No. 99-960

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARMEN VELAZQUEZ, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-55, precludes recipients of Legal Services Corporation funds from participating in "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system," except that it allows representation of "an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." The question presented is whether that provision violates the First Amendment.

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-50a) is reported at 164 F.3d 757. The opinion of the district court (App., *infra*, 51a-99a) is reported at 985 F. Supp. 323.

JURISDICTION

The court of appeals entered its judgment on January 7, 1999. A timely petition for rehearing was denied on July 8, 1999. On September 28, 1999, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including November 5, 1999, and on

October 27, 1999, she further extended the time for filing to and including December 5, 1999 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 504(a) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-55, provides, in pertinent part:

> None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity * * *—
>
> * * * * *
>
> (16) that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.

This restriction was carried forward in subsequent appropriations acts. See p. 4, *infra*.

STATEMENT

1. a. In 1974, Congress enacted the Legal Services Corporation Act (the LSC Act), Pub. L. No. 93-355, 88 Stat. 378, 42 U.S.C. 2996 *et seq.*, which creat[ed] the Legal Services Corporation (LSC) as an independent, non-profit corporation to "provide financial assistance

to qualified programs furnishing legal assistance to eligible clients." 42 U.S.C. 2996e(a)(1)(A). The LSC 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.* The LSC receives funds appropriated annually by Congress to provide such financial assistance. The LSC then distributes those funds to programs, individuals, and other entities that submit applications describing their proposed legal services activities. 42 U.S.C. 2996b(a), 2996e(a).

The LSC Act limits LSC financial support to "legal assistance in noncriminal proceedings or matters" for "persons financially unable to afford legal assistance." 42 U.S.C. 2996b(a). The LSC program was designed to target the "day-to-day" legal problems of the poor. 119 Cong. Rec. 20,688 (1973) (statement of Rep. Biester); see also 142 Cong. Rec. H8189 (daily ed. July 23, 1996) (statement of Rep. Torkildson) (the Act's primary focus is on "bread-and-butter services" to the poor).

Recipients of LSC funds have long been subject to restrictions to ensure the focus on basic legal services. The LSC Act has, from the outset, prohibited LSC fund 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." 42 U.S.C. 2996e(d)(3) and (4). The LSC 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. 42 U.S.C. 2996f(a)(5). And the Act has prohibited LSC funds from being used to provide legal assistance with regard to any proceeding relating to any nontherapeu-

tic abortion, elementary or secondary school desegregation, military desertion, or violation of the selective service statute. 42 U.S.C. 2996f(b)(8)-(10). Finally, the LSC Act has, from the outset, prohibited LSC fund-recipients from bringing any class action suits directly, or through others, unless express approval is obtained from the LSC fund recipient's project director according to established policies. 42 U.S.C. 2996e(d)(5). The LSC Act restrictions apply to LSC fund recipients' activities supported by LSC funds as well as by other nonpublic and nontribal funds. 42 U.S.C. 2996i(c).

b. In 1996, at a time when proposals were before Congress to eliminate the LSC altogether because of controversy over certain activities pursued by some LSC fund recipients, Congress enacted compromise legislation that expanded the scope of restrictions on the activities of LSC fund recipients. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321-53 (1996 Act). Congress carried forward the restrictions again in the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, § 502(a), 110 Stat. 3009-59 (1997 Act), and has continued the restrictions in subsequent legislation. See the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 502, 111 Stat. 2510; Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 411, 112 Stat. 2681-107.

Under those Appropriations Acts, LSC fund recipients are precluded from representing certain parties in specified circumstances. In the provision at issue here, the Acts prohibit LSC fund recipients from participating in "litigation, lobbying, or rulemaking, in-

volving an effort to reform a Federal or State welfare system," except that representation is allowed of an individual client "seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." 1996 Act, § 504(a)(16), 110 Stat. 1321-55 to 1321-56.

In addition, LSC fund recipients may not: advocate or oppose any reapportionment of a legislative, judicial, or elective district, or participate in any litigation related thereto; attempt to influence the "issuance, amendment, or revocation of any executive order, regulation" or similar government promulgation; attempt "to influence any part of any adjudicatory proceeding of any Federal, State, or local agency" that is formulating general agency policy; attempt to influence "the passage or defeat of any legislation, constitutional amendment, referendum, initiative * * * of the Congress or a State or local legislative body"; initiate or participate in class-action lawsuits; represent aliens who are unlawfully present in the United States except in cases of domestic violence; conduct a training program "for the purpose of advocating a particular public policy or encouraging a political activity"; claim or collect attorneys' fees; participate "in any litigation with respect to abortion"; "participat[e] in any litigation on behalf of a person incarcerated in a Federal, State, or local prison;" defend a person in a proceeding to evict the person from a public housing project if the person has been charged with illegal engaging in illegal drug activity which threatens the health or safety of a tenant or employee of the housing agency. 1996 Act, §§ 504(a)(1), (2), (3), (4), (7), (11), (12), (13), (14), (15)

and (17), 110 Stat. 1321-53 to 1321-56; 1997 Act, § 502(a)(2)(C), 110 Stat. 3009-60.[1]

The restrictions apply to the use by LSC fund recipients of funds received both from the LSC and from non-federal sources (except for Indian tribal funds). 1996 Act, §§ 504(d)(1) and (2), 110 Stat. 1321-56. LSC fund recipients must notify non-federal fund donors "that the funds may not be expended for any purpose prohibited" by the Act. 1996 Act, § 504(d)(1), 110 Stat. 1321-56.[2]

c. Shortly after passage of the 1996 Act, the LSC published regulations implementing the new statutory

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[1] The restrictions do not preclude LSC fund recipients from using non-LSC funds "to comment on public rulemaking or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body, or committee," 1996 Act, § 504(e), 110 Stat. 1321-57, or "for the purpose of contacting, communicating with, or responding to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient," 1996 Act, § 504(b), 110 Stat. 1321-56.

[2] The LSC Act has also provided since 1974 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." 42 U.S.C. 2996(6); see also 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 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.").

restrictions. See 61 Fed. Reg. 41,960 (1996); 61 Fed. Reg. at 63,749. Coupled with pre-existing guidelines, the regulations applied the new restrictions not only to LSC fund recipients but also to any "interrelated" organization, defined as an organization as to which the LSC fund recipient determined "the direction of management and policies" or influenced them "to the extent an arm's length transaction may not be achieved." 50 Fed. Reg. 49,279 (1985).[3]

2. a. On January 14, 1997, certain lawyers employed by LSC fund recipients, their indigent clients, and various contributors to LSC fund recipients (respondents) brought this suit in the United States District Court for the Eastern District of New York against the Legal Services Corporation and Legal Services of New York. They alleged that the restrictions on the use by LSC fund recipients of federal and non-federal funds violate a variety of federal constitutional provisions.

b. On March 14, 1997, the LSC announced its intention to amend its regulations to allow LSC fund recipients "to have an affiliation or relationship with separate organizations which may engage in prohibited activities funded solely with non-LSC funds," 62 Fed. Reg. 12,102, in the same manner as was approved for separate projects in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), and it issued interim regulations addressing that issue. See 62 Fed. Reg. 12,101 to 12,104 (1997). LSC

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[3] The regulations also applied the restrictions to any entity that received a transfer of funds from an LSC fund 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 fund recipient transferred non-LSC funds, the restrictions applied only to the transferred funds. *Ibid.*

issued final regulations on May 21, 1997. 62 Fed. Reg. at 27,695 (1997).

Under the final regulations, an LSC fund recipient may create an affiliate that may spend non-federal funds on activities in which the LSC fund recipient itself may not engage ("restricted activities"), so long as the LSC fund recipient maintains its "objective integrity and independence" from the affiliate. 45 C.F.R. 1610.8(a). An LSC fund 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 LSC fund recipient is "physically and financially separate" from the affiliate. *Id.* § 1610.8(a)(1)-(3). Satisfaction of the 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 the restricted activities occur, and the extent of such restricted activities; and (iv) [t]he extent to which signs and other forms of identification which distinguish the [LSC fund] recipient from the [affiliated] organization are present." *Id.* § 1610.8(a)(3)(i)-(iv).[4]

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[4] The new regulations also amended 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 an LSC fund recipient, that person or entity is subject to the restrictions with respect to both its LSC funds and its non-LSC funds. 45 C.F.R. 1610.7. However, a person or entity that receives *non*-LSC funds from an LSC fund recipient is not subject to the restrictions. See 62 Fed. Reg. at 27,696-27,697.

3. On March 14, 1997, the United States intervened in the district court proceedings, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the restrictions. On March 21, 1997, respondents sought a preliminary injunction against enforcement of the restrictions to the extent they prevent LSC fund recipients from using non-federal funds to engage in certain activities. The district court denied respondents' motion for a preliminary injunction, concluding that respondents had failed to establish a probability of success on the merits. App., *infra*, 53a-54a.

The court first held, following *Rust* v. *Sullivan*, 500 U.S. 173 (1991), that LSC's final regulations implementing the statutory funding restrictions provide for adequate alternative channels through which the respondent LSC fund recipients can engage in otherwise prohibited activities, because the regulations allow recipients to create and control affiliate organizations that engage in such activities. The court found that the LSC's regulations requiring separation between LSC fund recipients and their affiliates are consistent with the statutory funding restrictions, App., *infra*, 83a-88a, and that the LSC's program-integrity requirements are appropriately tailored to serve the government's interest in preventing the appearance that the government is endorsing activities that Congress does not wish to fund. *Id.* at 88a-94a. The court rejected respondents' contention that the LSC program integrity requirements, while "embraced by the Court in *Rust*" (*id.* at 88a), are different when applied to lawyer-client relationships.

The district court rejected respondents' argument that the affiliate rules accepted in *Rust* do not provide the appropriate benchmark here because the LSC regulations "strike at the heart of activities that are laden

with First Amendment value." App., *infra*, 94a (citation omitted). The court found that, while the lawyer-client relationship implicates First Amendment values, "the restrictions pertaining to LSC recipients do not significantly impinge on the lawyer-client relationship," especially when contrasted with the "proactive aspects" of Title X, involved in *Rust*. *Id.* at 97a. In fact, the court noted that the LSC regulations "broadly promote the lawyer-client relationship by providing that the lawyer may counsel the client, refer the client to another attorney, and explain to the client that LSC restrictions preclude the lawyer from engaging in the activity the client may wish to undertake." *Id.* at 98a.[5]

4. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-50a.

a. The court held that LSC's regulations are based on a reasonable interpretation of the relevant statutory provisions, App., *infra*, 12a-14a, and that the prohibition against furnishing LSC funds to entities that engage in certain activities does not unconstitutionally encroach on the relationship between lawyer and client, *id.* at 15a-17a. The court reasoned that, even assuming "that an 'all-encompassing' lawyer-client relationship enjoys heightened protection from government regu-

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[5] The district court rejected respondents' "rather casual due process and equal protection claims" App., *infra*, 98a. The due process claim failed "for the same reasons the analogous claim failed in *Rust*—namely, because plaintiffs are not absolutely precluded from engaging in prohibited activities and, furthermore, have no constitutional entitlement to the benefits provided by the legal services program." *Ibid.* The equal protection argument failed because "the Government had a rational basis for restricting the activities of recipients, and because poverty is not a suspect classification." *Ibid.*

lation, the lawyer-client relationships funded by LSC are no more 'all-encompassing' than the doctor-patient relationships funded under Title X, which were considered in *Rust*." *Id.* at 16a.

The court also rejected respondents' facial challenge to the adequacy of the regulations that allow LSC fund recipients to establish affiliate organizations that can then use non-federal funds to engage in activities that are foreclosed to the recipients themselves. App., *infra*, 17a-23a. The court rejected respondents' argument that the restrictions create "unconstitutional conditions" by unreasonably burdening LSC fund recipients' use of nonfederal funds to engage in activity protected by the First Amendment. The court noted that respondents "provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms." *Id.* at 23a. In particular, the court found that the existence of adequate alternative avenues for the exercise of restricted activities through affiliates is sufficient to satisfy First Amendment scrutiny. *Id.* at 21a.

The court of appeals next rejected respondents' claims of impermissible viewpoint discrimination with respect to the general restrictions on lobbying and attempting to influence a rulemaking proceeding. It held that the classifications established by the provisions were "based on subject matter, not viewpoint." App., *infra*, 23a-25a. The restrictions do not suppress ideas, the court reasoned, but rather merely prohibit fund recipients from engaging in activities outside the scope of the program. *Ibid.*

The court also upheld the prohibitions against lobbying and rulemaking "involving an effort to reform a * * * welfare system," App., *infra*, 25a, and the

prohibition against "initiat[ing] legal representation * * * involving an effort to reform a * * * welfare system," *Id.* at 25a-26a. The court reasoned that those provisions are viewpoint neutral because they could be read as prohibiting activity that either supports or opposes welfare reform. *Id.* at 25a-28a.

The court reversed, however, with regard to one aspect of the restrictions related to welfare reform—the provision that creates an exception to those restrictions by permitting representation of a client seeking specific relief from a welfare agency but only "if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." App., *infra*, 28a. The court acknowledged that this Court, in *Rust*, stated that "the Government has not discriminated on the basis of viewpoint" when "it has merely chosen to fund one activity to the exclusion of the other," *id.* at 30a, and that those words from *Rust* "seem on their face" to support the view of Judge Jacobs in dissent, who would have sustained the provision. *Id.* at 31a. The court stated, however, that it "doubt[ed] that these words can reliably be taken at face value." *Ibid.* The court thought it "inconceivable that the Supreme Court that approved the *Rust* regulation would have intended its language to authorize grants funding support for, but barring criticism of, governmental policy." *Id.* at 32a.

The court of appeals observed that "the First Amendment's free speech guarantee goes to the right to criticize government or advocate change in governmental policy." App., *infra*, 32a. The court then reasoned that a lawyer's argument that a statute or rule is unconstitutional or illegal "falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art," *id.* at 33a, and

that the welfare proviso represents an attempt to drive ideas from the "marketplace" of the courtroom. *Id.* at 34a.

The court of appeals therefore held that the exception permitting only certain representation of clients seeking relief from a welfare agency constitutes viewpoint discrimination subject to strict First Amendment scrutiny, and it perceived no reason why that provision survived strict scrutiny. App., *infra*, 35a. In fashioning a remedy, however, the court declined either to invalidate the entire welfare reform prohibition or to eliminate the individual-benefits exception to that prohibition altogether. Instead, the court chose to leave the general prohibition in place and to broaden the exception by striking the proviso to the exception that limits representation to situations in which the specific relief sought "involve[s] an effort to amend or challenge existing law." *Id.* at 35a-37a. The court of appeals therefore directed the district court to enter a preliminary injunction barring enforcement of that restriction on seeking specific relief.

b. Judge Jacobs filed a separate opinion, concurring in the majority's rulings upholding most of the statutory provisions but dissenting from the ruling striking down the one welfare-related provision as unconstitutional viewpoint discrimination. App., *infra*, 38a-50a. He pointed to the Ninth Circuit's decision in *Legal Aid Society of Hawaii* v. *Legal Services Corp.*, 145 F.3d 1017, cert. denied, 119 S. Ct. 539 (1998) (White, J., sitting by designation), which rejected similar challenges to LSC restrictions. App., *infra*, 47a.

In Judge Jacobs' view, this case falls within the teaching of *Rust*. App., *infra*, 45a, 46a-47a (quoting *Rust*, 500 U.S. at 193). He characterized as "surprising" the majority's position that *Rust* cannot "reli-

ably be taken at face value," noting that "[t]his approach to Supreme Court opinions is not one previously employed by this Circuit. I think the Supreme Court meant what it said." *Id.* at 46a.

Judge Jacobs also took issue with the notion that "the statute promotes one favored view over others in a supposed public forum. Whose viewpoint? What forum? According to the majority opinion: the government-funded lawyers possess the protected expressive interest; and the public forum is the courtroom (an idea that may come as a surprise to trial judges)." App., *infra*, 49a. Judge Jacobs similarly rejected the proposition that the proviso disfavors the speech of the clients, explaining that the limitation applies regardless of the ground on which the attorney would seek relief that would amend or invalidate existing law: "There are certainly people * * * who favor narrowing welfare eligibility, or reduced benefits, or abolition of the welfare system. But the statute gives them nothing. Where then is the viewpoint discrimination, even if one assumed (as I do not) that the LSC makes every courtroom into a public forum?" *Id.* at 50a. Judge Jacobs emphasized that the restriction at issue is viewpoint neutral, because it is "not a promotion of advocacy for the good old status quo, or a suppression of a point of view," but rather is a means for channeling money for "the administration of a complex existing statute so that everyone can get what the statute provides." *Id.* at 48a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding unconstitutional on its face the provision in successive Acts of Congress that creates only a limited individual-benefits exception to the general prohibition against participation by LSC

fund recipients in litigation, lobbying, or rulemaking involving an effort to reform a federal or state welfare system. That exception allows recipients of Legal Services Corporation (LSC) funds to represent individual eligible clients who are seeking specific relief from a welfare agency "if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321-55. The court of appeals concluded that the exception constitutes impermissible viewpoint discrimination by precluding lawyers employed by recipients of LSC funds from representing clients who seek such relief.

This Court has recognized, however, that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Rust* v. *Sullivan*, 500 U.S. 173, 193 (1991). The court of appeals' ruling conflicts with that holding in *Rust*.

The court of appeals believed that this case is controlled not by *Rust*, but by *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). Unlike the University in *Rosenberger*, however, Congress has not, through the LSC Act, chosen to promote a diversity of private views in a public forum. It has simply chosen to pay for certain services but not others to assist people in seeking benefits under welfare programs that are themselves government-funded.

The Second Circuit's decision holding that limitation unconstitutional is inconsistent with the Ninth Circuit's decision in *Legal Aid Society of Hawaii* v. *Legal Services Corp.*, 145 F.3d 1017, cert. denied, 119 S. Ct. 539 (1998) (*LASH*). There, the Ninth Circuit upheld against another facial First Amendment challenge various restrictions on LSC fund recipients, in light of the LSC regulations that permit an LSC fund recipient to create an affiliate that may spend non-federal funds on activities in which the recipient itself is restricted from engaging, so long as the recipient maintains its "objective integrity and independence" from the affiliate. 45 C.F.R. 1610.8(a).

