreasonable restrictions that hamper the abilities of LSC lawyers and advocates to adequately and ethically represent the interests of their clients.

Alabama Giving

Alabama Giving is an association of foundations and corporate giving programs representing more than 700 grantmaking institutions in Alabama. Alabama ranks sixth in the nation in per capita giving to support charitable programs and services that enhance and further publicly funded initiatives. Collaborations with federal agencies, state offices and local municipalities have enriched, improved and enhanced program delivery. We can identify many successful public-private partnerships from the Alabama Black Belt Action Commission in western Alabama to LINC, a program combating drug and alcohol use among elementary school children sponsored by the Calhoun County Sheriff's Department in Anniston, Alabama. The democratic freedom granted by the First Amendment to engage in these public-private partnerships for the greater good of society must be upheld and protected. To foster these essential services and to further these relationships we support Plaintiffs in this case.

Alliance for Justice

Alliance for Justice is an association of nearly 60 civil rights, women's, consumer, legal, environmental, and public interest organizations. We work to advance the cause of justice for all Americans, strengthen the nonprofit sector's influence on

public policy, and train and inspire the next generation of public interest advocates. We believe that nonprofit organizations have a unique and necessary role to play in the process of generating and supporting sound, effective, and just public policy. We provide training and technical assistance for foundations wishing to support nonprofit public policy work and for nonprofits doing such work. Our interest in this case is to ensure that our members, the nonprofit consumers of our training and technical assistance services, and other nonprofits have the leeway to use nongovernmental funds to bring their constituents' voices to policymakers.

Bernard F. and Alva B. Gimbel Foundation

The Bernard F. and Alva B. Gimbel Foundation's interest in this case is both narrowly and broadly focused. We support a number of organizations which provide legal services to low-income clients. In addition, we are concerned about the outcome of this case as it relates to funding for other kinds of organizations which rely on a mix of public and private funding. In examining the finances of prospective grantee organizations, we look for fiscal prudence. We encourage economies of scale and rarely make grants to organizations with disproportionately large overhead costs, no matter how good their programs; the requirement that restricted activities be housed in separate facilities with separate staff makes it impossible for organizations to meet those expectations. Finally, an important part of our grantmaking strategy is to look for opportunities to leverage public funds with our much more limited private funds. The outcome of this case directly affects our ability to carry out our grantmaking in a way that is both effective and fiscally responsible.

Center Lobbying in the Public Interest

Center for Lobbying in the Public Interest (CLPI) promotes, supports, and protects nonprofit advocacy and lobbying in order to advance charitable missions and strengthen participation in our democratic society. A national nonprofit based in Washington, D.C., CLPI accomplishes these goals through training, championing the importance of nonprofit participation in the public policy process, and coalition-based monitoring of nonprofit advocacy rights. It is the latter focus of our mission -- protecting nonprofit advocacy rights -- that is the catalyst for our concern that nonprofit organizations be free to use their private funds to engage in the public policy process.

Charles Stewart Mott Foundation

The Charles Stewart Mott Foundation is a private philanthropy committed to supporting projects that promote a just, equitable and sustainable society. We support non-profit programs throughout the United States and, on a limited geographic basis, internationally. Because our foundation gives money to projects that also receive federal funding, we are concerned that this case could set a precedent whereby the federal government places restrictions on our grantees' use of private funds.

Council on Foundations

The Council on Foundations, Inc., is a membership association of 2,000 grantmaking foundations and corporate giving programs worldwide. Since 1949, we have served the public good by promoting and enhancing responsible and effective philanthropy. Council members have assets of \$283 billion and make annual charitable grants in excess of \$21 billion. Many of our organizations engage in public-private partnerships, and we are concerned that this case might set a precedent emboldening the government to encumber the funds that our members donate to non-profits that also receive some government funding.

Independent Sector

Independent Sector is a nonprofit, nonpartisan coalition of approximately 500 national organizations, foundations, and corporate philanthropy programs, collectively representing tens of thousands of charitable groups in every state across the nation. Our mission is to advance the common good by leading, strengthening, and mobilizing the independent sector. Our members include charities that receive both government and philanthropic funding, and foundations and corporate philanthropies that support charities that also receive some government funding. We are concerned about the ability of charitable organizations to use their private funds freely and to engage in advocacy on public policy issues.

Michigan Nonprofit Association

To protect the First Amendment rights of Michigan charitable organizations, the Michigan Nonprofit Association is interested in participating in this case. The Michigan Nonprofit Association, with over 700 members across the State, enhances the effectiveness of the Michigan nonprofit sector in serving society.

Nathan Cummings Foundation

The Nathan Cummings Foundation is rooted in the Jewish tradition and committed to democratic values and social justice, including fairness, diversity, and community. We seek to build a socially and economically just society that values nature and protects the ecological balance for future generations, promotes humane health care, and fosters arts and culture that enriches communities. Because our organization gives money to non-profit groups that also receive federal dollars, we are concerned about restrictions that might encumber grantees' use of private funds.

