No. 98-296

# In the Supreme Court of the United States

OCTOBER TERM, 1998

LEGAL AID SOCIETY OF HAWAII, ET AL., PETITIONERS

*v.*

LEGAL SERVICES CORPORATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether certain restrictions placed on the activities of recipients of federal Legal Services Corporation funds by the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, and the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, are facially unconstitutional.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 145 F.3d 1017. The opinion of the district court (Pet. App. 37a-68a) is reported at 981 F. Supp. 1288.

### JURISDICTION

The court of appeals entered its judgment on May 18, 1998. The petition for a writ of certiorari was filed on August 17, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. a. In 1974, Congress enacted the Legal Services Corporation (LSC) Act (1974 Act), Pub. L. No. 93-355, 88 Stat. 378, 42 U.S.C. 2996 *et seq.*, creating the LSC as an independent, non-profit corporation to "provide financial assistance to qualified programs furnishing legal assistance to eligible clients." 1974 Act, § 1006(a)(1)(A), 42 U.S.C. 2996e(a)(1)(A). The Act authorizes the LSC to make grants to, and to contract with, individuals, organizations and, in certain limited circumstances, state and local governments, for the purpose of providing legal assistance to eligible clients. *Ibid.* LSC receives funds annually from Congress to provide such financial assistance. Pet. App. 9a. Programs, individuals, and other entities receiving such assistance from LSC are defined as "recipient[s]" under the Act. 1974 Act, § 1002(6), 42 U.S.C. 2996a(6). The Act limits LSC financial support to "legal assistance in noncriminal proceedings or matters" for "persons financially unable to afford legal assistance." 1974 Act, § 1003(a), 42 U.S.C. 2996b(a).

In addition to restricting use of LSC funds to financially needy clients and prohibiting financial assistance in criminal matters, the LSC Act has, from the outset, prohibited LSC recipients from, *inter alia*, making available any LSC funds, program personnel or equipment to any political party, to any political campaign, or for use in "advocating or opposing any ballot measures." 1974 Act, § 1006(d)(3) and (4), 42 U.S.C. 2996e(d)(3) and (4). The Act has also prohibited LSC funds from being used to influence any governmental agency action or legislation, except upon request or when necessary to represent an eligible client. 1974 Act, § 1007(a)(5), 42 U.S.C. 2996f(a)(5). And it has pro-

hibited LSC funds from being used to provide legal assistance with regard to any proceeding relating to any nontherapeutic abortion, elementary or secondary school desegregation, or military desertion or violation of the selective service statute. 1974 Act, § 1007(b)(7)-(9), 42 U.S.C. 2996f(b)(8)-(10). Finally, the Act has from the outset prohibited recipients' attorneys from bringing any class action suits directly, or through others, unless express approval was obtained from the recipient's project director according to established policies. 1974 Act, § 1006(d)(5), 42 U.S.C. 2996e(d)(5). The 1974 Act restrictions apply to recipients' activities funded by LSC funds as well as by other nonpublic and nontribal funds. 1974 Act, § 1010(c), 42 U.S.C. 2996i(c).

b. In 1996, in the context of proposals to eliminate LSC altogether because of controversy over certain activities pursued by some recipients, Congress enacted compromise legislation that expanded the scope of restrictions on the activities of LSC recipients. Pet. App. 10a. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(d)(1), 110 Stat. 1321-56 (1996 Act). Congress continued the restrictions in the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 502(a), 110 Stat. 3009-59 (1997 Act), and in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 502(a), 111 Stat. 2510-2511. See Pet. App. 13a & n.2.