1. In *Rust*, the petitioners made an argument almost identical to the one respondents make here, contending that a program funding family-planning services impermissibly discriminated on the basis of viewpoint because it allowed speech discussing some viewpoints (those favoring certain family planning options) while prohibiting competing viewpoints (those favoring abortion as a family planning option). 500 U.S. at 192. This Court rejected that argument, holding that Congress may "selectively fund a program to encourage activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id.* at 193. In doing so, the Court explained, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Ibid.* Thus, *Rust* was "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." *Id.* at 194. Accord *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587-588 (1998).

The court of appeals acknowledged that the language of *Rust* supports the view that the limitation on seeking certain relief from a welfare agency does not discriminate on the basis of viewpoint, but stated that it "doubt[ed] that these words can reliably be taken at face value." App., *supra*, 31a. Contrary to the court of appeals' view, however, the limitation at issue here falls squarely within *Rust*.

As in *Rust*, Congress has chosen to fund a certain program to the exclusion of another. Congress has chosen to fund litigation in which individuals seek to establish their entitlement to benefits *under* a current welfare program (which is itself funded by the government), but not to fund litigation in which individuals would ask a court to invalidate that very program in some respect. In that way, Congress has sought to maximize the availability of funds to pay for legal assistance that will enhance the value of the current welfare program to its intended recipients by providing assistance to persons who believe they were wrongfully denied the benefits the program makes available. Attorneys for LSC fund recipients who are requested to represent *other* individuals, whose entitlement to welfare benefits may depend on a court's invalidation of the current welfare program in some respect, are free to inform those individuals that such representation is beyond the scope of the LSC program and to refer the individuals concerned to legal counsel outside the program, including any lawyer at an affiliate organization that the LSC fund recipient may have established under the LSC regulations. The LSC program is thereby less restrictive than the statute upheld in *Rust*, which prohibited physicians and other fund-recipient personnel from "referring a pregnant woman to an abortion provider, even upon specific request," and

from providing even counseling about abortion. 500 U.S. at 180. Attorneys employed by LSC grantees thus are free to express their views, to actual or potential clients or anyone else, regarding any legal matter—including the view that a welfare rule or statute is unlawful or unconstitutional—and to refer clients to counsel who will represent them in conducting litigation that the attorneys employed by the LSC fund recipient cannot conduct themselves.

The court of appeals attempted to distinguish this case from *Rust* (and from *National Endowment for the Arts* v. *Finley*, *supra*) on the rationale that this case involves restrictions on speech that is critical of the government, which the court regarded as more protected by the First Amendment than abortion counseling or indecent art. The court of appeals erred in suggesting that the limitation on welfare litigation prevents LSC-funded lawyers from making certain arguments during the course of comprehensive legal representation. App., *infra*, 33a-34a. The limitation prevents LSC fund recipients from engaging in representation at all if it involves a request for a particular form of relief—namely, amendment or invalidation of a welfare statute or regulation. See App., *infra*, 42a-43a (Jacobs, J., dissenting). Thus, the proviso does not exclude certain viewpoints in the course of litigating a particular case; it excludes a certain class of cases from the scope of the program to ensure that the program focuses on the day-to-day legal problems of the poor people who are attempting to obtain benefits to which they may be entitled under the current program.[6]

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[6] The court of appeals rejected that interpretation of the program (App., *infra*, 34a n.9), believing that, "[a]s a practical matter,

As the dissent below explained, App., *infra*, 48a, the limitation at issue is not viewpoint-based; it merely ensures that the program operates within its intended limits to determine correctly the benefits owed under existing law. Congress reasonably may determine that funding legal assistance for people seeking to obtain benefits under existing welfare programs best furthers the interests of both those programs and the Legal Services program itself, without also funding legal representation for people who do not qualify under existing law.

2. The court of appeals also erred in applying what appears to be a public forum analysis, in reliance upon this Court's decision in *Rosenberger*. In that case, the Court struck down a university program that provided funding for student publications but that excluded publications with religious viewpoints, noting that the university had created a limited public forum for the expression of ideas. 515 U.S. at 837. In a situation where the government creates a public forum to promote a diversity of private views, the exclusion of particular viewpoints from that forum "abridges" the

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a lawyer often will not know in advance what arguments must be raised" in a particular case. Even if an LSC lawyer has already undertaken representation of a client believing that it would not be necessary to seek invalidation of a statute or regulation, but then concludes that such relief should be sought, the lawyer may at that point refer the client to another lawyer. The panel majority expressed concern that there may be circumstances in which an attorney could not readily "withdraw from litigation that is in progress" or where "prejudice to the client * * * may result from such a withdrawal." *Ibid.* As the dissent pointed out (*id.* at 43a-44a), however, this case presents a *facial* challenge to the statutory restrictions. The constitutionality of its application in particular instances such as those posited by the court of appeals is not at issue.

freedom of speech *in that limited forum*. But that is not what the LSC Act does.

In invoking *Rosenberger*, the court of appeals regarded the courtroom as the relevant public forum. The court reasoned that the limitation on seeking certain relief from a welfare agency is calculated to drive viewpoints that question the validity of statutes or regulations from the marketplace in that forum. App., *infra*, 34a. That analysis is inconsistent with the Ninth Circuit's holding in *LASH*, *supra*. In that case, the Ninth Circuit (per Justice White, sitting by designation) rejected the contention that *Rosenberger* undermines the validity of the LSC restrictions, noting that the government in *Rosenberger* expended funds to encourage a diversity of views, while the LSC program is designed to appropriate public funds to promote a particular category of professional services. The court concluded: "Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, *not create a forum for the free expression of ideas*." *Ibid.* (emphasis supplied).

The notion that litigation in the courtroom is a public forum for the free expression of views would, as the dissent below noted, "come as a surprise to trial judges." App., *infra*, 49a. While a courtroom might be referred to as a public forum in the sense that courts conduct public (as opposed to private) proceedings, we are aware of no case holding that a courtroom is a public forum for the robust expression of ideas by attorneys *or* clients or for applying strict scrutiny to rules regulating attorneys' speech. In fact, courts that have considered the matter have held to the contrary. See, *e.g.*, *Kelly* v. *Municipal Court*, 852 F. Supp. 724, 734-735 (S.D. Ind. 1994), aff'd, 97 F.3d 902 (7th Cir. 1996); see also *Zal* v. *Steppe*, 968 F.2d 924, 932 (9th Cir.) (Trott, J., con-

curring), cert. denied, 506 U.S. 1021 (1992). As one court has reasoned, "[a] courtroom is not a debate hall or gathering place for the public to exchange ideas; it is a forum for adjudicating the rights and duties of litigants. In contrast to discourse in public fora, discussions that occur in court are highly regulated by rules of evidence and procedure." *Kelly*, 852 F. Supp. at 735.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 2020, Docket 96-6006

CARMEN VELAZQUEZ, ET AL, PLAINTIFFS-APPELLANTS,

v.

LEGAL SERVICES CORPORATION,
DEFENDANT-APPELLEE,

UNITED STATES OF AMERICA, INTERVENOR-APPELLEE.

[Argued: March 20, 1998
Decided: Jan. 7, 1999
Rehearing and Rehearing En Banc Denied:
July 2, 1999]

Before: JACOBS, LEVAL, and GIBSON,* Circuit Judges.

Judge JACOBS concurs in part and dissents in part in a separate opinion.

LEVAL, Circuit Judge:

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* The Honorable John R. Gibson of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

This appeal concerns the validity of restrictions imposed by Congress and the Legal Services Corporation ("LSC") on the professional activities of entities that receive funding from LSC ("LSC grantees"). Plaintiffs are lawyers employed by New York City LSC grantees, their indigent clients, private contributors to LSC grantees, and state and local public officials whose governments contribute to LSC grantees. Plaintiffs sought a preliminary injunction against the enforcement of the restrictions, contending they violate various provisions of the U.S. Constitution. The district court denied a preliminary injunction, finding that plaintiffs had failed to establish a probability of success on the merits. We affirm in part and reverse in part.

I. Background

A. *The Legal Services Corporation and the Challenged Statute.* LSC is a non-profit government-funded corporation, created by the Legal Services Corporation Act of 1974 ("LSCA"), 42 U.S.C. § 2996 *et seq.*, "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). LSC fulfills this mandate by making and administering grants to hundreds of local organizations that in turn provide free legal assistance to between 1,000,000 and 2,000,000 indigent clients annually. *See Texas Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 685, 688 (D.C. Cir. 1991); S. Rep. 104-392 at 2-3 (1996). Many LSC grantees are funded by a combination of LSC funds and other public or private sources. S. Rep. 104-392 at 3; A. 225, A. 297. LSC grantees are governed by local Boards of Directors who

set policies and priorities in response to local conditions and client needs. LSC is empowered to implement the LSCA through the traditional administrative rule-making process. *Tex. Rural Legal Aid*, 940 F.2d at 692.

From the outset of the LSC program, LSC grantees have been restricted in the use of LSC funds. *See* 42 U.S.C. § 2996f(b)(1)-(10) (prohibiting use of LSC funds in, inter alia, most criminal proceedings, political activities, and litigation involving nontherapeutic abortion, desegregation, or military desertion). Recipient organizations are also barred from using most nonfederal funds for any activity proscribed by the LSCA. *See* 42 U.S.C. § 2996i(c).

In 1996, Congress substantially expanded the restrictions on activities of LSC grantees. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-53-56 (1996) ("OCRAA," or "the 1996 Act"), reenacted in the Omnibus Consolidated Rescissions and Appropriations Act of 1997, Pub. L. 104-208, § 502, 110 Stat. 3009 (1997). Section 504 of OCRAA, set forth below in pertinent part,[1] bars the use of LSC funds to aid entities

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[1] None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . .—

> (2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency (the "executive branch provision");
>
> (3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modifica-

tion of any agency policy of general applicability and future effect (the "agency adjudication provision");

(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body (the "legislation provision") (subsections (2), (3), and (4) are collectively the "lobbying provisions");

(5) that attempts to influence the conduct of oversight proceedings of the [LSC] or any person or entity receiving financial assistance provided by the Corporation (the "LSC oversight provision"); ...

(7) that initiates or participates in a class action suit (the "class action provision"); ...

(11) that provides legal assistance for or on behalf of [certain] alien[s] (the "aliens provision");

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration . . . (the "training provision");

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees (the "attorneys' fees provision"); ...

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison (the "incarcerated client provision");

(16) that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing

that perform various activities including lobbying, participation in class actions, providing legal assistance to aliens in certain categories, supporting advocacy training programs, collecting attorneys' fees under fee shifting laws, litigating on behalf of prisoners, and seeking to reform welfare.[2]

Congress left no question of its intention to restrict grantees' use of non-federal and federal funds alike. The Act provides that while program recipients may "us[e] funds received from a source other than the Legal Services Corporation to provide legal assistance, . . . such funds may not be expended by recipients for any purpose prohibited by this Act." § 504(d)(2)(B). Moreover, § 504(d)(1) requires recipients to notify all non-federal donors that their contributions "may not be expended for any purpose prohibited by . . . this title."

In August 1996, LSC proposed regulations to implement the 1996 Revisions, which, *inter alia*, (1) prohibited a grantee from "us[ing] non-LSC funds for any purpose prohibited by the LSC Act," 61 Fed. Reg. 41960, 41962 (1996); (2) prohibited any organization controlled by a grantee from pursuing restricted activities (the "interrelated organizations prohibition"), *see id.*; 50 Fed. Reg. 49276, 49279 (1985) (defining "control" as

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law in effect on the date of the initiation of the representation (the "welfare reform provision").

OCRAA, §§ 504(a)(2)-(5), (7), (11)-(13), (15)-(16).

[2] The 1996 legislation also restricted LSC grantees from litigation or activity involving political redistricting, § 504(a)(1) and from litigation "with respect to abortion," § 504(a)(14). Plaintiffs do not challenge these restrictions.

"the ability to determine the direction of [or] influence the management or policies" of another organization); and (3) applied the OCRAA restrictions to any third party to whom a grantee transfers LSC funds, and to any private funds transferred from a grantee to a third party irrespective whether the funds were private or public (the "transfer of funds provision"). 61 Fed. Reg. 63749, 63752 (1996). The combined effect of the regulations was to prohibit LSC grantees from engaging in any restricted activity, even through a legally distinct affiliate organization. These regulations were promulgated in December 1996. *See* 45 C.F.R. §§ 1610.3, 1610.8 (1996).

B. *The Challenges to the Statute and Implementing Regulations.* Plaintiffs filed this lawsuit in January 1997, alleging that the restrictions on the use of non-federal monies violate their rights under First, Fifth, and Tenth Amendments to the United States Constitution. They also claimed that the restrictions on the use of federal funds violate the First Amendment, the doctrine of Separation of Powers, and the Tenth Amendment. Plaintiffs sought a preliminary injunction only to enjoin restrictions on the use of non-federal funds.

Soon after this suit was filed, and before the hearing on plaintiffs' application for a preliminary injunction, a federal district court in Hawaii issued an order partially granting a motion by a different set of plaintiffs to preliminarily enjoin enforcement of the OCRAA restrictions. *See Legal Aid Society of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997) ("*LASH I*"). *LASH I* concluded that under *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991) and

other Supreme Court decisions, congressional restrictions on the activities of federally-funded entities were permissible only so long as they "left open adequate channels for [protected] speech."[3] 961 F. Supp. at 1414.

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[3] Because there is considerable overlap between the issues contested in *Rust* and those presented by this appeal, we briefly review that opinion.

The *Rust* plaintiffs brought a facial challenge to conditions attached by the Department of Health and Human Services to family planning services provided under Title X of the Public Health Service Act. *See* 500 U.S. at 178-79, 111 S. Ct. 1759. The Act provided that no Title X funds "shall be used in programs where abortion is a method of family planning." *Id.* at 178, 111 S. Ct. 1759 (quoting statute). The challenged regulations endeavored "to provide clear and operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." *Id.* at 179, 111 S. Ct. 1759 (internal quotation marks omitted).

The regulations attached three principal conditions on the grant of federal funds for Title X projects. First, Title X projects were precluded from "provid[ing] counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning." *Id.* Second, Title X projects could "not encourage, promote, or advocate abortion as a method of family planning." *Id.* at 180, 111 S. Ct. 1759. Third, the regulations provided that the Title X project must be "physically and financially separate from prohibited abortion activities." *Id.* The regulations set forth a nonexclusive list of factors to determine whether the separateness requirement had been met. *Id.* at 180-81, 111 S. Ct. 1759.

The Supreme Court rejected plaintiffs' viewpoint discrimination and unconstitutional conditions arguments. The Court concluded that the government "has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another." *Id.* at 193, 111 S. Ct. 1759. The Court rejected the unconstitutional conditions claim with the observation that Congress has "not denied the right to engage in abortion related activities

Applying this standard, the court found that the LSC regulations unduly burdened grantees' protected First Amendment rights to lobby, to associate, and to have meaningful access to courts. Central to the court's analysis was its finding that the interrelated organizations prohibition barred LSC grantees from creating affiliate organizations that could engage in restricted activity. *See LASH I*, 961 F. Supp. at 1415-16. The court held that as implemented, the 1996 restrictions denied to grantees not only the ability to undertake restricted activity directly, but also all alternative channels for exercise of these constitutionally protected activities. The court therefore determined that plaintiffs' constitutional challenge was likely to prevail on the merits and enjoined enforcement of portions of the OCRAA restrictions. *See id.* at 1421-22.

In order to cure these constitutional infirmities, LSC issued "interim regulations" in March 1997 modelled after the restrictions upheld by the Supreme Court in *Rust*. *See* 62 Fed. Reg. 12101, 12101-04 (1997) (interim regulations "are intended to address constitutional challenges raised by the previous rule"); *Legal Aid Society of Hawaii v. Legal Services Corp.*, 981 F. Supp. 1288, 1290 (D. Haw. 1997) ("*LASH II*"); *Velazquez v. Legal Services Corp.*, 985 F. Supp. 323, 332-333 (E.D.N.Y. 1997). The interim regulations modified the earlier rules in two important respects. LSC revised the transfer of funds rules so that, in most cases, non-federal funds transferred by a grantee to a controlled affiliate would cease to be subject to the restrictions. *Compare* 62 Fed. Reg. 12101, 12103, § 1610.7 (1997)

[but] merely refused to fund such activities out of the public fisc." *Id.* at 198, 111 S. Ct. 1759.

with 45 C.F.R. § 1610.7 (1996) (61 Fed. Reg. 63749, 63752). Equally important, a new section entitled "Program Integrity of Recipient," 62 Fed. Reg. 12101 at 12103-04, § 1610.8, provided that grantees could maintain a relationship with "affiliate" organizations, which could in turn engage in restricted activities so long as the association between the organizations met standards of "program integrity." The nonexclusive list of factors relevant to the determination of program integrity were (1) the existence of separate personnel; (2) the existence of separate accounting and timekeeping records; (3) the existence of separate facilities; and (4) the extent to which signage and identification distinguishes recipient from affiliate. *Id.* at 12104.

Ten days after the interim rules were promulgated, the court below held a hearing on the plaintiffs' motion for a preliminary injunction. *See* 985 F. Supp. at 332. The district court found that "although based on the *Rust* program integrity requirements," the interim regulations differed from those approved in *Rust* in three ways. *Id*. at 333. First, the LSC regulations, unlike *Rust*, included provisions that organizations under the "control" of a grantee would be subject to the statutory restrictions, unless the program integrity requirements were met. *See id.* Second, while the *Rust* regulations provided that "the 'degree of separation' of facilities would be considered," the interim regulations required the "existence" of separate facilities. *Id.* Third, the *Rust* regulations provided that the determination "whether a recipient and affiliate were sufficiently separate would be based on all 'facts and circumstances' whereas the interim regulations made no such statement, which arguably implied that [to satisfy the

separation rules] a recipient would have to satisfy each and every program integrity factor." *Id.* at 333-34.

The district court expressed some doubt as to the constitutionality of the interim regulations but nevertheless delayed decision. Observing that "these are interim regulations," the district court determined that it might "be provident to withhold judgment until the final regulations were promulgated." *Id.* at 334. The court speculated that "maybe after we have this argument today, there will be more regulations," and therefore undertook to "allow[] some period of time to let the dust settle until we get final regulations." *Id.*

On May 21, 1997, LSC replaced the interim regulations with a "Final Rule" (the "final regulations"). *See id.* As the district court noted, "[t]he revised program integrity section eliminates virtually every difference between the interim regulations and the *Rust* regulations in respect to program integrity requirements." *Id.* at 335. The three differences between the LSC regulations and the Title X regulations approved in *Rust* noted by the court at the March hearing were eliminated. *See id.* Concluding that the final regulations represented a permissible construction of the 1996 Act, *see id.* at 338-39, and were consistent with the First Amendment, the district court determined that the statute and regulations were not likely to be invalidated and therefore denied the motion for a preliminary injunction. *See id.* at 326-27.[4] This appeal followed.