National Committee for Responsive Philanthropy

The National Committee for Responsive Philanthropy (NCRP) has a nearly thirty-year history of research and analysis on the most productive means for nonprofits to carry out their tax exempt functions for public benefit and social change. NCRP has long promoted an understanding within the non-profit sector and with government lawmakers and administrators that it is entirely possible to meet the letter of the law in terms of ensuring that funds are not used or misused for prohibited activities and at the same time to maintain and advance the crucial importance of public-private partnerships and joint funding for the support and advancement of nonprofit work. In our history, NCRP has been the nation's premier national nonprofit leadership organization calling for enhanced nonprofit accountability and transparency, and has been among the leaders objecting to constraints on nonprofit free speech rights at the local, state, and federal levels.

As this case demonstrates, it is crucially important to protect the free speech rights of nonprofits in terms of their use of moneys raised in the private sector through charitable contributions. At the same time, it is entirely possible through tracking and allocating expenses to ensure that federal moneys do not get used for activities prohibited by the terms of the federal grant agreements. Modern cost accounting and tracking done by virtually every competent, professional nonprofit allows for this kind of tracking and allocating of expenditures. The notion that the only protection is to physically separate offices and staffs assigned to federally versus private charitably funded nonprofit activities is an impractical and costly option that is totally at odds with modern day realities. As longtime observers of the nonprofit sector, we firmly believe that the government's concept of "program integrity" will place an unnecessary and burdensome "premium" on the federal government and charitable contributors by requiring the establishment of separate

offices and building programmatic walls around subsequent operations. Further, we believe that the government's physical separation requirement is not only unnecessary and counterproductive, but will also undermine nonprofit free speech rights.

National Council of Non-profit Associations

The National Council of Non-profit Associations is a membership organization of state and regional associations of non-profits that work to promote and increase the capacity of the non-profit sector. As one of our guiding principles, we support and encourage non-profit advocacy as a means of civic engagement in the democratic process and non-profits' missions and the people and causes they serve. The program integrity regulation at issue in this case poses a direct affront to this principle.

Nonprofit Coordinating Committee of New York

The Nonprofit Coordinating Committee of New York is an "umbrella" organization for New York City metro area nonprofits of all kinds that has approximately 1350 nonprofits as its members. We seek to serve nonprofits in several ways: an active Government Relations Committee that monitors and comments on legislative and regulatory developments affecting New York's nonprofit sector; a program of workshops, a monthly newsletter and phone call and e-mail advice and referrals designed to provide help on infrastructure issues facing nonprofits; a series of discounts for members on items such as D&O insurance, office supplies, and shuttle flights; and efforts to secure publicity and provide information about the scope of the New York metro area nonprofit sector. (See our website at www.npcny.org).

OMB Watch

OMB Watch is a non-profit organization that promotes government accountability and citizen participation in public issues and decision-making. We work with and through the non-profit sector because of its vital place in communities and our faith that the sector can play a powerful role in reinforcing our democratic principles. Our primary focus areas are: the federal budget, regulatory issues, non-profit advocacy, and right-to-know. In all our work, we are guided by the belief that improving access to our governmental decision-makers and energizing citizens participation will lead to more just, equitable, and accountable government, which will ultimately strengthen our civil society.

OMB Watch places a high priority on protecting the advocacy rights of non-profit organizations. For the past twenty years we have worked at the national level to prevent unconstitutional constraints on the ability of non-profits to fully participate in the public policy process. We also seek to enhance the capacity of the sector to seek policy solutions to societal problems through educational and training activities. As a co-chair of the Let America Speak Coalition we helped stop federal legislation that would have prohibited non-profits that receive federal grants from using private funds. We strongly believe that such restrictions are an unconstitutional burden on free speech and detrimental to society as a whole, because they deprive lawmakers of an important perspective and source of information. The LSC restrictions on legal services programs have unduly hampered them and their non-profit allies from jointly pursuing the interests of low income households and individuals.

Open Society Institute

The Open Society Institute (OSI) is a private operating and grantmaking foundation that promotes the development of open society around the world. Internationally, it aims to shape public policy to promote democratic governance, human rights, economic, legal and social reform. In the United States, OSI's U.S. Programs seek to strengthen democracy by addressing barriers to opportunity and justice, broadening public discussion about such barriers, and helping marginalized groups to participate equally in civil society and to make their voices heard. The restrictions on the work of U.S. federally-funded lawyers for the poor pose critical threats to the ability of poor people to obtain relief through the courts. For the past six years, OSI has made grants to educate the public about the devastating impact of the restrictions and, ultimately, to roll back the restrictions. OSI supports the current challenge to the restrictions because it is essential to helping the poor preserve their claims to civil justice - a core open society concern.

Rockefeller Brothers Fund

The Rockefeller Brothers Fund's major objective is to promote the well-being of all people through support of efforts in the United States and abroad that contribute ideas, develop leaders, and encourage institutions in the transition to global interdependence. Our grantmaking aims to counter world trends of resource depletion, conflict, protectionism, and isolation which now threaten to move humankind everywhere further away from cooperation, equitable trade and economic development, stability, and conservation.

For over twenty years, the Rockefeller Brothers Fund had a program devoted to strengthening philanthropy and the private, non-profit sector. Consequently, we have a strong interest in preserving the freedom of philanthropies to direct their funds in ways that they believe are most effective. The Fund's interest in this case, then, not only grows out of our desire to preserve our own freedom, but also grows out of our dedication to fostering the development and effectiveness of philanthropy. Simply put, philanthropy will not flourish if its opportunities for action are restricted.

The Fund has also provided support to at least one legal services corporation which is restricted in the conduct of its privately funded work by the regulations challenged here.