Under the 1996 and 1997 Acts, recipients may not represent aliens who are unlawfully present in the United States except in cases of domestic violence, 1996 Act, § 504(a)(11), 110 Stat. 1321-54; 1997 Act, § 502(a)(2)(C), 110 Stat. 3009-60; "participate[] in any litigation on behalf of a person incarcerated in any

Federal, State, or local prison," 1996 Act, § 504(a)(15), 110 Stat. 1321-55; or represent people allegedly engaged in illegal drug activity in public housing eviction proceedings, 1996 Act, § 504(a)(17), 110 Stat. 1321-56. Recipients also may not initiate or participate in class action lawsuits, 1996 Act, § 504(a)(7), 110 Stat. 1321-53; litigate or lobby in an effort to reform the federal or state welfare laws or systems, 1996 Act, § 504(a)(16), 110 Stat. 1321-55; claim or collect attorney's fees, 1996 Act, § 504(a)(13), 110 Stat. 1321-55; or participate "in any litigation with respect to abortion," 1996 Act, § 504(a)(14), 110 Stat. 1321-55. The Acts require a written statement of facts by each legal aid organization prior to initiating litigation or pre-litigation negotiations, to be kept on file and made available to any federal agency that is auditing or monitoring the LSC. 1996 Act § 504(a)(8), 110 Stat. 1321-53. The restrictions apply to recipients' use of both LSC and non-LSC funds. See 1996 Act, § 504(d)(1) and (2), 110 Stat. 1321-56. Recipients must notify private parties who provide them with funds "that the funds may not be expended for any purpose prohibited" by the statute. 1996 Act, § 504(d)(1), 110 Stat. 1321-56.[1]

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[1] Since 1974, other provisions of the LSC Act have provided that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 1974 Act, § 1001(6), 42 U.S.C. 2996(6); see also 1974 Act, § 1006(b)(3), 42 U.S.C. 2996e(b)(3) (LSC "shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association * * * or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional

c. Shortly after the passage of the 1996 Act, LSC published regulations to implement the new statutory restrictions. See 61 Fed. Reg. 41,960 (1996); *id.* at 63,749. Coupled with pre-existing guidelines, the regulations applied the new restrictions not only to recipients but also to any "interrelated" organization, defined as an organization controlled by a recipient such that the recipient determined "the direction of management and policies" or influenced them "to the extent an arm's length transaction may not be achieved." See Pet. App. 13a (quoting 50 Fed. Reg. 49,276, 49,279 (1985)). The regulations also applied the restrictions to any entity that received a transfer of funds from an LSC recipient. 61 Fed Reg. at 63,752. If the funds transferred to the entity were LSC funds, the restrictions applied to all of the transferee entity's activities; if an LSC recipient transferred private funds, the restrictions applied only to the transferred funds. *Ibid.*

2. a. In January 1997, petitioners—several legal services organizations that receive LSC funds, an association of legal services clients, two organizations that fund work by legal services organizations, and individual legal services lawyers (Pet. App. 13a-14a)—brought the instant action against the Legal Services Corporation in federal district court. They alleged that the 1996 and 1997 Acts and the implementing LSC regulations were facially invalid under the First and Fifth Amendments of the United States Constitution to the extent they prevented LSC re-

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responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.").

cipients from spending non-federal funds to pursue activities protected by the First Amendment. Petitioners alleged that certain restrictions denied them equal protection and due process. Petitioners sought preliminary injunctive relief against enforcement of the new restrictions. Pet. App. 13a-14a.

The district court granted in part and denied in part the motion for a preliminary injunction. Pet. App. 69a-112a. The court denied relief with regard to certain of the challenged restrictions because they "do[] not implicate [petitioners'] constitutional rights," including the restriction on representing undocumented aliens except in cases of domestic violence (*id.* at 79a-80a); the prohibition on pursuing class actions (*id.* at 81a-82a); the prohibition on LSC grant recipients' seeking or collecting attorney's fees (*id.* at 82a); and the requirement that recipients prepare a statement of facts before engaging in litigation or negotiation (*id.* at 82a-83a).