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[4] The district court also rejected plaintiffs' due process and equal protection challenges. *See id.* at 344. These claims have been abandoned on appeal.

II. ***Discussion***

On appeal, plaintiffs object that the final regulations represent an unreasonable interpretation of the 1996 Act, and therefore fail under *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Plaintiffs also challenge the constitutionality of the 1996 Act and the final regulations, arguing that they impermissibly burden grantees' exercise of First Amendment activities, contrary to the command of *Rust v. Sullivan*, and that they constitute a viewpoint-based restriction on expression.

The posture of this appeal imposes upon plaintiffs a heavy burden. Because this is a facial challenge to legislative action, we need only determine whether there are "any circumstances under which the prohibitions of the Act are permissible in order to uphold the Act." *Able v. United States*, 88 F.3d 1280, 1290 (2d Cir. 1996); *see also Rust*, 500 U.S. at 183, 111 S. Ct. 1759 (plaintiffs "must establish that no set of circumstances exist under which the Act would be valid. The fact that the regulations might operate unconstitutionally under some conceivable set of circumstances is insufficient to render them wholly invalid.") (citation omitted).

The *LASH* court reached a result similar to the decision of the district court in this case, dismissing the unconstitutional conditions challenge with the observation that the "reasoning [of *Rust*] controls the result here." *LASH II*, 981 F. Supp. at 1299, *aff'd in relevant part*, *Legal Aid Society of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998) (*LASH III*). Among the issues before us, *LASH III* only addressed the unconstitutional conditions challenge. The Ninth Circuit did not address the claims based on abridgment of the lawyer-client relationship or viewpoint discrimination.

Plaintiffs' burden is also increased because the preliminary injunction they seek is against the government. Grant of a preliminary injunction normally requires a showing by the moving party of irreparable harm and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balancing of the hardships tipping decidedly in favor of the moving party. *See Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 142 (2d Cir. 1997). But where a preliminary injunction is sought against the enforcement of governmental rules, the movant may not invoke the "fair ground for litigation standard" but must show "likelihood of success." *See International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 70 (2d Cir. 1996).

A. *Statutory Claim*

We consider first plaintiffs' contention that the final regulations constitute an unreasonable interpretation of the 1996 Act. Plaintiffs claim that LSC's original rules, which precluded grantees from establishing or funding affiliates with the purpose of undertaking restricted activity, fairly reflected the statutory text. They maintain that the more lenient final rules, crafted after *LASH I* held the original rules unconstitutional, conflict with congressional command. Plaintiffs ask us to find that the final rules are unauthorized by the statute, and that the statute, without the flexibility provided by the final rules, is unconstitutional. *See* Appellants' Br. at 40.

LSC enjoys "the full measure of interpretive authority under the [LSCA]" and its interpretations of the

Act are entitled to deference under *Chevron*. *See Texas Rural Legal Aid*, 940 F.2d at 690. Under this standard, LSC's regulations must be upheld unless "Congress has directly spoken to the precise question at issue" and LSC has resolved it contrary to statute, or unless the regulation cannot be termed a "permissible construction" of the statute or is arbitrary or capricious. *See id.*; *Chevron*, 467 U.S. at 842-44, 104 S. Ct. 2778.

Plaintiffs argue that Congress plainly intended to bar LSC grantees from undertaking restricted activities through affiliate organizations. This argument relies principally on § 504(d)(2)(B) of the Act, which provides that LSC grantees may "use[ ] funds received from a source other than the Legal Services Corporation to provide legal assistance . . . except that such funds may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Corporation Act." According to plaintiffs, this language plainly articulates Congress's desire to prohibit grantees from engaging in restricted activity through an affiliate, even with non-federal funds. By permitting grantees to fund affiliates who engage in restricted activity, argue plaintiffs, the final rules impermissibly allow non-LSC funds to be "expended by recipients" for prohibited purposes. Plaintiffs claim to find support in the legislative history, which explains that "[t]he legislation prohibits the use of alternative corporations to avoid or evade the provisions of the law." S. Rep. No. 104-392 at 13 (1996). Plaintiffs contend that the final rules—which authorize grantees to create affiliates and fund them with nonfederal moneys allowing them to conduct activity proscribed under the Act—facilitate a purpose expressly precluded by Congress, and thus fail under the first step of *Chevron*.

We are not persuaded. Nowhere in the statute does Congress speak directly to the question whether grantees may create and support affiliate organizations. The Act does not indicate whether a transfer of non-federal funds by a grantee to an affiliate, or the affiliate's subsequent use of such transferred non-federal funds for a prohibited purpose, constitutes an "expend[iture] by [a] recipient[]" under the Act. We conclude that Congress has not spoken clearly regarding grantees' authority to design and fund affiliate organizations, so that the first prong of *Chevron* is inapplicable.

We are also reluctant to accept plaintiffs' invitation to find that the final regulations are unauthorized, and that the statute without those regulations is unconstitutional, because of the rule favoring an interpretation of a statute that preserves its constitutionality. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L.Ed.2d 645 (1988); *Hooper v. California*, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L.Ed. 297 (1895).

We find, moreover, that the final rules represent a "permissible construction" of the Act and therefore survive the second *Chevron* inquiry. While the legislative history may give some support to the view that Congress intended to prevent grantees from creating affiliates to undertake restricted activity, the statutory text is silent on the point. We conclude that the LSC regulations are not inconsistent with or unauthorized by the terms of the Act.

B. ***Constitutional Claims***

1. *Lawyer-Client Relationship.* Plaintiffs contend that the First Amendment forbids Congress from interfering with the "intense associational bond" between lawyer and client, even when Congress funds the relationship. Appellants' Br. at 30. Plaintiffs allege that the welfare reform provision, the attorneys' fees provision, and the lobbying provisions encroach upon "the autonomy and professional judgments" of LSC lawyers, in violation of their First Amendment rights.

Plaintiffs rely heavily on dictum drawn from *Rust v. Sullivan*. There, the Supreme Court remarked, "It could be argued . . . that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." 500 U.S. at 200, 111 S. Ct. 1759. Rather than address the argument, however, the Rust court found that "the doctor-patient relationship established by the Title X program [was not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Id.* Because Title X patients should be on notice that the scope of care received was subject to Congressional limitation, a "traditional" or "all-encompassing" doctor-patient relationship could not be said to exist. *Id.* Plaintiffs interpret this passage to extend constitutional protection to the doctor-patient relationship, and, by analogy, to the lawyer-client relationship.

We find the argument unconvincing. As a preliminary matter, *Rust* did not confer constitutional protection on the doctor- patient relationship. The opinion only speculated that the relationship may be protected

from government regulation and expressly declined to resolve the question. *Id.* The question was left open in *Rust* and remains open today.

Nor need we resolve it here. Even if we assume that an "all-encompassing" lawyer-client relationship enjoys heightened protection from government regulation, the lawyer-client relationships funded by LSC are no more "all-encompassing" than the doctor-patient relationships funded under Title X, which were considered in *Rust*. As noted above, the LSCA has always limited the range of legal services available through LSC grantees. *See* 42 U.S.C. § 2996i(c). Indeed, grantees have historically limited their representations to selected issues, and are typically "able to meet only a fraction of the demand for their services." *See Overview of LSC* at 4 (1996)(http://ltsi.ncs/lsc/about.html). Because grantee lawyers are bound to explain to prospective and actual clients the limitations imposed by the 1996 restrictions, and may refer clients to lawyers unencumbered by the restrictions, there is no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services. The LSC lawyer-client relationship cannot, therefore, be considered "sufficiently all encompassing so as to justify an expectation on the part of the [client] of comprehensive [legal] advice." *Rust*, 500 U.S. at 200, 111 S. Ct. 1759. Accordingly, we need not decide whether the traditional lawyer-client relationship enjoys constitutional protection, because (as in Rust) such a relationship does not exist for practitioners and clients operating under the challenged statutory scheme.

Nor do plaintiffs provide any basis to question the validity of the scheme itself. Just as Congress is

entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSCA. We think it clear, for example, that Congress could fund a legal aid office but limit its practice to specific services such as representing the indigent in landlord-tenant disputes or in consumer fraud cases. The limitations of the 1996 Act are no more suspect simply because they are defined in terms of representations that are prohibited rather than those that are permitted. We find, therefore, that Congress was within its power to limit the scope of legal services available under the LSCA.

2. *Unconstitutional Conditions*. Plaintiffs' second constitutional contention is that the program integrity rules contained in the final regulations unreasonably burden a grantee's ability to use nonfederal funds to engage in restricted activity. Because each of the provisions of the 1996 Act burdens protected rights of association and speech, say plaintiffs, the undue burden of the final rules amounts to an unconstitutional condition on the receipt of LSC subsidies.

Three Supreme Court cases provide the framework for evaluating plaintiffs' unconstitutional conditions claim. In *Regan v. Taxation With Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L.Ed.2d 129 (1983), Taxation With Representation (TWR), a non-profit organization devoted to studying tax issues and lobbying for tax reform, challenged Section 501(c)(3) of the Internal Revenue Code, which provided that organizations engaged in lobbying could not receive tax-deductible contributions. *See* I.R.C. § 501(c)(3). TWR argued that § 501(c)(3) impermissibly conditioned the benefit of contribution deductibility on the relinquishment of the

First Amendment right to lobby. *See Taxation With Representation*, 461 U.S. at 545, 103 S. Ct. 1997. Because this was not an instance where "Congress [had] discriminate[d] invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas," the Court applied minimal scrutiny and upheld the law. *Id.* at 548, 103 S. Ct. 1997 (alteration and internal quotation marks omitted). Nevertheless, Justice Rehnquist's majority opinion noted, and a concurring opinion relied upon, the fact that the I.R.C. allowed § 501(c)(3) organizations to establish financially independent but wholly controlled lobbying affiliates under I.R.C. § 501(c)(4) without compromising their eligibility for deductible contributions. *See id.* at 544, 103 S. Ct. 1997 (majority opinion); *id.* at 552-53, 103 S. Ct. 1997 (Blackmun, J., concurring) (concluding that § 501(c)(3) alone would be "constitutionally defect[ive]").

The next Term, the Court invalidated a condition denying federal public broadcasting funds to public stations that engage in editorializing. *See F.C.C. v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L.Ed.2d 278 (1984). The Court found that because a "noncommercial educational station that receives only 1% of its overall income" from the Corporation for Public Broadcasting (CPB) would be barred from editorializing, stations "ha[ve] no way of limiting the use of [their] federal funds to all noneditorializing activities, and, more importantly, [they are] barred from using even wholly private funds to finance editorial activity." *Id.* at 400, 104 S. Ct. 3106. The Court emphasized that Congress could cure the statute by amending it to allow stations "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds." *Id.*

Finally, in *Rust*, 500 U.S. 173, 111 S. Ct. 1759 (1991), recipients of family planning funds under Title X of the Public Health Services Act challenged regulations prohibiting Title X recipients from engaging in abortion counseling, referral, and any other activities advocating abortion as a means of family planning. In *Rust*, as in the instant case, "program integrity" regulations required separation of facilities, personnel and records between Title X providers and any medical provider dispensing abortion information. *See id.* at 180-81, 111 S. Ct. 1759. The Court observed that "[t]he Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." *Id.* at 196, 111 S. Ct. 1759 (emphasis omitted). For their part, Title X "employees remain free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X project." *Id.* at 198, 111 S. Ct. 1759. Because grantees were not "effectively prohibit[ed] . . . from engaging in the protected conduct outside the scope of the federally funded program," this circumstance was different from that considered in *League of Women Voters*, and there was no unconstitutional conditions violation. *Id.* at 197, 111 S. Ct. 1759.

Taking these cases together, we infer that, in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression. Section 501(c)(3)'s prohibition on lobbying in *Taxation With Representation* was permissible because the organizations receiv-

ing the benefit of deductibility could undertake lobbying activities through a § 501(c)(4) affiliate. In *League of Women Voters*, on the other hand, the prohibition on editorializing by CPB grantees was invalidated because the law left no adequate alternative avenue for the protected expression.

Notwithstanding *Rust*'s considerable superficial similarity to this case, we think it is the least pertinent of these precedents. Without diminishing its potential importance to some grantees, the speech restriction in *Rust* was nonetheless very narrow; it was limited to speech at odds with the values Congress was seeking to advance through its grant program. As the Supreme Court noted in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995), discussing *Rust*, "When the government disburses public funds to private entities to convey a governmental message, it may . . . ensure that its message is neither garbled nor distorted by the grantee."

In these respects, *Rust* is unlike the present case. The restrictions here placed on grantees are not narrow; they are extremely broad. Grantees are prohibited outright from engaging in attempts to influence government's adoption of laws. Nor does the justification that prevailed in *Rust*—avoiding the distortion or dilution of the very government message advanced by the program—have any bearing here. For this program, unlike Title X in *Rust*, is not advancing any particular set of values that might be diluted or distorted if the forbidden speech were permitted. Here Congress has simply chosen to rule that organizations which accept LSC funds to finance their activities shall not engage in

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

Our conclusion that the First Amendment tolerates this restriction on speech is influenced more by *Taxation With Representation's* approval of the restriction in lobbying by § 501(c)(3) organizations and by the suggestion in *League of Women Voters* that the prohibition in editorializing by CPB grantees would have been acceptable if the law allowed them adequate alternative avenues for expression through affiliates than by the holding of *Rust*. Nonetheless, *Rust* is consistent with these cases, and tends to support their suggestion that the program we consider here can withstand at least a facial challenge despite its broad restrictions on the speech of LSC grantees.

Plaintiffs contend that, notwithstanding the authority of these cases, the 1996 Act is unlawful. They point to the "immensely wasteful" program integrity requirements of separate offices, equipment, libraries and personnel that grantees must meet in order to be able to speak through affiliates. Appellants' Br. at 37. Plaintiffs allege that the revised program integrity rules—although virtually identical to those approved in *Rust*[5]—impose "extraordinary" burdens that imper-

[5] Under both Title X and the 1996 Act regulatory schemes, a grantee may provide restricted activities only if the restricted

missibly impede grantees from exercising their First Amendment rights to associate with clients, to lobby, and to litigate. *Id.* The costs of compliance, they argue, are "so substantial" as to be prohibitive. Appellants' Reply Br. at 18. They argue further that the justification in *Rust* for requiring substantial separation between the program recipient and the affiliate—to avoid the risk of weakening or garbling the government's message—is not present here, as the government is not using its grantees to advocate a message. Thus, plaintiffs argue, there is no justification for requiring the degree of separation of affiliates that was upheld in *Rust.*

We find that plaintiffs' allegations are insufficient to sustain a *facial* challenge. It may be, as plaintiffs urge, that the program integrity rules will, in the case of some recipients, prove unduly burdensome and inadequately justified, with the result that the 1996 Act and the regulations will suppress impermissibly the speech of certain funded organizations and their lawyers. And it may be, as plaintiffs contend, that the program integrity requirements may prove especially burden-

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service provider is distinguished by (1) separate personnel; (2) separate accounting records; (3) physical separation; and (4) signs or other outward markers of separation. *Compare* 45 C.F.R. § 1610.8 *with* 42 C.F.R. § 59.9 (suspended 1993). Under both schemes, whether the funded and restricted programs are sufficiently separate is determined on a case-by-case basis. *See* 45 C.F.R. § 1610.8(3); *Rust*, 500 U.S. at 180-81, 111 S. Ct. 1759. In almost every respect, the burden of separation is identical under the two schemes. *See LASH III*, 145 F.3d at 1024 (noting that "[t]he regulations promulgated by the LSC to preserve the distinction between restricted and unrestricted organizations are nearly identical to the regulations upheld in *Rust*").

some in the context of legal services. We are unable to assess these contentions on the sparse record before us, and we need not assess them to decide this appeal. Any grantee capable of demonstrating that the 1996 restrictions in fact unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act. But plaintiffs present little evidence to support their predictions regarding how seriously the 1996 Act will affect grantees generally, and they provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms. It appears likely that LSC grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty. Plaintiffs have therefore failed to "establish that no set of circumstances exists under which the Act would be valid," and so their facial challenge must be rejected. *Rust*, 500 U.S. at 183, 111 S. Ct. 1759 (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987)).

3. *Viewpoint Discrimination.* We turn finally to plaintiffs' claim that the 1996 Act discriminates against certain speech on the basis of viewpoint and is therefore unconstitutional even as applied to the use of federal monies. It appears that plaintiffs direct this argument against the lobbying provisions and the welfare reform provision of the Act.[6]

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[6] The plaintiffs' brief also suggests that the redistricting provision and abortion provision impermissibly discriminate on the basis of viewpoint. Brief for Appellants at 27. As noted above, however, plaintiffs did not challenge these provisions in the court

With respect to the lobbying provisions, the claim is misplaced. The classification established by these provisions is based on subject matter, not viewpoint. We think it clear that Congress may discriminate on the basis of the subject matter of grantees' expression, because such discrimination properly "confine[s the LSC program] to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829, 115 S. Ct. 2510. We thus find that the lobbying restrictions constitute valid limitations on the scope of the LSC program.

The legislation provision, for example, restricts LSC grantees from "attempt[ing] to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body." OCRAA, § 504(a)(4). While this language imposes a sweeping restriction on grantee activity, it burdens no particular viewpoint and favors neither speech in support of legislative action nor speech opposed. Because it prohibits the grantee from "attempt[ing] to influence *the passage or defeat*" of a legislative or constitutional initiative, the prohibition applies regardless whether the prohibited activity would have sought change or opposed change. The provision operates only to restrict LSC-funded entities from lobbying with respect to legislative decisions, regardless of viewpoint.

The agency adjudication provision similarly restricts grantees from "attempt[ing] to influence any part of any adjudicatory proceeding of any Federal, State, or

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below, and so arguments challenging their validity are not properly before us.

local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect." *Id.* at § 504(a)(3). We perceive nothing in this language that burdens one viewpoint more than another; the restriction permits grantees to participate on neither side of a rule-creating adjudicatory proceeding. Rather, the provision permissibly channels grantee program activity away from adjudicatory policymaking in a viewpoint-neutral manner.

The executive branch provision similarly forbids grantees from "attempt[ing] to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency." *Id.* at § 504(a)(2). We interpret this provision to define a limitation on program content, without favoring policy continuity over change or otherwise discriminating against any viewpoint. In the language of Rust, the provision does not suppress ideas but merely prohibits "a project grantee . . . from engaging in activities outside the project's scope." 500 U.S. at 194, 111 S. Ct. 1759.

The welfare reform provision of § 504(a)(16) is more obscure. It includes four categories of prohibited activities "involving an effort to reform a Federal or State welfare system"—initiating legal representation, and participating in litigation, lobbying, or rulemaking—with an exception relating to the legal representation or litigation prohibitions. Under the most natural reading of each of these provisions, three appear to prohibit the type of activity named regardless of view-

point, while one might be read to prohibit the activity only when it seeks reform.

The litigation prohibition is clearly viewpoint neutral. It denies grant funds to an entity that "participates in any . . . way, in litigation . . . involving an effort to reform a . . . welfare system." § 504(a)(16). Litigation by definition has at least two sides, and one "participates" in the litigation regardless of which side one is on. If litigation occurs "involving an effort to reform a . . . welfare system," one "participates" in it whether one is on the side seeking reform or the side opposing it. Grantees are therefore prohibited not only from litigating in an effort to reform a welfare system, but also from intervening or filing amicus briefs in such litigation in opposition to proposed reforms. We therefore conclude that the basic prohibition on participating in litigation involving an effort to reform a welfare system is viewpoint neutral.

The same considerations apply to the prohibition on "lobbying" and "rulemaking" "involving an effort to reform a . . . welfare system." One "participates" in lobbying and rulemaking "involving an effort to reform" whether one's participation supports or opposes the reforms under consideration.

The disqualification of an entity that "initiates legal representation . . . involving an effort to reform a . . . welfare system" is perhaps less clear. One reading of this clause seems to prohibit only efforts aimed at reform. A person who intended to oppose reform might not see himself as covered by a prohibition on activity "involving an effort to reform." On another interpretation, the statute could be read to cover both support

and opposition to reform. Under this interpretation, if some other person is making an effort to reform the welfare system, one who initiates a legal representation intended to oppose that effort is engaging in activity that involves (*i.e.*, concerns) an effort to reform the system.

Even if it involves some linguistic strain to read the provision this way, two factors persuade us to do so. First, subsection (a)(16) on welfare reform is one of a long string of prohibitions on activity related to reform efforts. All the others are clearly expressed in a manner that bars activity on either side of the issue. It is unlikely that, with respect to welfare and welfare alone, Congress intended to bar only pro-reform activity and not opposition to reform.[7] If the welfare provision were read to prohibit only activity that sought reform and not activity that opposed it, this would mean that Congress had acted with respect to welfare in a manner inexplicably at variance with the law's numerous parallel provisions. It makes far better sense, if the words of the statute permit, to interpret the welfare provision as consistent with those provisions.

Second, to read the welfare provision as viewpoint biased would render it unconstitutional. As we noted above, see supra at 763, courts should be reluctant to read statutes in a manner that renders them unconsti-

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[7] This possibility is rendered all the more unlikely by the fact that the legislative history shows a particular congressional concern to block LSC grantees from *opposing* welfare reform. *See* 142 Cong. Rec. H8179 (daily ed. July 23, 1996)(statement of Rep. Burton) ("The LSC is fighting the welfare reform plan in Wisconsin. . . . Why are taxpayers' dollars being used to fight the very things we think are important?").

tutional. If two readings are possible, the one that would preserve the statute is generally preferable. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L.Ed.2d 645 (1988); *Hooper v. California*, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L.Ed. 297 (1895).

We are therefore constrained to read the basic limitations of the welfare provision of § 504(a)(16) as viewpoint neutral prohibitions on the specified activities, regardless whether the activities are undertaken to promote reform or to defeat it.

There is, however, another specification in the welfare provision that is inescapably viewpoint-biased. Subsection (a) (16) expressly provides that its prohibitions do not prevent a grantee from representing "an eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation" (the "suit-for-benefits exception"). According to this exception, representation of a client seeking a welfare benefit is permitted, but only if the representation will not involve any challenge to the propriety of any previously existing rule that led to the denial of benefits. The grantee thus could not argue that the rule that led to the denial of the client's benefits was unauthorized by the governing regulation, that the regulation was unauthorized by the statute, or that the regulation or statute was unauthorized by the Constitution. Such representation is permitted only if it includes no challenge to the underlying law.

It seems clear to us that this limitation on the suit-for-benefits exception is not viewpoint neutral. It accords funding to those who represent clients without making any challenge to existing rules of law, but denies it to those whose representation challenges existing rules. It clearly seeks to discourage challenges to the status quo. The provision thus discriminates on the basis of viewpoint, and requires us to decide whether this discrimination is permissible in the context of the LSCA.

The government's "[d]iscrimination against speech because of its message" is suspect under the First Amendment. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995) (noting that such discrimination is "presumed to be unconstitutional"). Whether a subsidy that is dependent on viewpoint constitutes illegal discrimination presents a complex question, which is illuminated by three relevant recent Supreme Court holdings.

In *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991), the Court upheld regulations forbidding recipients of government funds for family planning from counselling or advocacy related to abortion. *See id.* at 203, 111 S.Ct. 1759.

In *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 141 L.Ed.2d 500 (1998), the Court last term upheld a requirement that the NEA, in making grants for the arts based on excellence, also "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American people." *Finley*, 118 S. Ct. at 2171.

In *Rosenberger*, the Court struck down a provision in a program of governmental grants to support student publications that excluded from eligibility publications expressing a viewpoint on religion. See *Rosenberger*, 515 U.S. at 837, 115 S. Ct. 2510.

We assess the relevance of these precedents differently from our dissenting colleague. Judge Jacobs argues that *Rust* and *Finley* together establish the government's broad entitlement to discriminate on the basis of viewpoint in making financial grants. Viewpoint discrimination, he argues, is suspect only where, as in *Rosenberger*, the government seeks to promote a diversity of private speech. Judge Jacobs relies heavily on explanatory language in the *Rust* opinion, which was quoted by the Supreme Court in *Finley*:

> The Government can, without violating the Constitution, selectively fund a program . . . it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Rust, 500 U.S. at 193, 111 S. Ct. 1759; *see also Finley*, 118 S. Ct. at 2168.

Under Judge Jacobs's analysis, just as Congress may lawfully fund family planning services conditioned on the grantee's not counseling on the availability of abortion, so Congress also may fund the legal representation of a welfare applicant conditioned on the grantee's not raising arguments that question the validity of any

statute, regulation or governmental procedure pertaining to welfare.

We acknowledge that the words from Rust that Judge Jacobs cites seem on their face to support his view. But we doubt that these words can reliably be taken at face value. In seeking to understand how a judicial precedent in a relatively unexplored area of law bears on other undecided questions, it is often more instructive to look at what the Court has done, rather than at what the Court has said in explanation. Explanations that seem sound enough in the context of the facts for which they are devised often carry implications the court would never subscribe to if applied to other facts not in contemplation. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821) (Marshall, C.J.) ("It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."); *United States v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring) ("A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'"); *cf. CBS, Inc. v. American Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 934-35 (2d Cir. 1980) (Newman, J.) ("[T]he safer course is to read judicial opinions as deciding only what they purport to decide.").

The quotation from *Rust*, for example, seems on its face to imply that Congress could lawfully fund institutions to study the nation's foreign or domestic policies,

conditioned on the grantee's not criticizing, or advocating change in, the policies of the government. That would fall within the parameters of choosing "to fund one activity to the exclusion of [an]other." Congress would be "selectively fund[ing] a program . . . it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." Nonetheless, we think it inconceivable that the Supreme Court that approved the *Rust* regulation would have intended its language to authorize grants funding support for, but barring criticism of, governmental policy.[8]

We think the resolution lies in the fact that different types of speech enjoy different degrees of protection under the First Amendment. "Expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S. Ct. 3409, 73 L.Ed.2d 1215 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467, 100 S. Ct. 2286, 65 L.Ed.2d 263 (1980)). The strongest protection of the First Amendment's free speech guarantee goes to the right to criticism government or advocate change in governmental policy. "[E]xpression of dissatisfaction with the

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[8] Concurring in the judgment in *Finley*, Justice Scalia did argue that the government can allocate subsidies "*ad libitum*, insofar as the First Amendment is concerned." *Finley*, 118 S. Ct. at 2184 (Scalia, J., concurring in judgment). This position was joined by only one other Justice, however. The majority left no doubt that the First Amendment "has application in the subsidy context," *id.* at 2179, and that a subsidy "aim[ed] at the suppression of dangerous ideas" would violate the First Amendment, *id.* at 2178 (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 550, 103 S. Ct. 1997, 76 L.Ed.2d 129 (1983)).

policies of this country [is] situated at the core of our First Amendment values." *Texas v. Johnson*, 491 U.S. 397, 411, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Criticism of official policy is the kind of speech that an oppressive government would be most keen to suppress. It is also speech for which liberty must be preserved to guarantee freedom of political choice to the people. For those reasons we think it clear that, notwithstanding *Rust*'s semantic endorsement of Congress's right to fund one activity to the exclusion of another, the Supreme Court would not approve a grant to study governmental policy, conditioned on the grantee's not criticizing the policy.

In our view, a lawyer's argument to a court that a statute, rule, or governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art. The fact that Congress can make grants that favor family planning over abortion, or that favor decency over indecency, in no way suggests that Congress may also make grants to fund the legal representation of welfare applicants under terms that bar the attorney from arguing the unconstitutionality or illegality of whatever rule blocks the client's success. Among the only directly effective ways to oppose a statute, regulation or policy adopted by government is to argue to a court having jurisdiction of the matter that the rule is either unconstitutional or unauthorized by law. The limitation on the suit-for-benefits exception prohibits a legal services organization that has received LSC grant funds from making such an argument on behalf of a client, even though that argument may be necessary to establish the client's rights in precisely the repre-

sentation for which the funding was granted.[9] Such a restriction is a close kin to those "calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Finley*, 118 S. Ct. at 2179 (quoting *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L.Ed.2d 476 (1991)). If the idea in question is the unconstitutionality or illegality of a governmental rule, the courtroom is the prime marketplace for the exposure of that idea. *Cf. Cooper v. Aaron*, 358 U.S. 1, 18, 78 S. Ct. 1401, 3 L.Ed.2d 5 (1958) (stating the "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"). To forbid a lawyer from articulating that idea in the court proceeding effectively drives the idea from the marketplace where it can most effectively be offered.

The Supreme Court's discussion in *Finley* underscores the suspect nature of the limitation on the suits-for-benefits exception for a further reason. In *Finley*, considerations of "decency and respect" were merely to be taken "into consideration." The Supreme Court stressed that the questioned provision offered "vague exhortation[s]" and "impose[d] no categorical requirement." *Id.* 118 S.Ct. at 2176, 2177. The NEA might still make grants notwithstanding indecency. The Court, in fact, seemed to imply that an absolute prohibition, of

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[9] We do not agree with Judge Jacobs' view that the statute merely prohibits lawyers from taking on certain representations. As a practical matter, a lawyer often will not know in advance what arguments must be raised to counter those raised by the opposition as the litigation progresses. We think furthermore that Judge Jacobs overstates the ease with which a lawyer can withdraw from litigation that is in progress and underestimates the prejudice to the client that may result from such a withdrawal.

the sort "calculated to drive 'certain ideas or viewpoints from the marketplace,'" would have required a different result. *Id.* at 2176, 2179 (internal citation omitted). The limitation on the suit- for-benefits exception is just such an absolute prohibition: It muzzles grant recipients from expressing any and all forbidden arguments.

For these reasons, we believe that the suit-for-benefits exception is viewpoint discrimination subject to strict First Amendment scrutiny. Defendants offer no arguments why the provision can survive such scrutiny and we perceive none. We therefore conclude that the suit-for-benefits exception of § 504(a)(16) unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law.

The next question is which part of the statute should be found invalid as a result of the unconstitutionality of the viewpoint-based proviso to the suit-for-benefits exception. The four most likely candidates for invalidation are (1) the entire Act; (2) the entire subsection (a)(16) relating to welfare reform; (3) the entire suit-for-benefits exception; and (4) the proviso to the effect that an attorney suing for a client's benefits may not challenge existing law.

We quickly conclude that the first and second possibilities go too far. "A court should refrain from invalidating more of [a] statute than is necessary." *Alaska Airlines v. Brock*, 480 U.S. 678, 683, 107 S. Ct. 1476, 94 L.Ed.2d 661 (1987) (internal quotation marks omitted). In our view, without this restriction, the 1996 Act will still "function in a manner consistent with the intent of Congress," *id.* at 685, 107 S. Ct. 1476 (emphasis

omitted). Our finding of unconstitutionality affects only one tiny restriction in the statute, which can otherwise continue to function as intended. Subsection (a)(16) can also continue to bar activities "involving an effort to reform a . . . welfare system," as Congress intended, without the unconstitutional provision.

The more troublesome question is whether the invalid viewpoint-based restriction should result in the invalidity of the entire suit-for-benefits exception, or only of the proviso that bars a grantee in the course of a legal representation of an eligible individual from arguing to amend or challenge any existing law. We recognize a reasonable argument that the overall intent of the Act is so opposed to challenges to law that the intent of Congress would be better served by striking down the entire suit-for-benefits exception than by allowing a grantee lawyer representing a client to argue the invalidity of any existing rule of law.

On the other hand, because complex legislation represents an amalgam of different viewpoints and compromises, one might see the suit-for-benefits exception as an intentionally more measured provision, one recognizing that a lawyer engaged in the representation of a client must make the arguments necessary to secure the relief their client seeks. The proviso as drafted does not forbid grantee lawyers from challenging all laws—only those that were in existence at the time of the initiation of the representation. Thus, notwithstanding its hostility to litigation seeking legal reform, Congress intentionally permitted challenges to law in the context of individual representation so long as the challenge addressed a law passed after the initiation of the representation.

Because it is unclear which alternative better carries out the intent of Congress, we think it best to invalidate the smallest possible portion of the statute, excising only the viewpoint-based proviso rather than the entire exception of which it is a part. This conclusion follows the Supreme Court's guidance that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976) (citation and internal quotation marks omitted); *see also Regan v. Time, Inc.*, 468 U.S. 641, 653, 104 S. Ct. 3262, 82 L.Ed.2d 487 (1984) ("[T]he presumption is in favor of severability."). We thus conclude that the viewpoint-based proviso barring grantee lawyers representing individuals from contesting the legality of an existing rule is severable from the overall suit-for-benefits exception. The exception permitting a grantee to "represent[ ] an individual eligible client [w]ho is seeking specific relief from a welfare agency" will survive our holding that the viewpoint-based proviso to the suit-for-benefits exception is unconstitutional.

We therefore direct the district court to enter a preliminary injunction barring enforcement of that part of the suit-for-benefits exception of § 504(a)(16) that would make an entity ineligible for an LSC grant if, in the course of a representation of an individual client seeking specific relief from a welfare agency, that entity sought "to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." In all other respects, the statute will continue to function as written. Grantees will be barred (on penalty of losing their entitlement to grantee status)

from engaging in any of the activities prohibited by § 504. They will be prohibited under § 504(a)(16) from initiating legal representation, or participating in any other way in litigation, lobbying, or rulemaking concerning "effort[s] [by anyone] to reform a Federal or State welfare system." On the other hand, grantees will be permitted to represent "an individual eligible client who is seeking specific relief from a welfare agency," regardless whether such representation includes arguments that seek "to amend or otherwise challenge existing law." § 504(a)(16).

Conclusion

The district court's denial of a preliminary injunction is reversed solely with respect to the limitation on the suit-for-benefits exception of § 504(a)(16). In all other respects, the district court's order denying a preliminary injunction is affirmed.

JACOBS, Circuit Judge, concurring in part, dissenting in part:

I agree with the conclusions of the majority opinion except insofar as it holds unconstitutional a critical proviso in a subsection of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA"), Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321, 1321-55 to 1321-56 (1996). That subsection

> (i) denies Legal Services Corporation ("LSC") funding to any entity "that initiates legal representation or participates in any other way in litiga-

tion, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system,"

(ii) creates an *exception* for the representation of "an individual eligible client who is seeking specific relief from a welfare agency,"

(iii) subject however to the *proviso* that bars LSC grantees from taking cases that "involve an effort to amend or otherwise challenge existing law."

The majority throws the section out of kilter by preserving the exception but striking the proviso, on the ground that under *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995), the proviso amounts to viewpoint discrimination.

I respectfully dissent because:

(A) The proviso, which helps specify the type of representation that a grant recipient may undertake, is part of Congress's entirely appropriate—and necessary—specification of the services available in a program it created.

(B) The majority has not successfully identified a disfavored viewpoint of any person in any public forum. To the extent that this legislation funds a "viewpoint" at all, it is one that advocates the delivery of welfare benefits to claimants.

A. *Program Definition*

In creating a government program, Congress can of course specify the goods and services that will be provided and the goods and services that will be excluded. In so doing, Congress is permitted to fund the exercise of some constitutionally protected rights, but not others. *See Rust v. Sullivan*, 500 U.S. 173, 194-95, 111 S. Ct. 1759, 1773, 114 L.Ed.2d 233 (1991). Although *Rosenberger* curbs the government's power to fund some *viewpoints* to the exclusion of others, that limitation operates only when the government creates a limited public forum for the expression of diverse viewpoints. A grantee of the Legal Services Corporation is not a public forum or the participant in a public forum in which it is invited to contribute its point of view; it is a contractor furnishing services that the government wants provided, and in that way it resembles the recipients of Title X funds in *Rust*, and any of the private agencies that carry out myriad other government programs that have limited and specified purposes.

1. *Statutory Authority*

From its inception, the purpose of the LSC has been to fund individual client services for indigent persons with legal problems. *See* 42 U.S.C. § 2996 (1994). Over the years, Congress has shaped and clarified the kind of legal services that LSC and, in some cases, its grant recipients may fund:

- No "fee-generating" cases. *See* 42 U.S.C. § 2996f(b)(1) (1994).
- No felony cases. *See* 42 U.S.C. § 2996f(b)(2) (1994).