The district court preliminarily enjoined enforcement of the remaining restrictions challenged by petitioners. Pet. App. 103a-104a. The court found that petitioners had a "significant likelihood of success" on their claim that those provisions place unconstitutional conditions upon the receipt of federal funds. *Id.* at 96a-97a. The court held that, under the standards enunciated in *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984); and *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), Congress may restrict the use of funds in conjunction with a subsidized program only if adequate alternative channels exist whereby the grant recipients can pursue the unsubsidized activities. Pet. App. 89a-90a. The court found that the LSC's regulations did not allow a recipient to form an affiliate organization through which it could pursue restricted activities with non-LSC funds

and, therefore, did not provide alternative channels through which recipients could exercise their First Amendment rights. *Id.* at 91a-96a.

b. Following entry of the preliminary injunction, LSC announced its intention to amend its regulations to allow recipients "to have an affiliation or relationship with separate organizations which may engage in prohibited activities funded solely with non-LSC funds" in the same manner as was approved for separate projects in *Rust*, and it issued interim regulations addressing that issue on March 14, 1997. 62 Fed. Reg. 12,101, 12,102. On May 21, 1997, LSC issued final regulations that amended the interim regulations in significant part. *Id.* at 27,695 (codified at 45 C.F.R. Pt. 1610).

Under the final regulations, an LSC recipient may create an affiliate that may spend non-federal funds on activities that the recipient itself is restricted from engaging in ("restricted activities") so long as the recipient maintains its "objective integrity and independence" from the affiliate. 45 C.F.R. 1610.8(a). A recipient "will be found to have objective integrity and independence" from an affiliate if: (1) the affiliated organization is a "legally separate" organization; (2) the affiliate "receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities"; and (3) the recipient is "physically and financially separate" from the affiliate. The third criterion requires more than mere bookkeeping separation. 45 C.F.R. 1610.8(a)(1)-(3). Satisfaction of that third criterion is to be determined on a case-by-case basis according to the "totality of the facts," including, but not limited to: "(i) [t]he existence of separate personnel; (ii) [t]he existence of separate accounting and timekeeping records; (iii) [t]he degree of separation from facilities in which restricted activities occur, and the extent of such restricted activi-

ties; and (iv) [t]he extent to which signs and other forms of identification which distinguish the recipient from the [affiliated] organization are present." 45 C.F.R. 1610.8(a)(3)(i)-(iv).[2]

c. On April 14, 1997, the United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the restrictions. Pet. App. 40a. LSC and the United States (collectively respondents) both moved for summary judgment, arguing that, as implemented by the final LSC regulations, the statutory restrictions do not violate petitioners' constitutional rights. Petitioners opposed that motion and filed their own motion for summary judgment. *Ibid.*

The district court denied petitioners' motion for summary judgment, concluding that LSC's final regulations cured the constitutional defects that had led the court to issue the preliminary injunction, and it granted summary judgment to respondents because petitioners failed to raise a material issue of fact regarding the constitutional validity of the LSC regulations. Pet. App. 45a. The court held that, by allowing an LSC recipient to establish a legally separate organization with separate personnel and facilities, the regulations leave open an adequate alternative channel for the exercise of constitutional rights. *Id.* at 44a-45a.

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[2] The final regulations also amend the rule governing the transfer of funds to provide that the restrictions apply only when an LSC recipient transfers LSC funds to another person or entity. When a person or entity receives LSC funds from a recipient, that person or entity is subject to the restrictions with respect to its LSC and non-LSC funds. 45 C.F.R. 1610.7. However, a person or entity that receives non-LSC funds from an LSC recipient is not subject to any of the restrictions. See 62 Fed. Reg. 27,695, 27,696-27,697 (1997).

The court noted that the requirement for separate personnel and facilities (the insularity requirement) was modeled after the regulations upheld by this Court in *Rust*. Pet. App. 46a. The court rejected petitioners' attempt to distinguish *Rust* as a case that involved different bookkeeping problems for physicians, that involved a governmental message, and that did not involve litigation. The court found that there was no relevant bookkeeping distinction, that Congress did not control the analysis and advice of either a *Rust* physician or an LSC lawyer, and that the role of litigation would be relevant only if petitioners had raised vagueness or overbreadth challenges to the restrictions, which they had not. *Id.* at 47a-49a. The court further concluded that the practical difficulties with abiding by the insularity requirement cited by petitioners did not render the requirement unconstitutional, because petitioners retain many practical means of complying with the restrictions without sacrificing First Amendment rights. *Id.* at 51a-55a. The court emphasized that it read the LSC regulations to allow a recipient to exercise control over an affiliate that engages in restricted activities, if the affiliate otherwise meets the insularity requirement, so that the affiliate would provide an alternative channel through which the recipient could engage in activities protected by the First Amendment, thereby defeating petitioners' facial challenge. *Id.* at 56a-60a.