- No civil actions challenging a criminal conviction. *See* 42 U.S.C. § 2996f(b)(3) (1994).
- No cases seeking "to procure a nontherapeutic abortion." *See* 42 U.S.C. § 2996f(b)(8) (1994).
- No school desegregation cases. *See* 42 U.S.C. § 2996f(b)(9) (1994).
- No cases involving the Military Selective Service Act, 50 App. U.S.C. § 451 *et seq*. *See* 42 U.S.C. § 2996f(b)(10) (1994).
- No cases involving assisted suicide. *See* 42 U.S.C.A. § 2996f(b)(11) (West Supp.1998).
- No litigation (or other activity) regarding "the timing or manner of the taking of a census." *See* OCRAA § 504(a)(1), 110 Stat. at 1321-53.
- No class action litigation. *See id.* § 504(a)(7), 110 Stat. at 1321-53.
- No legal assistance to certain classes of aliens. *See id.* § 504(a)(11), 110 Stat. at 1321-54 to 1321-55.
- No litigation on behalf of someone incarcerated. *See id*. § 504(a)(15), 110 Stat. at 1321-55.
- No litigation on behalf of persons being evicted from public housing for selling drugs. *See id.* § 504(a)(17), 110 Stat. at 1321-56.

The majority opinion correctly rejects the constitutional challenges that the plaintiffs make to several of these program-shaping provisions. *See* Majority at [page 764] (rejecting challenge to prohibition on fee-generating cases); *id.* at [pages 764-67] (rejecting unconstitutional condition challenge to all the § 504 restrictions).

The restriction that § 504(a)(16) imposes—on the use of LSC money to fund political agitation concerning welfare policy—is another effort by Congress to define the types of services that LSC grantees may provide and to channel all the government's funds (without substitution or displacement) to those services and no others. The exception for advocacy in suits to collect welfare benefits, as limited by the proviso barring expenditures to challenge existing law, serves the same purpose and operates in the same way.

The proviso on welfare litigation is not (as the majority appears to believe) an effort to weed out a certain class of arguments in cases in which LSC-funded lawyers appear. The statute nowhere contemplates or requires that an LSC-funded lawyer appear in a case in which he or she must forbear from challenging a welfare statute on meritorious constitutional grounds; to the contrary, the proviso says that a lawyer or grantee may not take on such a representation in the first place. There is nothing remarkable about this. Lawyers often turn down representations that they cannot fulfill, either by reason of conflict or otherwise (such as availability of time and resources, or lack of expertise). For example, a public interest lawyer cannot file a claim for job discrimination against a charitable agency she organized or has represented; and a

public interest lawyer representing a plaintiff who is pressing for school vouchers cannot be expected to take on a representation that entails the argument that school vouchers are illegal or unconstitutional. The LSC's authorizing legislation as well as rules of legal ethics prohibit a lawyer from undertaking a representation in which that lawyer would be barred from pursuing a potentially fruitful avenue of argument.[1] A grantee (or a lawyer employed by a grantee) is ethically obliged to decline such a case, and may refer the client to a lawyer who can handle it, *see Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323, 343 (E.D.N.Y. 1997), and in some instances, the client will be referred to an affiliated entity, *see* Majority at [pages 761- 62].

The majority argues that as a "practical matter" an attorney will "often" not know what arguments may be needed in a given representation. *See* Majority at [page 771 n. 9]. Since this is a *facial* challenge, however, this Court may not base its invalidation of this statute on a

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[1] *See* 42 U.S.C. § 2996e(b)(3) (1994) (requiring the LSC to "ensure" that the activities it finances are carried out in accordance with attorneys' ethical obligations); 42 U.S.C. § 2296f(a)(1) (1994) (requiring the Corporation to "insure the maintenance of the highest quality of service and professional standards"); *Model Rules of Professional Conduct* Rule 1.1 (1995) (requiring attorneys to utilize the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); *id.* Rule 1.2 cmt. 5 (noting that a "client may not be asked to agree to a representation so limited in scope as to violate Rule 1.1"); *id.* Rule 1.2 cmt. 4 ("Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles."); *id.* Rule 1.16(a)(1) (barring attorney from taking case that would result in violation of any ethical rule); *id.* Rule 1.16 cmt. 1 ("A lawyer should not accept representation in a matter unless it can be performed competently, promptly . . . and to completion.").

hypothetical set of circumstances, even one it believes will "often" occur. *See* Majority at [page 762] (Plaintiffs "must establish that *no set* of circumstances exist under which the Act would be valid.") (quoting *Rust*, 500 U.S. at 183, 111 S. Ct. 1759 (emphasis added)). Moreover, as the majority points out, the LSC does not fund a traditional, all-encompassing lawyer-client relationship. It has always operated under significant restrictions, and it is required to advise prospective clients of these limitations. So there is therefore "no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services," Majority at [page 764], such as help in mounting a Constitutional challenge to a welfare statute.

2. *Supreme Court Authority*

On its face, this statute funds a program that provides certain services, and the restriction found in § 504(a)(16) (together with its exception and its proviso) prohibits grantees from rendering services that fall outside the scope of the program. The Supreme Court has recognized the undoubted power of Congress to do this. *See Rust*, 500 U.S. at 192-94, 111 S. Ct. at 1771-73; *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671, 65 L.Ed.2d 784 (1980).

In *Rust*, the Court considered a section of the Public Health Service Act prohibiting the use of funds appropriated for family-planning services "in programs where abortion is a method of family planning." *Rust*, 500 U.S. at 178, 111 S. Ct. at 1764-65 (quoting 42 U.S.C. § 300a-6). The Court upheld the constitutionality of that prohibition because it ensured that grantees did

not engage in activities outside the scope of the program:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Id. at 193, 111 S. Ct. at 1772. The program definition upheld in *Rust* is therefore "not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194-95, 111 S. Ct. at 1773. Of the present case it is possible to say in paraphrase of *Rust* that the scope of the LSC project is the funding of certain individual client services, that the law does not single out any "disfavored group," and that the government has simply "refus[ed] to fund activities, including speech, which are specifically excluded from the scope of the project funded."

The error of the majority opinion arises from its inapt (and complete) reliance on *Rosenberger*, a case in which the purpose of the government program was to fund the expression of politically diverse views. The University of Virginia was defraying part of the printing costs of student publications, but denied funding to journals that promoted a religious viewpoint. The Supreme Court held that such content-based funding

decisions are impermissible when the expenditure of funds is intended to facilitate private speech and thus to "encourage a diversity of views from private speakers." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834, 115 S. Ct. 2510, 2519, 132 L.Ed.2d 700 (1995). The holding of *Rosenberger* is that when government subsidizes private speakers to express their own viewpoints, it cannot discriminate among potential recipients on the basis of viewpoint. The LSC, which supports a defined program of legal representation to indigent clients, of course does not underwrite the expression of the private speech or viewpoints of its grantees or their lawyers, or (for that matter) their clients.

Rosenberger does not impair the principle—explicitly announced in *Rust* and not implicated by the facts of *Rosenberger*—that when the government funds specific services it deems to be in the public interest, it may require grantees to get with its program. The majority's surprising, short answer to this argument is that the passage from *Rust* on which I rely cannot "reliably be taken at face value." Majority at [page 770]. This approach to Supreme Court opinions is not one previously employed in this Circuit. I think the Supreme Court meant what it said, and that it bears repeating:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of view-

> point; it has merely chosen to fund one activity to the exclusion of the other.

Rust, 500 U.S. at 193, 111 S. Ct. at 1772. Recently the Supreme Court itself invoked *Rust*—and quoted that passage—to uphold restrictions on the disbursement of funds by the National Endowment for the Arts. *See National Endowment for the Arts v. Finley*, 524 U.S. 569,——, 118 S. Ct. 2168, 2179, 141 L.Ed.2d 500 (1998) (*quoting Rust*, 500 U.S. at 193, 111 S. Ct. at 1772).

There is one sure fire way to find out whether the Supreme Court meant what it said in *Rust* and *Finley*, and now that the majority has split with the Ninth Circuit on this issue, we may not have long to wait. Relying on *Rust*, the Ninth Circuit rejected a viewpoint discrimination challenge to the LSC restrictions that are at issue on this appeal. *See Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir.), *cert. denied*, —- U.S. ——, 119 S. Ct. 539, 142 L.Ed.2d 448 (1998). Justice White (part of the *Rust* majority), sitting by designation on the Ninth Circuit, wrote: "Like the Title X program in Rust, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas." *Id.* at 1028.

In an attempt to distinguish the *Rust* opinion from the *Rust* result, the majority offers the hypothetical of government-financed think tanks commissioned to study American foreign policy, but forbidden to criticize it. This hypothetical is far removed from any program to furnish legal services; tellingly, it looks very much like the University of Virginia's student-publication program in *Rosenberger*.

A closer analogy would be presented if Congress (i) decided to out-source the advice that the Internal Revenue Service now gives taxpayers on how much taxes they owe and how much they can shelter or deduct, (ii) underwrote accountants and tax lawyers to counsel and represent qualifying middle-class taxpayers, and then (iii) discovered that the outside contractors were expending appreciable grant resources on agitation for tax reform along lines favored by the contractors and deemed by them to be in the interest of the middle classes. Congress could certainly plug that drain by specifying that the representation be limited to achieving the accurate computation of amounts due under the *present* tax code, and by barring advocacy aimed at, *inter alia*, tax reform, establishing the single tax or flat tax, or organizing constitutional litigation to challenge particular revenue provisions or the ratification of the 16th Amendment. Congress could do this, and if it did, the legislation would look like the restriction that the majority here holds unconstitutional.

The LSC restrictions, like my hypothetical statute to assist taxpayers, is not a promotion of advocacy for the good old status quo, or a suppression of a point of view. Both programs channel money to an identified public purpose, which is the administration of a complex existing statute so that everyone can get what the statute provides. I cannot imagine a more viewpoint-neutral legislative scheme.

B. ***Viewpoint Discrimination***

Considering that the majority has invalidated a statute on the ground that it constitutes impermissible viewpoint discrimination, it is odd that the majority

only vaguely articulates the viewpoint that is supposedly disfavored by this legislation and (reciprocally) never states what viewpoint is favored. The fact is, the LSC subject-matter restrictions do not lend themselves to analysis in these terms. One subsection bars funding "to provide legal assistance in civil actions to persons who have been convicted of a criminal charge . . . for the purpose of challenging the validity of the criminal conviction." 42 U.S.C. § 2996f(b)(3) (1994). Does the statute thereby "discriminate" against the "viewpoint" that prisoners have constitutional rights? Another provision bars funding "to provide legal assistance with respect to any proceeding or litigation relating to the desegregation of any elementary or secondary school." 42 U.S.C. § 2996(b)(9) (1994). Does the statute thereby "discriminate" against the "viewpoint" that schools ought to be desegregated? If limitations on classes of cases eligible for representation by LSC-financed lawyers constitute impermissible discrimination against the people who may want to advance theories in such cases, then it is hard to see how any of the many statutory limitations on LSC funds are constitutional.

By the same token, I cannot agree that the statute promotes one favored view over others in a supposed public forum. Whose viewpoint? What forum? According to the majority opinion: the government-funded lawyers possess the protected expressive interest; and the public forum is the courtroom (an idea that may come as a surprise to trial judges). *See* Majority at [pages 770-71]. But the proviso stricken by the majority bars representation *in lawsuits*. The viewpoints of litigating lawyers in a courtroom cannot matter for present purposes, because (among other things) the advocacy of a lawyer in litigation is at the

service of the client; it would be inaccurate (and unfair) to assume that a lawyer's advocacy expresses that lawyer's personal view on politics or morals. *See Model Rules of Professional Conduct* Rule 1.2(b) (1995).

It also cannot be said that the proviso disfavors the speech of the clients; the *only* litigants who are funded are those who seek benefits. There are certainly people on the other side of welfare issues, such as those who favor narrowing welfare eligibility, or reduced benefits, or abolition of the welfare system. But the statute gives them nothing. Where then is the viewpoint discrimination, even if one assumed (as I do not) that the LSC makes every courtroom into a public forum?

The statute bars constitutional and other challenges to the welfare laws, but it certainly does not *fund* the view that the welfare laws are constitutionally impregnable. The proviso invalidated by the majority does not promote or favor any message. It lays down specifications for services to be provided to favored beneficiaries. And it excludes some of the most expensive services—constitutional litigation and statutory challenges—in the same way that the statute elsewhere bars the expenditure of LSC funds for class actions. In excluding these expensive initiatives, the statute maximizes the expenditure of limited available funds for less expensive benefit-collection lawsuits.[2] Congress is able to do that; and a statute in which Congress does that should be able to withstand a facial challenge.

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[2] By striking the proviso, the majority essentially appropriates money for the precise category of expensive (and often politically oriented cases) that Congress chose not to fund.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 97-CV-182 (FB)

CARMEN VELAZQUEZ, WEP WORKERS TOGETHER!, COMMUNITY SERVICE SOCIETY OF NEW YORK, INC., NEW YORK CITY COALITION TO END LEAD POISONING, CENTRO INDEPENDIENTE DE TRABAJADORES AGRICOLAS, INC., AND GREATER NEW YORK 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 ACTIVITY PROSCRIBED BY PUB. L. 104-208;

FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., ON BEHALF OF ITSELF, AND ON BEHALF OF ALL SIMILARLY SITUATED NOT-FOR-PROFIT LEGAL SERVICES ENTITIES; NAMELY, ORGANIZATIONS WHO WISH TO BE ELIGIBLE TO RECEIVE FUNDS FROM THE LEGAL SERVICES CORPORATION, AND WHO WISH TO BE FREE TO ENGAGE IN LEGAL ADVOCACY ACTIVITIES THAT ARE PROSCRIBED BY PUB. L. 104-208;

LUCY A. BILLINGS, PEGGY EARISMAN, OLIVE KAREN STAMM, JEANETTE ZELHOF, ELISABETH BENJAMIN, JILL ANN BOSKEY, 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; AND

ANDREW J. CONNICK, COUNCILMEMBER C. VIRGINIA FIELDS, COUNCILMEMBER GUILLERMO LINARES, COUNCILMEMBER STANLEY MICHELS, COUNCILMEMBER ADAM CLAYTON POWELL, IV, SENATOR LAWRENCE SEABROOK, AND ASSEMBLYMAN SCOTT M. STRINGER, ON BEHALF FF THEMSELVES AND ALL SIMILARLY SITUATED INDIVIDUALS; NAMELY, INDIVIDUALS WHO HAVE PROVIDED PUBLIC OR PRIVATE NONFEDERAL 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, PLAINTIFFS,

v.

LEGAL SERVICES CORPORATION, DEFENDANT

[Filed: Dec. 22, 1997]

MEMORANDUM & ORDER

BLOCK, District Judge.

Plaintiffs challenge the constitutionality of certain provisions of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504,

110 Stat. 1321 (1996), which were re-enacted by the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 502, 110 Stat. 3009 (1996) (hereinafter collectively referred to as the "Act"), as implemented by regulations which were issued subsequent to the commencement of this lawsuit. The Act prohibits attorneys and organizations that receive federal monies from defendant Legal Services Corporation ("LSC") from engaging in a large number of activities (the "prohibited activities"), such as lobbying, challenging welfare reform legislation, and participating in class action litigation. The Act also provides that such LSC-funded attorney or entity ("recipients") cannot engage in any of the prohibited activities even if funding for the prohibited activity were to come from non-federal sources. However, implementing regulations issued by the LSC after the commencement of the litigation allow recipients to engage in the prohibited activities by affiliating with legal services organizations that do not receive any federal monies from the LSC.

Presently before the Court is plaintiffs' motion for preliminary injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.[1] Plaintiffs contend that the Act's restrictions, as implemented by the LSC's regulations, are facially violative of the First and Fifth Amendment rights of recipients, as well as attorneys for, clients of, and donors to, those recipients.[2] The Court disagrees and, regarding the

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[1] On March 24, 1997, the Court held a preliminary injunction hearing ("Hearing") and entertained oral argument from the parties.

[2] Plaintiffs' amended complaint seeks class certification for each of these groups. The parties have agreed that the issue of

implementing regulations, holds that they are a permissible construction of the Act and are appropriately tailored to the Government's legitimate interests. The Court accordingly denies the motion for preliminary injunctive relief.

BACKGROUND

I. The Legal Services Corporation & The Statutory Restrictions

Congress created the LSC in 1974 in response to, *inter alia*, the "need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program." 42 U.S.C. § 2996(2). The LSC is a nonprofit corporation charged with distributing federal funds, in the form of grants, to recipients nationwide that provide legal assistance to low-income individuals. In 1995, LSC recipient organizations served approximately 1,900,000 indigent clients, encompassing over 1,700,000 matters, which benefitted almost 5,000,000 people living in poverty.[3] The LSC has thus been described as "the primary vehicle for insuring that the poor are included in this nation's legal system."[4] Recipients generally rely on both LSC funds and monies raised from a variety of public and private sources[5] to finance their operations.

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class certification need not be decided pending the Court's determination of the preliminary injunction motion.

[3] S. Rep. 104-392, at 13 (1996).

[4] *Id.*

[5] These sources include: state and local grants, IOLA (Interest on Lawyers' Accounts) programs, and private donations.

Despite the success of the LSC in meeting the legal needs of the poor, controversy has surrounded the LSC since its inception. This controversy has focused on the extent to which recipients should be limited in their use of LSC funds. At one end of the spectrum, critics of the LSC charge that recipients often use federal funds to advance activist agendas, and that broad limitations are necessary to ensure that LSC funds are spent to meet the basic legal needs of the poor. At the other end, opponents of such restrictions argue that activist litigation is necessary to assist impoverished individuals, and that the vast majority of LSC funds are used to help the poor in so-called "basic" legal proceedings.

In response to this debate, Congress has repeatedly placed restrictions on the permissible uses of federal funds by recipient organizations. For example, the 1974 Act prohibited the use of LSC funds by any recipient to provide legal assistance in any case seeking to obtain a nontherapeutic abortion. 42 U.S.C. § 2996f(b)(8). The 1974 Act and implementing regulations also restricted recipients from participating in the following areas: political activity, criminal proceedings, training, school desegregation, lobbying, violations of the Military Selective Service Act, and fee-generating cases. 42 U.S.C. §§ 2996f(b)(1)-(4), (6)-(10). In 1989, the LSC extended the restrictions to include redistricting cases. 45 C.F.R. § 1632. The present dispute arises from the latest round of congressional debate and compromise, which resulted in continued funding for the LSC, but with an additional set of restrictions on recipients of LSC funds.