The court also upheld, against First Amendment challenge, the requirement that an affiliate organization be a "legally separate entity" from the recipient, rather than merely a separate project of the recipient, as was the case under the *Rust* regulations. The court noted that the separate incorporation requirement narrows the availability of alternative channels more than in

*Rust* only to a de minimis extent (Pet. App. 50a), does not in any significant way add to petitioners' burden (*id.* at 56a), and, standing alone, was found not to be unduly burdensome by this Court in *Taxation With Representation*, 461 U.S. at 544 n.6. Pet. App. 55a-56a.[3]

With regard to petitioners' assertion of numerous due process and equal protection claims of indigent clients, the district court held that only one plaintiff, the California State Client Council, had standing to assert them. Pet. App. 60a-62a. As for the due process claims, assuming that the clients had the constitutional rights claimed, the court ruled that, under *Rust*, the LSC regulations do not violate such rights because the indigent clients retain the same choices they would have had absent the federal government's creation of LSC. *Id.* at 62a-64a. And the court held that the LSC regulations do not violate equal protection because they are supported by a rational basis. *Id.* at 65a-66a.[4]

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[3] The district court noted that petitioners belatedly attempted to raise a viewpoint discrimination claim, but it rejected that claim under the *Rust* rationale because the government may fund legal representation in certain cases it believes to be in the public interest and not fund others without engaging in unconstitutional viewpoint discrimination. Pet. App. 66a-67a n.20.

[4] The district court noted that, at the summary judgment stage, petitioners had attempted to make a new argument that the court should apply a least-restrictive-alternative standard; but the court concluded not only that that standard is inapplicable because petitioners' constitutional rights are not infringed, but also that, even under that standard, petitioners would not prevail because the LSC regulations "are as narrowly tailored [as those] in *Rust* and the burdens do not exceed those upheld in *Rust*." Pet. App. 43a n.3.

3. The court of appeals affirmed in relevant part.[5] In an opinion by retired Associate Justice White, sitting by designation pursuant to 28 U.S.C. 294(a), the court held that neither the challenged Acts of Congress nor the implementing LSC regulations impose unconstitutional conditions on LSC fund recipients' exercise of First Amendment rights. Pet. App. 2a, 9a.[6] The court noted that the LSC regulations requiring "[a] distinction between restricted and unrestricted organizations are nearly identical to the regulations upheld in *Rust* and there is no basis for distinguishing this case from *Rust*." *Id.* at 18a. Thus, the court of appeals explained, "the Court's discussion in *Rust* of why the Secretary's regulations were constitutional controls the disposition of this case." *Id.* at 21a. As in *Rust*, the court reasoned, the government here is not denying a benefit to anyone on the basis of First Amendment activity, but is "instead simply insisting that public funds be spent for the purposes for which they were authorized." *Ibid.* (quoting *Rust*, 500 U.S. at 196). Moreover, the court continued, LSC recipients are not being required to give up prohibited activities, but are merely being required to keep such activities separate from LSC-

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[5] The court of appeals vacated the district court's judgment regarding the due process and equal protection claims based on rights of indigent clients, and remanded the case with directions to dismiss those claims, because petitioners failed to establish that they had standing to raise them on behalf of the indigent clients. Pet. App. 9a, 36a. Petitioners do not raise those claims in this Court.

[6] The court emphasized that petitioners failed to satisfy the stringent standard required for their facial challenges to the LSC regulations. Pet. App. 16a, citing *Rust*, 500 U.S. at 183 (in facial challenge, plaintiff "must establish that no set of circumstances exists under which the Act would be valid").

funded functions by conducting them "through entities that are separate and independent" from the LSC recipient. *Ibid.*

The court of appeals, like the district court, specifically rejected petitioners' various attempts to distinguish *Rust*. The court held that use of the term "recipients" in the LSC regulations, rather than "projects" as in *Rust*, is not significant because "[t]he proper constitutional test does not focus on the particular term used by the government agency, but whether the regulations 'effectively prohibit [ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program.' 500 U.S. at 197. * * * The LSC regulations pass this test." Pet. App. 22a. The court explained that the regulations simply call for the same degree of separation as in *Rust*, with the added requirement of a separately incorporated entity—a requirement that is consistent with *Taxation With Representation*, 461 U.S. at 544 n.6 (requiring separate incorporation of tax-exempt organization and lobbying entity that is not tax-exempt), and with *League of Women Voters*, 468 U.S. at 400 (noting that a requirement that noncommercial television and radio stations receiving federal funds establish affiliates to editorialize with nonfederal funds would plainly be valid). Pet. App. 23a-24a.

The court of appeals rejected petitioners' speculation that LSC might apply the regulations in such a way as to make it financially impossible for recipients to engage in restricted activities. The court concluded that such speculation is inadequate to support a facial challenge, Pet. App. 25a-26a, and that it is not unconstitutional to require additional efforts by a recipient to engage in restricted activities, especially here, where

the filing of incorporation papers by an entity employing attorneys is not a significant burden, *id.* at 26a-27a.

Finally, the court of appeals rejected petitioners' contention that *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), renders the challenged restrictions unconstitutional because, according to petitioners, LSC "is a program designed to encourage private speech and therefore the restrictions are subject to heightened scrutiny." Pet. App. 27a. The court reasoned that, unlike in *Rosenberger*, where the government expended funds to encourage a diversity of views from private speakers, "the LSC program is designed to provide professional services of limited scope to indigent persons, not [to] create a forum for the free expression of ideas." *Ibid.* The court similarly rejected the contention that the restrictions should be evaluated under a compelling interest standard, pointing out that a recipient voluntarily receives LSC funding and consents to the restrictions, that the recipient remains free to engage in the activities at issue through a separate entity, and that, contrary to petitioners' assertion, *Rust* did not apply such a standard. *Id.* at 28a-29a.[7]

**ARGUMENT**

The court of appeals correctly held that the restrictions imposed by the challenged Acts of Congress on

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[7] The court rejected petitioners' contention that the LSC regulations violate the First Amendment insofar as they prohibit a full-time legal services lawyer from engaging in the outside practice of law. The court noted that such a limitation is common in government agencies and is "a consequence of that attorney's decision to accept full-time employment with a LSC funded organization." Pet. App. 29a-30a.

activities of organizations that receive funds from the Legal Services Corporation (LSC) are not facially invalid under the First Amendment. That ruling was based on a straightforward application of this Court's precedents and does not conflict with any decision of any other court of appeals. Review by this Court therefore is not warranted.

1. a. The decision of the court of appeals does not conflict with the decision of any other federal court. In fact, in another challenge to the LSC restrictions, the United States District Court for the Eastern District of New York denied the plaintiffs' request for a preliminary injunction to enjoin the restrictions. *Velazquez* v. *LSC*, 985 F. Supp. 323 (1997), appeal pending, No. 98-6006.

The court of appeals' decision also is fully consistent with this Court's precedents. It is, of course, clear that Congress has broad power to specify the purposes for which funds appropriated out of the Federal Treasury may be spent. See U.S. Const. Art. I, § 9, Cl.7. It also is well settled that Congress may provide that federal funds may not be used to support particular activities that also are supported by non-federal funds—even if the activities involved are of the sort that are fully protected by the First Amendment when engaged in solely by private parties—so long as the fund recipient is allowed to form an affiliate organization to receive and spend non-federal funds to engage in the protected activities. See, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364, 400 (1984). Congress also may require that such an affiliate organization be kept "physically and financially separate" from the recipient organization. *Rust* v. *Sullivan*, 500 U.S. 173, 180, 187-190 (1991).

The Court has, on several occasions, rejected contrary arguments akin to those pressed by petitioners

here. In *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), the Court rejected a challenge to Section 501(c)(3) of the Internal Revenue Code, which forbids tax-exempt organizations from engaging in lobbying. The Court held that the restriction on lobbying activity did not place an unconstitutional condition on the receipt of a tax benefit because the organization could create a separate affiliate to engage in lobbying activity. *Id.* at 544. The Court explained: "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." *Id.* at 545 n.6.