Although restrictions on LSC funds have been commonplace since Congress created the LSC, the Act is unique because the restrictions apply, for the first time,

to recipient activities that are supported by non-federal public funds. Previously, recipients were allowed to use non-federal funds from public sources as they pleased so long as accounting practices documented the segregation of federal and non-federal funds.[6] Thus, while the former statute provided that "[n]o funds made available by [LSC] may be used" for any of the prohibited activities, 42 U.S.C. § 2996f(b), the new statute provides that "[n]one of the funds appropriated [by the LSC] may be used to provide financial assistance to any [recipient]" that engages in any of the prohibited activities. Act § 504(a). Furthermore, the new statute states that recipients are free to "us[e] funds received from a source other than the Legal Services Corporation to provide legal assistance . . . except that such funds may not be expended by recipients for any purpose prohibited by this Act . . . ." Act § 504(d)(2)(B).

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[6] Although Congress has never before prohibited recipients from using public non-LSC funds—such as grants from state and local entities and IOLA funds—to engage in prohibited activities, Congress had previously extended some of the restrictions to activities funded with private donations. 42 U.S.C. § 2996i(c); 45 C.F.R. pts. 1610, 1627 (1995). Despite this curious dichotomy, plaintiffs do not challenge the restrictions on private funds, contending that those prior restrictions on the use of private funds were insignificant since public funds constitute the "overwhelming majority" of recipients' non-LSC funds. Memorandum of Law In Support of Motion for Preliminary Injunction at 3 n. 2. Therefore, the Court's reference herein to "non-LSC" funds refers to *public* non- LSC funds.

Plaintiffs' amended complaint challenges the constitutionality of the following prohibited activities set forth in the Act:[7]

None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any [recipient]:

> (2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency [hereinafter "executive order provision"];
>
> (3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect [hereinafter "agency provision"];
>
> (4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body [hereinafter "legislation provision"] [subsections (2), (3), and (4) will be referred to collectively as the "lobbying provisions"];
>
> (5) that attempts to influence the conduct of oversight proceedings of the [LSC] or any person or entity receiving financial assistance provided by the

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[7] Some of the restrictions are new; some were contained in prior statutes, such as lobbying. Act § 504(a)(2)-(4); 42 U.S.C. § 2996f(a)(5).

Corporation [hereinafter "LSC oversight provision"];

(7) that initiates or participates in a class action suit [hereinafter "class action provision"];

(11) that provides legal assistance for or on behalf of [certain] alien[s] [hereinafter "aliens provision"];[8]

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration . . . [hereinafter "training provision"];

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees [hereinafter "attorneys' fees provision"];

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison [hereinafter "incarcerated client provision"];

(16) that initiates legal representation or participates in any other way . . . involving an effort to reform a Federal or State welfare system . . . [hereinafter "welfare reform provision"];

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[8] The Act sets forth a series of exceptions, such as lawfully admitted aliens who are permanent residents. *See* Act § 504(a)(11)(A)-(F).

> (18) unless such person or entity agrees that [it] will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action . . . [.] [hereinafter "solicitation provision"] . . . .

Act §§ 504(a)(2)-(5), (7), (11)-(13), (15)-(16), (18).

II. Evolution of Regulations Establishing Program Integrity Requirements Governing Alternative Channels for Engaging in Prohibited Activities

A. The Nature of the Regulations at the Time of *LASH I*

It is well-settled that the LSC has the power to promulgate rules and regulations to implement the Act. *See* Act § 503(b) ("the [LSC] shall promulgate regulations to implement a competitive selection process for the recipients"); 42 U.S.C. § 2996g(e) (requiring the LSC to publish in the Federal Register "all its rules, regulations, guidelines, and instructions"). Although the LSC was established as a federally-chartered nonprofit corporation of the District of Columbia rather than as an agency, Congress has manifested its intent to treat the LSC as a federal agency for regulatory purposes. *See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 690-91 (D.C. Cir. 1991) ("We conclude that the Act clearly grants both general and specific rulemaking powers to [the] LSC . . . ."). In light of the fact that the Act's restrictions now apply to non-LSC funds, the LSC recognized in the preamble to

the first set of regulations passed after the Act that new regulations were necessary:

> [These regulations] incorporate[% the restrictions imposed by the [Act], which apply to both a recipient's LSC funds and its non-LSC funds. Past appropriations acts have applied restrictions contained in those acts only to the funds appropriated thereunder. In contrast, the [Act] prohibits LSC from funding any recipient that engages in certain specified activities or that fails to act in a manner consistent with certain [of the Act's] requirements.

61 Fed. Reg. 41,960, 41,960 (Aug. 13, 1996). Central to the regulations was the section providing that "[a] recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with section 504 . . . ." 45 C.F.R. § 1610.3 (1996).

On December 2, 1996, the LSC promulgated a revised set of regulations, 61 Fed. Reg. 63,749, which included a new regulation entitled "Transfers of recipient funds." It provided that when a recipient transferred any funds, whether from LSC or non-LSC sources, the prohibitions on use of the funds would continue to apply to those transferred funds. 45 C.F.R. § 1610.7 (1996). Comments accompanying the revised regulations explained that applying the restrictions to transferred non-LSC funds was necessary "because otherwise recipients would be able to avoid the conditions on their non-LSC funds by simply transferring the funds." 61 Fed. Reg. 63,749, 63,752 (1996).

These new and revised regulations left in place a long-standing LSC regulation entitled "Interrelated

Organizations," 50 Fed. Reg. 49,276, 49,279 (Nov. 29, 1985), which addressed the circumstances under which another organization would be deemed "controlled" by a recipient. The interrelated organizations regulation stated that "[f]unds held by an organization which . . . is controlled by . . . a recipient . . . are subject to the same restrictions as if the funds were held by the recipient." *Id.* at 49,279-80. The regulation posited eight non-exclusive factors to be weighed to determine whether control exists.[9] The Act's extension of restrictions to non-LSC funds placed heightened importance on the interrelated organizations policy since non-LSC funds of any organization that was "controlled" by a recipient were subject to all of the Act's statutory restrictions.

B. The Decision in *LASH I*

This Court is not the first federal forum to pass on the constitutionality of the Act as implemented by LSC regulations. On February 14, 1997, a federal district court for the District of Hawaii issued an order

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[9] These factors were: "(a) Extent and pattern of any overlap of officers, directors, or other managers among organizations; (b) Contractual and financial relationships; (c) History of relationships among the organizations; (d) Close identity of interest; (e) One organization has become a mere conduit, 'incorporated pocketbook,' or 'straw' party for another whether or not there was an attempt to work an injustice or promote a fraud; (f) Funds are solicited by a separate entity in the name of and with the expressed or implicit approval of the recipient . . .; (g) A recipient transfers resources to another entity that holds these resources for the benefit of the recipient; and, (h) A recipient assigns functions to an entity whose funding is primarily derived from sources other than public contributions." Audit and Accounting Guide for Recipients and Auditors § 1-7, 50 Fed. Reg. 49,276, 49,279 (1985).

granting in part and denying in part the plaintiffs' request for preliminary injunctive relief. *Legal Aid Society of Hawaii, et al. v. Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997) (Kay, J.) (hereinafter referred to as "*LASH 1*").

The *LASH I* court resolved the preliminary injunction issue through a two-part analysis. First, the court determined the threshold issue of which of the challenged restrictions implicated constitutional rights, since the "*sine qua non* of [prevailing on a claim of infringement on constitutional rights] is proving that the restrictions at least implicate Plaintiffs' constitutional rights." *LASH I*, 961 F. Supp. at 1408. The court then considered whether the restrictions implicating constitutional rights actually amounted to constitutional violations. *Id.* at 1411. The parties before this Court agree that the two-part framework adopted by the *LASH I* court was appropriate. *See* Pl. Supp. Mem. of Law at 3; Def. Supp. Mem. of Law at 1 n. 2. The court in *LASH I* concluded that plaintiffs had a probability of success on the merits in respect to all but three of the restrictions, which it determined did not implicate constitutional rights.

In the first phase of its analysis, the *LASH I* court examined the "laundry list" of constitutional rights plaintiffs argued were implicated by the Act's restrictions. 961 F. Supp. at 1402. The court concluded that First Amendment rights to lobby, to associate, and to meaningful court access were implicated by all but three of the challenged restrictions. Specifically, the right to lobby was implicated by the executive order provision, the agency provision, the legislation provision, and the welfare reform provision, *id.* at 1408

(Act § 504(a)(2)- (4), (16));[10] the rights of association and to meaningful court access were implicated by the training provision and the incarcerated client provision. *Id.* at 1409-10 (Act § 504(a)(12), (15)).[11]

The *LASH I* court concluded, however, that the aliens, class action, and attorneys' fees provisions did not implicate constitutional rights. The aliens provision did not implicate such rights because "[i]f Congress in its near plenary power over aliens decides that legal aid associations and their lawyers should not represent them, that decision should not be disturbed." *Id.* at 1410. As for the class actions provision, the *LASH I* court concluded that adopting plaintiffs' position would in effect constitutionalize Rule 23 of the Federal Rules of Civil Procedure, which it found "imprudent . . . absent any appellate precedent." *Id.* Finally, in respect to the attorneys' fees provision, the *LASH I* court concluded that "[p]laintiffs do not cite any authority that fee-shifting provisions violate Due Process or implicate the First Amendment," and that "because the provision does not implicate a suspect class, under

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[10] The *LASH I* court also concluded that a restriction on participation in reapportionment cases implicated the right to lobby. *Id.* (Act § 504(a)(1)). Plaintiffs in this case have not challenged that provision. The Court also notes that, although apparently not challenged in *LASH I*, the LSC oversight provision, Act § 504(a)(5), also implicates the right to lobby for the same reasons as those articulated by *LASH I*.

[11] The *LASH I* court also determined that rights to meaningful court access and to associate were implicated by the restriction, not challenged by plaintiffs in this case, on representation of persons allegedly involved in illegal drug activity in public housing eviction proceedings. *Id.* (Act § 504(a)(17)).

Equal Protection the restriction need only pass rational basis which it clearly does." *Id.* at 1411.

Having found that all but three of the challenged restrictions implicated constitutional rights, the *LASH I* court proceeded to determine whether those restrictions, as implemented by LSC regulations, "not only implicate the First Amendment but whether they also impinge the First Amendment." *Id.* The court's analysis of the constitutional issue focused on the regulations promulgated by the LSC rather than the restrictions, since those regulations affected the ability of recipients to engage in activities prohibited by the Act through affiliate organizations. The court stated that "the dispositive factor . . . is whether the restrictions [leave] open adequate channels for speech . . . . [T]herefore, the Plaintiffs' likelihood of success rests on their ability to prove that the LSC restrictions prevent the organizations and lawyers from voicing their un-subsidized opinions." *Id.* at 1414.

The *LASH I* court examined the trilogy of leading Supreme Court cases on unconstitutional conditions—*Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991); *FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L.Ed.2d 278 (1984); and *Regan v. Taxation with Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L.Ed.2d 129 (1983)—and focused its analysis on a comparison between the LSC regulations and the regulations upheld by the Supreme Court in *Rust.* The *Rust* case originated from the enactment in 1970 of Title X to the Public Health Service Act, "which provides federal funding for family-planning services." 500 U.S. at 178, 111 S. Ct. at 1764. The regulations at issue in *Rust* ("*Rust* regulations") were promulgated in

1988 pursuant to a provision requiring that " '[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.' " *Id.* (quoting 42 U.S.C. § 300a-6).[12] The Supreme Court noted "three principal conditions on the grant of federal funds for Title X projects" created by the regulations: "[(1)] a Title X project may not provide counseling concerning the use of abortion as a method of family planning . . . [(2)] a Title X project [may not] engag[e] in activities that encourage, promote or advocate abortion as a method of family planning . . . [and (3)] Title X projects [must] be organized so that they are physically and financially separate from prohibited abortion activities." *Id.* at 179-80, 111 S. Ct. at 1764-65 (internal quotations omitted).

Although the plaintiffs in *Rust* raised several grounds for their challenge to the Title X regulations, most pertinent to the present case is the *Rust* Court's disposition of the claim that the Title X regulations were impermissible "because they condition the receipt of a benefit . . . on the relinquishment of a constitutional right." *Rust*, 500 U.S. at 196, 111 S. Ct. at 1773. The Supreme Court summarized the unconstitutional conditions doctrine as follows:

> [O]ur "unconstitutional conditions" cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the

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[12] As noted, the statute at issue in the present case provides, in almost identical language, that: "None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any recipient that [engages in the prohibited activities]." Act § 504(a).

> protected conduct outside the scope of the federally funded program.

Id. at 197, 111 S. Ct. at 1774. The Court upheld the regulations on Title X projects because the regulations "do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities." *Id.* at 196, 111 S. Ct. at 1773.

The Title X regulations governing the separateness of projects engaging in restricted activities, referred to as "program integrity" requirements, mandated that to conduct prohibited abortion counseling, the grantee had to maintain separate facilities, personnel, and records for the prohibited activity. The Government defended the program integrity requirements on the grounds that "they are necessary to assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities." *Id.* at 188, 111 S. Ct. at 1769.

Ultimately, the *Rust* Court rejected the unconstitutional condition claim since:

> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has . . . not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the [agency] has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

Id. at 198, 111 S. Ct. at 1774.

The *LASH I* court therefore framed the issue as follows: "The more difficult question (and the more contested between the parties) consists of what side of the continuum this case falls with regard to *Rust*." *LASH I*, 961 F. Supp. at 1415. Ultimately, the *LASH I* court determined that the LSC regulations were less flexible and more burdensome than the *Rust* regulations, concluding that "the LSC regulations fall on the unconstitutional side of *Rust*," and accordingly found that the plaintiffs were likely to prevail on the merits. *Id.* at 1416.

Of particular importance to the *LASH I* court was the combination of the expansion of the restrictions with the LSC's long-standing interrelated organizations policy. The court noted that in light of the expansiveness of the factors used to determine whether a recipient "controls" an organization, which made likely a finding of control between a recipient and any other organization in a relationship with the recipient, "the LSC regulations cannot be said to be more liberal than those in *Rust*." *Id*. In other words, "the *Rust* regulations appear far more expansive in allowing an organization to pursue" its involvement in prohibited activities through other organizations. *Id.* In its probability of success on the merits inquiry, therefore, the *LASH I* court concluded that the LSC regulations were most analogous to those in *League of Women Voters*, the only case in the unconstitutional conditions doctrine trilogy that held that adequate alternative channels were not available for the expression of First Amendment rights. *Id.*

C. The Interim Regulations Promulgated Subsequent to *LASH I*

On January 27, 1997, little more than two weeks prior to the *LASH I* decision, plaintiffs in this Court filed their amended complaint, attacking the same set of restrictions at issue in *LASH I*. In the aftermath of the *LASH I* court's holding that the challenged regulations fell on the unconstitutional side of *Rust*, on March 14, 1997 the LSC promulgated new, interim regulations which were "intended to address constitutional challenges raised by the previous rule." 62 Fed. Reg. 12,101 (1997) ("interim regulations"). Although issued after plaintiffs' amended complaint, the interim regulations were in place at the time of the preliminary injunction Hearing.[13] Counsel for defendant- intervenor United States conceded at the Hearing that passage of the interim regulations was an attempt to cure the constitutional deficiencies found by the *LASH I* court, Tr.[14] at 63, and that the Court should focus its attention on the constitutionality of the new regulations. Tr. at 4 ("the playing field really has narrowed . . . what we're

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[13] At the Hearing, counsel for plaintiffs argued that the *LASH I* court's analytical framework and legal conclusions were correct, with the exception of the court's holdings that three of the restrictions did not implicate plaintiffs' constitutional rights. Thus, a holding by this Court at that posture of the litigation that the interim regulations were constitutionally impermissible would have required the Court to examine those three disputed provisions. On the other hand, a determination that the regulations were sufficient to protect plaintiffs' constitutional rights would render academic the issue of which of the Act's restrictions implicated the constitution in the first instance.

[14] "Tr." refers to the transcript of the preliminary injunction Hearing.

really debating about are whether or not the program integrity requirements and the new regulations are constitutional in light of *Rust*"); *see also* 62 Fed. Reg. 12,101, 12,101 ("limited adjustments" are intended to "respond to the constitutional concerns addressed by the [*LASH I*] Court"). Plaintiffs' counsel also conceded at the Hearing that the battle ground had really shifted to the new regulations. Tr. at 36-37 ("I don't believe it's impossible to develop a set of regulations that would permit the Government to advance the only interest that it has here.").

The interim regulations made two critical changes to the regulations in existence at the time *LASH I* was decided. First, the transfer of funds provision was revised so that transfer by a recipient of non-LSC funds would not be burdened by the statutory prohibitions. 45 C.F.R. § 1610.7. However, the LSC added a new section entitled "Program integrity of recipient." 45 C.F.R. § 1610.8. As conceded by counsel for LSC and counsel for the United States at the Hearing, the program integrity requirements were carefully patterned after those approved in *Rust*. *See* Tr. at 51 ("These are exactly the same kinds of regulations from *Rust* . . . . In fact, the language of them is exactly the same.") (statement by counsel for LSC); Tr. at 63 ("The folks at LSC sat down and they promulgated regulations. They asked themselves how to do it, and what they did is they looked at what the Supreme Court said in *Rust* and they did their level best to copy from *Rust*.") (statement by counsel for United States).

Program integrity requirements regulate the ability of recipients to maintain a relationship with organizations, often referred to as "affiliates," that do not re-

ceive any LSC funds and engage in activities prohibited by the Act. Unlike organizations "controlled" by recipients, which are deemed to be LSC actors, affiliates can maintain a relationship with a recipient yet engage in prohibited activities. As in *Rust*, the use of affiliates under the interim regulations was intended to strike a balance between providing an outlet to engage in advocacy prohibited by the Act and maintaining the integrity of the Act by ensuring that no LSC funds would be used to subsidize prohibited activities in violation of congressional intent. The program integrity requirements section of the interim regulations reads, in pertinent part:

> [The Act's restrictions will not be applied to an affiliate if it] is physically and financially separate from the organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. In order to be physically and financially separate, the recipient and the [affiliate] must have an objective integrity and independence from one another. Factors considered to determine whether such objective integrity and independence exist shall include, but are not limited to:
>
> (i) The existence of separate personnel;
>
> (ii) The existence of separate accounting and timekeeping records;
>
> (iii) The existence of separate facilities; and
>
> (iv) The extent to which signs and other forms of identification which distinguish the recipient from the [affiliate] are present.