In *League of Women Voters*, 468 U.S. at 381-402, the Court struck down a statutory provision that prohibited federally subsidized radio stations from broadcasting editorial opinions, in part because a station "is not able to segregate its activities according to the source of its funding" and has "no way of limiting the use of its federal funds to all noneditorializing activities." *Id.* at 400. The Court recognized, however, that "if Congress were to adopt a revised version of [the statute] that permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." *Ibid.*

In *Rust*, the Court sustained regulations implementing Title X of the Public Health Service Act that prohibited the use of federal funds "in programs where abortion is a method of family planning." 500 U.S. at 178. The regulations prohibited Title X projects from, among other things, counseling patients regarding abortion, referring patients to abortion providers,

lobbying for legislation to increase the availability of abortion, and using legal action to make abortion available. See *id.* at 180. The regulations also required that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion-related activities. Under that provision, the federally funded project was required to have "objective integrity and independence" from prohibited activities, beyond mere bookkeeping separation. *Id.* at 180-181. The Court held that the regulations did not violate the First Amendment, because "[b]y requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan* [v. *Taxation With Representation*], not denied it the right to engage in abortion-related activities." *Id.* at 198. Rather, "Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program." *Ibid.*

The LSC restrictions at issue here pass muster under the standards enunciated in *Taxation With Representation*, *League of Women Voters*, and *Rust*. The statutory restrictions, as interpreted by LSC in its final regulations, allow recipients to create and control affiliates that may furnish restricted legal services with non-LSC funds, thereby providing a means by which the recipients may engage in activity protected by the First Amendment. As noted by the courts below, the challenged regulations are substantially the same as those upheld in *Rust*. See Pet. App. 19a-21a (comparing the two sets of regulations); *id.* at 46a-47a n.6 (same). Like the *Rust* regulations, the LSC regulations require

"physical and financial separation" as part of a requirement that the LSC recipient and its affiliate maintain "objective integrity and independence." Compare 45 C.F.R. 1610.8 with 42 C.F.R. 59.9. Sufficient physical and financial separation under the LSC program is determined on a case-by-case basis using the same factors used in the *Rust* regulations: the existence of "separate personnel," "separate accounting and timekeeping records," the "degree of separation from facilities in which restricted activities occur," and the presence of "forms of identification which distinguish the recipient" from the affiliate. Compare 45 C.F.R. 1610.8 with 42 C.F.R. 59.9.

In some respects, the LSC restrictions are more permissive than those at issue in *Rust*, because the latter contained a rule that prevented physicians in the program from referring a patient to an abortion provider or even mentioning abortion as a method of family planning. See 500 U.S. at 180. The LSC regulations contain no comparable restriction. Recipients are free to discuss client options that include restricted activities and to refer clients to organizations that provide restricted services—including an affiliate organization established by the recipient. The one requirement in the LSC regulations that was not in the *Rust* regulations—that a recipient and its affiliate organization be "legally" separate entities (45 C.F.R. 1610.8)—does not alter the analysis, because such a requirement was held by this Court in *Taxation With Representation* not to constitute an undue burden. 461 U.S. at 544-545 n.6.

The LSC regulations plainly allow for adequate alternative channels for petitioners to engage in activities protected by the First Amendment. If an LSC recipient avails itself of the affiliate structure, its ability to use non-federal contributions is subject to restrictions

only if a donor makes a specific choice to give the money to the recipient rather than to its non-LSC affiliate after having received written notification that that choice would make the contribution subject to the same restrictions as federal funds. Such a scheme is constitutional under *Taxation With Representation*, *League of Women Voters*, and *Rust*.

b. The lower courts correctly rejected petitioners' attempts (Pet. 16-23) to distinguish *Rust*. The fact that the LSC restrictions apply to recipients of funds rather than to programs (see Pet. 18-20) is not of constitutional significance. Nothing in *Rust* suggests that allowing the creation of a separate "project" was the only way for government regulations to avoid an impermissible burden of First Amendment interests. In fact, the *Rust* Court illustrated how the government could achieve the same result by using the "affiliate" option recognized as valid in *League of Women Voters* and *Taxation with Representation*. 500 U.S. at 197-198.

Petitioners' claim (Pet. 20-21) that the applicability of the LSC restrictions to attorneys somehow distinguishes this case for constitutional purposes from *Rust*, which involved a program that applied to physicians, is without merit. In *Rust*, the Court held that the "doctor-patient relationship established by the Title X program" in *Rust* was not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." 500 U.S. at 200. Here, however, the concerns identified by the Court in *Rust* with respect to physicians in a counseling relationship do not even directly arise. Unlike the doctors in *Rust*, who were subjected to a rule that prohibited them from even counseling patients about receiving an abortion elsewhere, LSC recipient attorneys remain free to inform their clients that certain litigation

is beyond the scope of LSC funding and to refer those clients to an affiliate organization or other lawyers who can handle such litigation. Thus, LSC recipient attorneys may furnish such advice as an alternative to entering into a full attorney-client relationship. Furthermore, the attorney-client relationship that might arise with an LSC attorney is not so all encompassing as to justify an expectation on the part of the client of comprehensive legal services, because of the significant restrictions that have been placed on the scope of representation by LSC-funded attorneys from the creation of LSC, including prohibitions against representing clients in criminal matters, school desegregation, certain abortion cases, and selective service cases, as well as special limitations on class action filings. Simply put, and contrary to petitioners' suggestion (Pet. 21 & n.20), Congress never intended for LSC attorneys to provide all forms of legal services to their clients; Congress intended for them to furnish those types of legal services that it believed would best serve the public interest.

Petitioners err in contending (Pet. 21-22) that *Rust* does not apply here because, unlike the Title X program in *Rust*, which was designed to convey a governmental message, the LSC program is designed to encourage private speech. As the court of appeals recognized, petitioners borrow that distinction from *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), where the Court noted that *Rust* "did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program." The court of appeals correctly found, however, that LSC funding is not a program akin to the one at issue in *Rosenberger*, which was designed to encourage diverse private

expression and which, in essence, constituted a limited public forum for such private expression. *Id.* at 829-830; see *NEA* v. *Finley*, 118 S. Ct. 2168, 2178 (1998); see also *id.* at 2184 (Scalia, J., concurring) (*Rosenberger* "found the viewpoint discrimination unconstitutional, not because funding of 'private' speech was involved, but because the government had established a limited public forum"). The LSC program, by contrast, is not a program dedicated to the promotion of diverse private expression—it exists to subsidize certain discrete legal services and activities. Any limitations on LSC recipients' speech are but an incidental result of the program's restrictions on certain types of activities. Such an incidental limitation on the use of federal funds for expressive purposes is "not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in *activities* outside of the project's scope." *Rust*, 500 U.S. at 194 (emphasis added).

2. Petitioners suggest (Pet. 23-29) that certiorari should be granted to clarify the standard for determining when a funding restriction imposes unconstitutional conditions. At the same time, petitioners recognize that, in the past, the Court has addressed that question on a case-by-case basis with an analysis that "was tailored to the specific facts and necessities of the particular case." Pet. 26. In essence, petitioners urge the Court to review this case to adopt a more stringent standard than the Court's precedents support, *i.e.*, a new standard that would require the government to prove that restrictions on activities of federal fund recipients are "*necessary* in a particular case to insure that its funding limits are respected." Pet. 24. Petitioners contend that the restrictions here would not meet that standard because, in their view, accounting

separation, accompanied by disclaimers, should suffice. Pet. 27-28.[8]

The court of appeals correctly rejected this attempt by petitioners to inject a form of strict scrutiny into the case, requiring that government restrictions be "necessary" to preserve the funding decisions of Congress. In *Taxation With Representation*, the Court expressly rejected the contention that strict scrutiny applied, holding that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." 461 U.S. at 549. In *League of Women Voters*, the Court applied heightened scrutiny in a case where the statutory restriction did not provide an alternative channel for First Amendment expression, 468 U.S. at 381-399, but specifically went on to state that the statute "would plainly be valid" if it allowed for an affiliate structure. *Id.* at 400. In *Rust*, the Court found that the regulations did not abridge First Amendment rights, without any requirement of a showing that the restrictions were narrowly tailored to achieve a substantial interest. The *Rust* Court held that by requiring a recipient to engage in restricted activity separately, Congress has "not denied it the right to engage in abortion-related activities" but "has merely refused to fund such activities out of the public fisc." 500 U.S. at 198. Thus, rather than analyze the government's interest in interfering with First Amendment