45 C.F.R. § 1610.8(b)(3).

Although based on the *Rust* program integrity requirements, the interim regulations did not exactly mirror those requirements. Several differences between them are noteworthy because they formed the basis of plaintiffs' position at the time of the Hearing that the program integrity requirements were unconstitutional in part because they were more restrictive than the *Rust* program integrity regulations.

First, in addition to the program integrity requirements, a separate section in the interim regulations perpetuated the LSC's former "interrelated organizations" policy. The regulation provided in that regard:

> If a recipient controls, is controlled by or is subject to common control with another organization, the two organizations are interrelated organizations and the restrictions in this part will be applied to both organizations, unless the association between the two organizations meets the standards of program integrity in paragraph (b) of this section.

45 C.F.R. § 1610.8(a). This provision formally replaced the LSC's prior "interrelated organizations" regulation. 62 Fed. Reg. 12,101, 12,101 (1997). Under this new provision, therefore, an organization could be "controlled" by a recipient yet engage in prohibited activities so long as the program integrity requirements were satisfied. Despite this exception, no provision regarding control appeared in *Rust*'s program integrity requirements, and plaintiffs argued that this provision contributed to the regulation's constitutional infirmity. *See* Plaintiffs' Reply Memorandum at 8-9.

The second difference between the interim and *Rust* program integrity requirements concerns one of the

four factors used in the program integrity analysis—namely, the separateness of the recipient's and affiliate's facilities. In *Rust*, the regulation stated that the "degree of separation" of facilities would be considered, whereas the interim regulation required the "existence" of separate facilities. Plaintiffs argued that "[t]his difference appears to be more than semantics," *id.* at 10, and that "[u]nlike the [*Rust* regulation], which measured the *degree* of separation, the LSC rule focuses on the *existence* of separate facilities." *Id.*

Third, the *Rust* program integrity requirements stated that the determination of whether a recipient and affiliate were sufficiently separate would be based on all "facts and circumstances," whereas the interim regulations made no such statement, which arguably implied that in order to show objective integrity, a recipient would have to satisfy each and every program integrity factor. Plaintiffs emphasized that unlike the *Rust* program integrity requirements, which "made it clear that [each of the four considerations] was only one factor in the assessment of program integrity," the interim regulations appeared to establish a "*per se* test." *Id.* Based on all these differences between the interim regulations and the *Rust* program integrity requirements, plaintiffs concluded that the LSC restrictions on the use of affiliates "go[] far beyond the simple segregation requirements of *Rust*." *Id.* at 12.

The Court asked plaintiffs' counsel at the Hearing whether it might be provident to withhold judgment until the final regulations were promulgated, commenting:

> [T]hese are interim regulations. Is there not some wisdom in allowing some period of time to let the dust settle until we get final regulations? They may come in a different form two months from now or three months from now. You may have to come back to this or another court to deal with a whole different spate of regulations.

Tr. at 8. The colloquy continued as follows:

> [PLAINTIFFS]: If there's any change, we'll let you know immediately, but I should say, I don't anticipate that there will be a significant change. We think that these are the regulations that we're going to be operating on into the foreseeable future.
>
> THE COURT: You know, there were a spate of new regulations after Judge Kay [in *LASH I*] spoke. Maybe after we have this argument today, there will be more regulations.

Tr. at 10. At the conclusion of the Hearing, the Court, noting the responsiveness of the rulemaking process to the *LASH* litigation, commented:

> Maybe as a result of this opportunity for all of us to discuss these issues, there can be some further way in which these matters can be addressed, or there will be an ongoing dialogue between people of good will and good spirit in our great profession. If [this Hearing] has possibly facilitated that possibility, I feel that's also a purpose to be served from my end of the spectrum . . . .

Tr. at 68.

D. The Final Program Integrity Requirements

On May 21, 1997, the LSC replaced the interim regulations with what it termed the "Final rule," which made revisions to the interim rule "[b]ased on [comments received by the LSC] and its own internal research and review." 62 Fed. Reg. 27,695, 27,695 (May 21, 1997) ("final regulations"). The Court therefore will treat plaintiffs' motion as directed at the final regulations rather than the regulations analyzed in *LASH I* or the interim regulations issued shortly after *LASH I* and in effect at the time of the Hearing. In particular, the Court focuses on the revised program integrity requirements, which plaintiffs contend are still overly restrictive in a manner which renders them facially unconstitutional.

The program integrity section of the final regulations provides as follows:

> (a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:
>
> > (1) The other organization is a legally separate entity ["separate entity requirement"];
> >
> > (2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities ["no subsidy requirement"]; and

> (3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:
>
> (i) The existence of separate personnel;
>
> (ii) The existence of separate accounting and timekeeping records;
>
> (iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
>
> (iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present [collectively the "separation factors"].

45 C.F.R. § 1610.8(a). Significantly, subsection (b) of § 1610.8 provides that recipients must certify to the LSC their compliance with the program integrity requirements.

The revised program integrity section eliminates virtually every difference between the interim regulations and the *Rust* regulations in respect to program integrity requirements. First, the final requirements deleted the provision regarding control of an affiliate by a recipient. The LSC removed the provision because "the [LSC] determined that if a program is found to be

in compliance with the [remainder of the] program integrity test, there would be a sufficiently separate identity and operational independence from the recipient." 62 Fed. Reg. 27695, 27697.

The final regulations made two further changes intended to bring the program integrity requirements exactly in line with *Rust*. First, the separate facilities factor was changed from "the existence of separate facilities" to "the degree of separation from facilities in which restricted activities occur." And second, the LSC added language to emphasize that there is no *per se* rule in respect to the factors relevant to the program integrity determination. In fact, the new language is even less restrictive than the *Rust* regulation since it states that "[t]he presence or absence of any one or more factors will not be determinative."

The Court notes that, despite the similarity between the program integrity requirements in *Rust* and the LSC's final regulations, the *Rust* regulations placed further restrictions on federally-funded family planning projects which have no counterpart in the LSC regulations. First, the *Rust* regulations limited the content of a doctor's advice to the project's client; specifically, Title X doctors were forbidden from advising women regarding abortion. *Rust*, 500 U.S. at 179, 111 S. Ct. at 1764 (citing 42 C.F.R. § 59.8(a)(1) (1989)). Second, doctors were absolutely prohibited from referring clients to a project which performed abortions, which included any affiliate of the project. *Id.* at 179-80, 111 S. Ct. at 1764-65 (citing 42 C.F.R. § 59.8(a)(2)). And third, doctors were banned from even explaining to the patient that the content of the advice given was being

curtailed by an administrative rule. *Id.* at 180, 111 S. Ct. at 1765 (citing 42 C.F.R. § 59.8(b)(5)).

Notably, although the LSC chose to incorporate the program integrity requirements from *Rust* into the final regulations, it did not carry over from *Rust* any specific restrictions on: (1) counseling the client; (2) referring the client to another group, such as the recipient's affiliate; and (3) explaining to the client that it cannot perform the prohibited activity because it is barred by LSC regulation. Since the Act itself does not state whether the prohibited activities, most of which are actions taken outside of the recipient's office, are intended to encompass legal advice, referral to affiliates, and explanation about the Act, the Court interprets the LSC's decision not to carry over these additional restrictions from the *Rust* regulations as an implicit approval of these three activities. Counsel for the LSC recognized this interpretation as the LSC's position in a letter to the Court:

> [In contrast to *Rust*], the statutory restrictions at issue here (as implemented by LSC's regulations) do not prevent LSC-subsidized lawyers from fully advising their clients of their legal rights and practical options; indeed, the restrictions do not inhibit lawyers' *speech* to their clients at all. For example, an LSC lawyer is free to advise potential clients that their case is best suited for class action treatment, or that they may have a claim that a welfare law is unconstitutional. The lawyer is also permitted to advise potential clients that while the LSC-funded entity cannot take the case, the lawyer knows of other attorneys who can. Therefore, unlike

> the women in *Rust*, who received "skewed" information, the clients of LSC- subsidized lawyers receive complete information.

Letter to the Court from Alan Levine, dated March 31, 1997 at 2.

III. ***LASH II***

Following the issuance of the final program integrity requirements, the LSC moved for summary judgment in the Hawaii court, contending that the final revisions made by the LSC brought the regulations into complete conformity with the *Rust* program integrity requirements, thereby compelling a determination that the final program integrity requirements were no more burdensome on plaintiffs' constitutional rights than those at issue in *Rust*. The Hawaii court agreed. In an Order dated August 1, 1997, the court dissolved the previously entered preliminary injunction as moot, and granted LSC's motion. *Legal Aid Society of Hawaii, et al. v. Legal Servs. Corp.*, 981 F. Supp. 1288 (D. Haw. 1997) ("*LASH II*").

The *LASH II* court began its analysis by noting that the LSC regulations on interrelated organizations had been substantially modified by the interim and final regulations, and that the issue in the case had therefore been reduced to the following:

> [D]oes a legal aid organization's ability to control a separate legal organization with separate personnel and facilities provide an alternative channel for the exercise of the first legal aid organization's constitutional rights as required by the unconstitutional conditions doctrine.

Id. at 1292. The *LASH II* court summarized its First Amendment holding by emphasizing that the ability of recipients to exercise control over affiliates constituted an adequate alternative channel for exercising their First Amendment rights:

> The Court reads the new regulations as allowing a LSC funded organization to control another organization that engages in restricted activities so long as all the insularity and separate incorporation requirements of the regulations are satisfied. With this ability to control the separately incorporated and insular second organization, the Court finds that alternative channels exist for LSC-funded organizations to exercise their constitutionally protected rights such as lobbying the legislature. Thus, the LSC-funded legal aid societies will be able to control affiliates who care for the needs of the poor in areas from which the regulations restrict the societies.

LASH II at 1289.

In reaching this conclusion, the court rejected a number of arguments advanced by the plaintiffs in their effort to distinguish *Rust*. First, in respect to the insularity requirements, the court rejected plaintiffs' contention that *Rust* only upheld requirements beyond mere bookkeeping separation because it is more difficult for doctors than lawyers to account for their time. The court held that "[i]t is no more difficult for a doctor to categorize his conversation with a patient than it is for a lawyer to do so with his client." *Id.* at 1292.

The court then summarily rejected the argument that *Rust* was distinguishable because the Act was not intended to convey a Government message, stating that

"Congress does not control the analysis and advice of either a Title X doctor or a LSC lawyer except for prohibiting advice in certain areas such as abortion." *Id.* at 1292. The court then considered the claim that since litigation, unlike communication in a doctor's office, is a traditional sphere of expression, *Rust* cannot control. The court noted that, even assuming litigation was a traditional sphere of expression, restrictions on those forms of expression are not *per se* unconstitutional; rather, such expression is subject to First Amendment vagueness and overbreadth doctrines. The court did not address the issues of overbreadth or vagueness since it determined that plaintiffs "have not alleged that the restrictions are vague or overbroad." *Id.*

The *LASH II* court then noted that the final program integrity requirements were more restrictive than the *Rust* regulations insofar as the affiliate of LSC recipients had to be separately incorporated. This difference, the court determined, was insubstantial in light of the approbation given to such a requirement by the Supreme Court in *Regan v. Taxation with Representation*, 461 U.S. 540, 544 n. 6, 103 S. Ct. 1997, 2000 n. 6, 76 L.Ed.2d 129 (1983) (noting that such a requirement is not "unduly burdensome"). The court thus concluded that "[t]he requirement of separate incorporation does not in any significant way add to Plaintiffs' burdens." 981 F. Supp. at 1296.

Finally, the *LASH II* court dismissed plaintiffs' due process and equal protection arguments. The due process claims were rejected primarily on the ground that, as dictated by *Rust*, "Congress' refusal to fund the restricted activities here leaves the indigent clients

with the same choices they would have had absent the creation of the LSC." *Id.* at 1298. The court therefore concluded that "the regulations cannot be deemed to 'impermissibly burden' whatever Due Process rights the client may have." *Id.* The court also emphasized that the "ample alternative channels" provided by the regulations significantly diminished the impact of the restrictions on indigent clients. *Id.* at 1300. Turning to the equal protection claims, the *LASH II* court rejected these contentions for two reasons. First, since poverty is not a suspect classification, any discrimination against the poor need only have a rational basis to survive an equal protection challenge. The court had no trouble finding that the regulations passed the rational basis level of scrutiny. *Id.* And second, the court dispelled the notion that the equal protection clause was violated because of "discriminatory distribution of fundamental rights," noting the "long line of cases holding that the government need not fund the exercise of a fundamental right." *Id.* (citing *Harris v. McRae*, 448 U.S. 297, 315, 100 S.Ct. 2671, 2687, 65 L.Ed.2d 784 (1980)).

ISSUES CURRENTLY BEFORE THE COURT

Although there have been no submissions by the parties addressing *LASH II*, based upon prior submissions to the Court plaintiffs presumably would not concur in *LASH II*'s approbation of the final regulations, except in respect to the separate incorporation requirement, which they do not contest. Plaintiffs' contentions embrace the arguments made by the plaintiffs in *LASH II*, but are in a number of respects more expansive. As best the Court can glean from the memoranda of law, oral argument, and a number of

post-Hearing letters submitted both before and after the adoption of the final regulations, the following issues are fairly presented to the Court in the context of plaintiffs' preliminary injunction application: (1) can the LSC lawfully adopt regulations to guard against the appearance that the Government endorses the prohibited activities; (2) if so, are the regulations enacted by the LSC, specifically the "separate personnel" and "degree of separate facilities" program integrity requirements, properly drawn to address that interest considering the differences, such as they are, between the Title X proscriptions in *Rust* and the impact in this case on the legal profession and the attorney-client relationship; and (3) do any of the restrictions or regulations violate the Due Process or Equal Protection clause of the Fifth Amendment?

DISCUSSION

I. Preliminary Injunction Standard

Generally, in order to obtain preliminary injunctive relief, a plaintiff must show "a threat of irreparable injury and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the claims to make them a fair ground of litigation, and a balance of hardships tipping decidedly in favor of the moving party." *Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997). However, when a plaintiff seeks to enjoin "'governmental action taken in the public interest pursuant to a statutory or regulatory scheme,'" plaintiffs must meet the stricter "probability of success" standard. *Id.* (quoting *Plaza Health Lab., Inc. v. Perales*, 878 F.2d 577, 580 (2d

Cir. 1989)); *see also Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996) (When seeking to enjoin such governmental action, plaintiffs "cannot resort to the 'fair ground for litigation' standard."). Plaintiffs recognize that, since they seek to enjoin the LSC's enforcement of regulations issued pursuant to a statutory scheme, they must demonstrate a probability of success on the merits. Memorandum of Law in Support of Motion For Preliminary Injunction at 6.

Since the parties all appropriately agree that the final regulations implicate plaintiffs' First Amendment rights, the key inquiry is whether they go so far as to actually violate those rights. The Court recognizes that, if plaintiffs' First Amendment rights are violated, then they almost certainly have established irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitute irreparable injury.").

II. Permissibility of the Final Regulations

All parties agree that as a consequence of enactment of the subject regulations after the commencement of plaintiffs' lawsuit challenging the constitutionality of the Act, the focus of this litigation has essentially shifted. Indeed, plaintiffs acknowledge that the Court's principal inquiry is to now determine whether the regulations constitutionally "provide a meaningful opportunity for LSC recipients to engage in restricted activities using non-LSC funds." Plaintiffs' Reply Memorandum at 2. However, before turning to the constitutionality of the Act as implemented by the final regulations, the Court must determine the threshold

issue of whether those regulations constitute a *permissible* construction of the Act by the LSC. *See Rust*, 500 U.S. at 183-87, 111 S. Ct. at 1766-68. This requires an analysis of whether the final regulations are consistent with the Act's language and congressional intent. *Id.*

Plaintiffs contend that the program integrity requirements are not a permissible construction of the Act because they require more than "maintain [ing] accurate time and expense records distinguishing restricted from unrestricted activities . . . so that LSC could verify that federal funds were not spent on restricted activities." Plaintiffs' Supplemental Memorandum of Law at 6. From the plaintiffs' perspective, the only permissible regulation the LSC can implement to ensure separation between the recipient and affiliate is the imposition of such "bookkeeping" requirements.

The Court's permissibility analysis is guided by the broad-based principle of administrative law that when reviewing an agency's construction of a statute which does not "directly [speak] to the precise question at issue," the court must bear in mind that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S. Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). Moreover, "[i]n determining whether a construction is permissible, '[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.'" *Rust*, 500 U.S. at 184, 111 S. Ct. at 1767 (quoting *Chevron*, 467 U.S. at 843 n. 11, 104 S. Ct. at

2781 n. 11). Furthermore, the Court notes that the United States Court of Appeals for the District of Columbia Circuit has held that LSC regulations are entitled to full *Chevron* deference. *See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 689-90 (D.C. Cir. 1991) ("We conclude that the basic principles of *Chevron* apply to the statutory scheme created by the Act and the role contemplated for LSC under it.").

Chevron's canon of deference to agency interpretations is applicable to this case because nothing in the Act speaks to the precise question of how, or even whether, program integrity requirements can be maintained. *See Rust*, 500 U.S. at 184, 111 S. Ct. at 1767 (the statute "does not speak directly to the issue[] of . . . program integrity"). The Act gives no indication as to the steps a recipient must take to separate its LSC-authorized activity from its engagement in prohibited activity funded by non-LSC sources. The Court therefore turns to the question of whether the LSC's interpretation of the Act is consistent with the Act's language and underlying intent.

The Court rejects plaintiffs' proposed construction of the Act because it would undermine the Act's attempt to achieve a significant measure of separation between recipients and the prohibited activities. The Government interest underlying the Act is broader than just preventing the subsidization of prohibited activities with federal funds—indeed, if that were the case, there would be no need to restrict the use of *non*-LSC funds at all. Rather, the Act reveals an additional interest—preventing the *appearance* of Government endorsement of the prohibited activities.

Congress' intent to prevent the appearance of endorsement through passage of the Act is supported by two facts. First, the difference between the wording of the Act and its predecessors reflects Congress' intent to move beyond recipients' prior practice of using nothing more than accounting procedures to document compliance with the statutory proscriptions on using federal funds for prohibited activities. Specifically, the pre-Act statutory language focused on the subsidization interest by providing that "[n]o funds made available by [LSC] may be used" for any of the prohibited activities, 42 U.S.C. § 2996f(b), whereas the Act states that "[n]one of the funds appropriated [by the LSC] may be used to provide financial assistance to any [recipient]" that engages in any of the prohibited activities. Act § 504(a). This broader language evinces an intent to distance recipients of any LSC funds from all of the prohibited activities rather than merely tracing the path of federal funds.