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[8] In a footnote (Pet. 23 n.21), petitioners attempt to raise an argument that the LSC restrictions aim at the suppression of particular viewpoints. That claim must fail because, just as in *Rust*, Congress has simply declined to fund certain legal activities and has provided for a degree of separation between an LSC recipient and an affiliate to safeguard the integrity of the federal program.

rights, the Court held that the restrictions did not materially interfere with such rights in the first place.[9] The same principle governs the instant case.

Moreover, even if one were to apply petitioners' proposed legal standard, the LSC restrictions would meet that standard. The same governmental interests served by the *Rust* regulations are served by the LSC's program regulations. See Pet. App. 43a n. 3 (district court rejected petitioners' belated argument for a least restrictive alternative standard because petitioners' constitutional rights were not infringed and, alternatively, found that even if that standard applied, the LSC restrictions are valid because they are "as narrowly tailored [as] in *Rust* and the burdens do not exceed those upheld in *Rust*"). As in *Rust*, the government restrictions at issue here ensure that federal funds are used only for "federally authorized purposes," and "that grantees avoid creating the appearance that the Government is supporting [the restricted] activities." 500 U.S. at 188.

LSC's separate-entity requirements promote the government's interest in using federal funds to address certain basic legal needs of the poor and to avoid any indirect subsidy of restricted activities. Congress made clear when it enacted the restrictions that "it is in-

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[9] The only reference in *Rust* to "narrow[] tailor[ing]" appears in a footnote stating that the Court "also" finds that the regulations are narrowly tailored to fit Congress's intent that federal funds not be used to promote or advocate abortion. 500 U.S. at 195 n.4. If, as petitioners contend, narrow tailoring is an essential element of the analysis, the *Rust* Court would have addressed the issue as a threshold matter rather than note it in a fashion suggesting an alternative analysis. In any event, the *Rust* footnote indicates that, even under such an alternative analysis, the LSC restrictions are sufficiently tailored.

appropriate for Federal resources to be used to support directly or indirectly these [prohibited] activities," since such activities "only further drain much needed resources from the program's core mission—to provide basic legal aid to poor individuals." H.R. Rep. No. 196, 104th Cong., 1st Sess. 121 (1995); see also S. Rep. No. 392, 104th Cong., 2d Sess. 7 (1996) ("[M]any legal services grantees currently receive funds from both public and private sources[.] Since the money is basically fungible, it would be difficult if not impossible to place restrictions only on the Federal funds."). Congress also emphasized the importance of avoiding the outward appearance of unauthorized use of federal funds. See 138 Cong. Rec. H2994 (daily ed. May 6, 1992) (statement of Rep. McCollum); S. Rep. No. 392, *supra*, at 7 ("the public cannot differentiate between LSC advocacy subsidized with public versus private funds"); 141 Cong. Rec. S14,588 (daily ed. Sept. 29, 1995) (statement of Sen. Hollings) (LSC restrictions enacted to "maintain the integrity of the program"); 142 Cong. Rec. S1963 (daily ed. Mar. 13, 1996) (statement of Sen. Domenici) (LSC restrictions enacted to "protect LSC from the negative perceptions of those who wish to see its termination").

Finally, petitioners' repeated references to the allegedly burdensome nature of the restrictions provide no basis to conclude that the LSC restrictions are unconstitutional. Petitioners failed to make the requisite showing to support their facial challenge to the statutory provisions and implementing regulations. As the court of appeals made clear (Pet. App. 25a-26a), LSC regulations provide that no one factor is determinative in deciding whether an affiliate structure meets the separation requirements. Rather, LSC will make case-by-case determinations. The fact that the

restrictions apply to all LSC recipients (Pet. 29-30 n.31) does nothing to show that the LSC restrictions will operate in such a burdensome manner that they are invalid on their face.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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