The second indication of this intent is contained in the Senate Report which accompanied the Act when it was reported out of the Committee on Labor and Human Resources:

> [The Act] also bans LSC attorneys from using nonfederal funds for any purpose prohibited by the LSC Act, as amended. There are two important justifications for this restriction. First, many legal services grantees currently receive funds from both public and private sources. Since the money is basically fungible, it would be difficult if not impossible to place restrictions only on the Federal funds. Second, the public cannot differentiate be-

> tween LSC advocacy subsidized with public versus private funds. As a result, the public grows weary of watching LSC attorneys lobby legislators—even if that dismay might sometimes be misplaced.

S. Rep. No. 104-392, at 6 (1996). That the LSC shares this view of the Government interests at stake is confirmed by the preamble to the interim regulations:

> [The program integrity requirements] are necessary to ensure that there is no identification of the recipient with restricted activities and that the [affiliate] is not a sham or paper organization and is not so closely identified with the recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities.

62 Fed. Reg. 12101, 12102. Under the plaintiffs' interpretation, the Act would have no practical impact on the day-to-day operations of recipient organizations. Recipient organizations could simply continue to use non-LSC funds for prohibited activities, label such as the actions of their "affiliate," and keep accounting records to document this nominal separation. Surely Congress did not intend such a meaningless change in the law.

Applying *Chevron* deference to the LSC's interpretation of the Act, the Court concludes that the final regulations are consistent with the Act's language and intent, and therefore constitute a permissible construction of the Act. The Court rejects plaintiffs' counter-interpretation as contrary to congressional intent to achieve both a monetary and clearly identifiable separation between recipients and affiliates.

It is also apparent that Congress may always lawfully decide to disassociate itself from the appearance of endorsement of activities it chooses not to subsidize. Thus, in *League of Women Voters*, the Supreme Court noted that "the Government certainly has a substantial interest in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster's editorials reflect the official view of the government." 468 U.S. at 395, 104 S. Ct. at 3125. Similarly, the Court in *Rust* implicitly gave its approbation to the Government's contention that program integrity requirements "are necessary to assure that Title X grantees . . . avoid creating the appearance that the Government is supporting abortion-related activities." 500 U.S. at 188, 111 S. Ct. at 1769.

III. Constitutionality of the Act as Implemented by the Final Regulations

Plaintiffs contend that the program integrity requirements are not appropriately tailored to the Government's interest in avoiding the appearance of endorsement. They argue, specifically, that the insularity requirements—separate personnel and degree of separate facilities—while embraced by the Court in *Rust*, have no warrant in the context of the lawyer-client relationships and the nature of the prohibited activities in this case. They distinguish *Rust* as follows:

> The Title X regulations applied to a doctor counseling a patient alone in the doctor's office and the prohibition to be effectuated by those regulations was preventing the doctor from counseling abortion, when funded by the Government. In that context, considerations of separate personnel and separation

> of facilities, and signs and other forms of identification were relevant to making sure that the patient understood that when she was receiving abortion counseling at the same family planning clinic, it was not supported by federal funds.

Letter to the Court from Peter M. Fishbein, dated June 5, 1997.

By contrast, plaintiffs contend that the restricted activities here at issue "are actions to be taken outside the office," namely "in courts, administrative agencies or legislative bodies," and that the appearance that these activities are being carried out with LSC funds can be obviated "simply by requiring that the papers filed or the advocate making the presentation clearly identify that the activity is being carried out by the entity that is not funded by LSC." *Id.*

In addition, plaintiffs attack the final regulations as "vague and unworkable" because "arrangements will be assessed 'on a case-by-case basis' and determinations 'will be based on the totality of the facts.'" Letter to the Court from E. Joshua Rosenkranz, dated May 27, 1997. Accordingly, plaintiffs conclude that the "LSC has created a standardless world in which the only rational judgment a Legal Services program could possibly make is not to enter into an affiliate relationship or, once it did, not tinker with it." They contend that the "LSC can easily draft regulations that provide more guidance to recipients of LSC funds." *Id.*

Plaintiffs' arguments cannot carry the day for a number of reasons. Initially, when dealing with an interest that is viewpoint neutral and not aimed at

suppressing vital, fundamental constitutional rights, the Government need only show "a 'fit' between the legislature's ends and the means chosen to accomplish these ends . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632, 115 S. Ct. 2371, 2379, 132 L.Ed.2d 541 (1995) (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 3034, 106 L.Ed.2d 388 (1989)); *see also Rust*, 500 U.S. at 195 n. 4, 111 S. Ct. at 1773 n. 4; *City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804-05, 104 S. Ct. 2118, 2128-29, 80 L.Ed.2d 772 (1984); *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1678, 20 L.Ed.2d 672 (1968). This would appear to be the proper standard to apply when evaluating whether regulations are properly drawn to protect the Government's interest in avoiding the perception of endorsement of programs which it does not subsidize.

Moreover, in order to sustain their facial challenge to the final regulations' program integrity requirements, plaintiffs "must demonstrate that the challenged law either 'could never be applied in a valid manner' or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.'" *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11, 108 S. Ct. 2225, 2232, 101 L.Ed.2d 1 (1988) (quoting *Taxpayers for Vincent*, 466 U.S. at 798, 104 S. Ct. at 2124); *see also Sanitation and Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 992 (2d Cir. 1997); *Rust*, 500 U.S. at 183, 111 S. Ct. at 1766 ("A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the

challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.") (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L.Ed.2d 697 (1987)).

The Court does not find persuasive plaintiffs' contention that the "separate personnel" and "degree of separate facilities" requirements, each of which are limited to the office environment, are irrelevant to the Government's asserted interest in preventing the appearance of endorsement because the prohibited activities all take place in a courtroom or other forum outside of recipients' offices and that, in any event, a mere disclaimer would be sufficient. Contrary to plaintiffs' assertion, many integral aspects of engaging in prohibited activities take place in the recipients' office, such as: taking depositions, drafting pleadings, and preparing witnesses for trial. It simply cannot be said that potential clients, opposing attorneys, and other visitors to the recipient's office would not be exposed and vulnerable to the perception, absent separate personnel and facilities, that the Government supports the prohibited activities. Furthermore, the suggestion by plaintiffs that a mere disclaimer on documents submitted to courts and legislatures is sufficient to prevent the appearance of endorsement does not square with reality. Although judges and law clerks, as well as legislators and their aides, might notice the disclaimer, it is unlikely that the media would report the disclaimer to the public. Moreover, even if the disclaimer was announced at the commencement of or intermittently during a judicial or legislative pro-

ceeding, there is simply no reasonable assurance that members of the public attending various stages of the proceeding would be privy to the announcement.

Plaintiffs' contention that the regulations which direct the LSC to make determinations of program integrity on a case-by-case basis and not to place determinative weight on any one factor render them "vague and unworkable" fails as well, especially in light of *Rust*. Indeed, this contention runs directly contrary to the argument plaintiffs made in their reply memorandum, which criticized the interim regulations for imposing a rigid "*per se* test" rather than adopting from *Rust* a flexible test where no one factor would be determinative. Plaintiffs' Reply Memorandum at 10. Now that the LSC has revised its regulations to incorporate the same degree of flexibility as the *Rust* regulations, plaintiffs protest that the regulations are unworkable. Plaintiffs' abrupt about-face undermines the integrity of their reconstituted position. In any event, the *Rust* Court specifically noted, and gave its implicit approval to, the fact that the program integrity factors were "nonexclusive" and were to be applied through "case-by-case" determinations. 500 U.S. at 181, 111 S. Ct. at 1766. Nor are the program integrity requirements "void for vagueness." The separation factors give fair warning to recipients of the standards by which their program integrity compliance certifications will be evaluated. *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L.Ed.2d 222 (1972); *cf. Finley v. National Endowment for the Arts*, 100 F.3d 671, 681 (9th Cir. 1996) (striking down as unconstitutionally vague funding criteria requiring that art works show "decency and respect for the diverse beliefs and values of the American public"),

cert. granted,—- U.S. ——, 118 S. Ct. 554, 139 L.Ed.2d 396 (1997). They are "sufficiently clear that the speculative danger of arbitrary enforcement does not render [them] void for vagueness." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503, 102 S. Ct. 1186, 1195, 71 L.Ed.2d 362 (1982).

In respect to the recipients' program integrity compliance certifications, 45 C.F.R. § 1610.8(b), the LSC presumably will attach significant credence and presumptive validity to such certifications by recipient organizations, which are in the main staffed and/or supervised by members of the bar. This will undoubtedly minimize the prospects of "as applied" litigation challenges. The Court therefore determines that the "case-by-case basis" and "no one factor is determinative" language, in conjunction with the separation factors, are appropriately tailored to advance the Government's interest in preventing the appearance of endorsement, and accordingly do not render the regulations facially invalid.

Nor, in a similar vein, can the regulations be considered unconstitutionally overbroad. The Second Circuit has recently emphasized that overbreadth challenges are to be accepted "sparingly and only as a last resort," *Sanitation and Recycling Indus., Inc.*, 107 F.3d at 997 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916, 37 L.Ed.2d 830 (1973)), and that such a challenge "may prevail only if plaintiffs can show that an impermissible risk is created that ideas may be chilled whenever" the law is applied. 107 F.3d at 997. Further, "invalidation of a statute on its face is permitted 'only if the overbreadth is substantial.'" *Lebron v. National R.R. Passenger Corp.*, 69

F.3d 650, 660 (2d Cir. 1995) (quoting *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S. Ct. 2568, 2571, 96 L.Ed.2d 500 (1987)); *see also Dorman v. Satti*, 862 F.2d 432, 436 (2d Cir. 1988) ("An act's overbreadth 'must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'") (quoting *Broadrick*, 413 U.S. at 615, 93 S. Ct. at 2917). This Court has not hesitated to invoke the overbreadth doctrine in the face of a facial constitutional challenge whenever a challenged regulation "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise" of protected constitutional rights. *See Scott v. Goodman*, 961 F. Supp. 424, 427 (E.D.N.Y. 1997) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 741, 84 L.Ed. 1093 (1940)). Such, however, is plainly not the present case since neither the Act nor the regulations can plausibly be perceived as having such a preclusive effect upon the exercise of the plaintiffs' or third parties' First Amendment rights.

Having determined that the program integrity requirements are appropriately tailored to advance the Government's legitimate interest in preventing the appearance of endorsement and that they are not overbroad, the Court now turns its attention to plaintiffs' overarching argument that "the affiliate rules in *Rust* do not provide the benchmark where, as here, the restrictions strike at the heart of activities that are laden with First Amendment value." Letter to the Court from E. Joshua Rosenkranz, dated May 27, 1997 (quoting Plaintiffs' Reply Memorandum at 2).

There is no quarrel amongst the parties, nor could there be, that when the Government imposes upon the time-honored functions of the lawyer and, in particular, the lawyer-client relationship, it treads deeply in waters bound up in First Amendment sensibilities. As the Court in *LASH I* correctly assessed, the restrictions embodied by the Act impact, under the umbrella of the First Amendment, a broad range of rights affecting the pursuit and vindication of legal interests, including the right to lobby legislators and administrators, access to the courts, and even the confidential nature of the relationship between lawyers and prospective clients. *LASH I*, 961 F. Supp. at 1408-09. Because of the spate of new restrictions which Congress has now added to its prior restrictions upon LSC recipients, and the broad range of First Amendment rights arguably impacted by these restrictions, plaintiffs contend that *Rust* is not an appropriate analogue since the limited and narrowly drawn abortion counseling constraints did not significantly, if at all, impinge on the doctor-patient relationship. By contrast, plaintiffs assert that the profundity of the lawyering restrictions here at issue do indeed affect the fundamental nature of lawyering and the attorney-client relationship.

The Court in *Rust* recognized that there are certain traditional spheres of free expression "so fundamental to the functioning of our society" that the Government's ability to restrict basic First Amendment rights within that sphere by attaching conditions to the expenditure of Government funds "is restricted by the vagueness and overbreadth doctrines of the First Amendment," meaning in that context that the restriction, if justified at all, must be especially precise. *Rust*, 500 U.S. at 200,

111 S. Ct. at 1776 (citing *Keyishian v. Board of Regents, State Univ. of N.Y.*, 385 U.S. 589, 603, 605-06, 87 S. Ct. 675, 683, 684-85, 17 L.Ed.2d 629 (1967)) ("We emphasize once again that '(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,'" 385 U.S. at 603, 87 S. Ct. at 683, quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L.Ed.2d 405 (1963)). The *Rust* Court surmised by analogy that it could be argued "that traditional relationships such as that between doctor and patient should enjoy [special] protection under the First Amendment from Government regulation, even when subsidized by the Government." *Id.* The lawyer-client relationship obviously is at least on equal First Amendment footing with the doctor-patient relationship, and given the panoply of the constitutional rights of association and speech adhering to the attorney-client relationship, one could conceivably argue that the First Amendment is even more caught up in the lawyer-client relationship than the doctor-patient relationship.

The Court in *Rust*, however, did not deem it necessary to explore the nature of the doctor-patient relationship since it was of the opinion that the Title X program regulations did not "significantly impinge" upon that relationship because "[n]othing in them requires a doctor to represent as his own any opinion that he does not in fact hold." *Id.* In that respect, the Court attached significance to the fact that the regulations did not preclude the doctor from advising the patient that "advice regarding abortion is simply beyond the scope of the program." It concluded, therefore, that "[i]n these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force." *Id.*

While the Court obviously has reverence for the majesty of the law, the restrictions pertaining to LSC recipients do not significantly impinge on the lawyer-client relationship, especially when contrasted with Title X's proactive aspects. Indeed, they simply proscribe the activities in which LSC recipients may engage.[15] Moreover, the extent of the activities which LSC recipients are prohibited from engaging in cannot enter into the constitutional mix since it is bedrock law that Congress need not fund the exercise of constitutional rights, regardless of their magnitude. *See Lyng v. International Union, United Auto., Aerospace and Agric. Implement Workers*, 485 U.S. 360, 368, 108 S. Ct. 1184, 1190, 99 L.Ed.2d 380 (1988) ("We have held in several contexts [including the First Amendment] that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.") (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 549, 103 S. Ct. 1997, 2002, 76 L.Ed.2d 129 (1983)). It matters not, therefore, whether one or more activities are proscribed since the numerosity of

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[15] For this reason, the Court also rejects plaintiffs' contention that *Rust* is distinguishable because here recipients are not acting as Government "mouthpieces." Tr. at 46-47. As the Supreme Court recently clarified in *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829-30, 115 S. Ct. 2510, 2516-17, 132 L.Ed.2d 700 (1995), the "government as speaker" analysis is only implicated when the Government engages in viewpoint, rather than content, discrimination. Congress can constitutionally define the scope of its funding programs by excluding subject matter regardless of whether it is attempting to convey a particular message. *Cf. Rosenberger*, 515 U.S. at 831, 115 S. Ct. at 2517 ("By the very terms of the [regulation], the [government] does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.").

prohibited activities is not correlated to constitutional concerns. Furthermore, in contrast to the limited nature of doctor-patient counseling provided for in *Rust*, the regulations, as interpreted by LSC's counsel, broadly promote the lawyer-client relationship by providing that the lawyer may counsel the client, refer the client to another attorney, and explain to the client that LSC restrictions preclude the lawyer from engaging in the activity the client may wish to undertake. The Court will take the LSC at its word and will take a critical view, as other courts should as well, of any restrictions on such basic lawyering, in addition to any unreasonable rejections of recipients' certificates of compliance with the program integrity requirements, if such issues should arise in any future "as applied" litigation.

In respect to plaintiffs' rather casual due process and equal protection claims, their due process argument fails for the same reasons the analogous claim failed in *Rust*—namely, because plaintiffs are not absolutely precluded from engaging in prohibited activities and, furthermore, have no constitutional entitlement to the benefits provided by the legal services program. 500 U.S. at 201-02, 111 S. Ct. at 1776-77. The Court rejects plaintiffs' equal protection argument since, as explained throughout this decision, the Government had a rational basis for restricting the activities of recipients, and because poverty is not a suspect classification. *See LASH II*, 981 F. Supp. at 1300; *see also Maher v. Roe*, 432 U.S. 464, 471, 97 S. Ct. 2376, 2380, 53 L.Ed.2d 484 (1977) ("this Court has never held that financial need alone identifies a suspect class for purposes of equal protection" analysis).

CONCLUDING COMMENTS

This is not the same case that first came to the Court. It was entirely plausible for plaintiffs to initially challenge the constitutionality of the laundry list of prohibited activities wrought by the Act. Regardless of whether the Court would have agreed with all or any part of its sister court's constitutional conclusions in *LASH I*, this litigation, as plaintiffs have acknowledged, took on vastly different contours once the LSC responded to the compelling concerns raised in *LASH I* by enacting the interim regulations, and further responded in its final regulations to the plaintiffs' concerns regarding the interim regulations and to the Court's entreaties during the course of the litigation. In many ways, the litigation stands as a testament to the continued vibrancy and vitality of the very First Amendment rights at the heart of this lawsuit—access to the courts, free and open public debate, and freedom to associate for the vindication of legal rights. It also reflects the value of advocacy in the judicial setting by protagonists acting at the highest level of the legal profession. In that regard, plaintiffs are commended for bringing and furthering this litigation; defendants are commended for appropriately addressing plaintiffs' concerns.

CONCLUSION

Plaintiffs have failed to establish a probability of success on the merits of their facial constitutional challenge, and their preliminary injunction motion is therefore denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-6006

CARMEN VELAZQUEZ, ET AL, PLAINTIFFS-APPELLANTS

v.

LEGAL SERVICES CORPORATION,
DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, INTERVENOR-APPELLEE

Filed: July 8, 1999

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees Legal Services Corporation, Intervenor-Appellee United States of America and the appellants Carmen Velazquez et al.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that a request for an en banc vote having been made by a judge of the panel that heard the appeal, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof, rehearing in banc is DENIED.

FOR THE COURT:
KAREN GREVE MILTON, Acting Clerk

By: RALPH A. ANDERSON
RALPH A. ANDERSON, Deputy Clerk
Acting Operations Manager