

05-0340-cv

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiff-Appellee-Cross-Appellants,

COMMUNITY SERVICE SOCIETY OF NEW YORK, INC., PEGGY EASTMAN,
LAUREN SHAPIRO, on behalf of each, and on behalf of all similarly situated
individuals, namely, attorneys employed or formerly employed by entities receiving funds
from the Legal Services Corporation who with to be free to represent indigent,
ANDREW J. CONNICK, NEW YORK FOUNDATION,

Plaintiff-Cross-Appellants

(Caption continued on inside front cover)

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

**REPLY/CROSS-APPELLEE'S BRIEF FOR
INTERVENOR-APPELLANT UNITED STATES OF AMERICA**

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Plaintiffs,

v.

LEGAL SERVICES CORPORATION,

Defendant-Appellant-Cross-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellant-Cross-Appellee.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

BROOKLYN LEGAL SERVICES CORP., INC., ET AL.,

Plaintiffs-Appellees,

v.

LEGAL SERVICES CORPORATION,

Defendant-Appellant,

and

UNITED STATES OF AMERICA,

Intervenor-Appellant.

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

REPLY/CROSS-APPELLEE'S BRIEF FOR
INTERVENOR-APPELLANT UNITED STATES OF AMERICA

INTRODUCTION AND SUMMARY OF ARGUMENT

1. In our opening brief, we demonstrate that the district court's decision enjoining operation of the Program Integrity Regulation essentially renders the

Regulation meaningless. Under the district court's ruling, the substantive restrictions established by Congress exist on paper only; they can be evaded with minimal effort through the normal timekeeping and billing processes used by a typical law firm.

Plaintiffs' brief confirms this fact. They now acknowledge that, if the injunction stands, the restrictions that they have strenuously challenged for years no longer concern them. In fact, they state (Pl. Br. 76-77) that the substantive restrictions imposed by Congress, even as they apply to the use of LSC funds directly, no longer cause them any injury whatsoever. In doing so, plaintiffs aptly illustrate why their contention that the government has no interest in enforcing the Program Integrity Regulation is wrong. If the substantive LSC reforms Congress enacted are to have any real effect, the program integrity requirements must be upheld.

a. Plaintiffs' contention that the Program Integrity Regulation discriminates against secular speech because it contains more stringent separation requirements than various charitable choice provisions is incorrect. Charitable choice provisions do not, as plaintiffs assert, provide favorable treatment for religious entities or religious speech, but merely ensure that religious organizations are not denied the opportunity to compete for government contracts or grants. These provisions do not affect or alter the Program Integrity Regulation, which applies to all grant recipients regardless of their religious or secular character.

b. In contending that the Program Integrity Regulation places an “undue burden” on the exercise of their First Amendment rights, plaintiffs lose sight of the ultimate purpose of the test, namely, to determine whether the regulatory scheme leaves “adequate alternative channels” for the exercise of plaintiffs’ rights. Plaintiffs in fact make no effort to dispute the fact that they have the resources to create and control affiliate organizations consistent with the requirements of the Program Integrity Regulation. In arguing that the financial burden is too great, plaintiffs fail to articulate a theory explaining how one determines when the financial burden becomes “undue,” but instead suggest that any financial burden is unacceptable. And plaintiffs’ discussion of the “programmatic” and “administrative” burdens not only is based upon speculation, but shows only that plaintiffs do not believe an affiliate arrangement will be the most efficient way to operate. But the First Amendment requires only adequate alternative channels, not maximum efficiency.

Plaintiffs’ assertion that the government lacks a legitimate interest in enforcing the Program Integrity Regulation also is without merit. The government is entitled to define the limits of its program, and its interests in preventing indirect subsidization of restricted activities, ensuring that LSC grantees devote their energy and resources to providing the core legal services funded by the statute, and avoiding public confusion are important interests that are furthered by the regulation.

c. Plaintiffs' effort to resurrect their Tenth Amendment challenge to the regulations should be rejected. Not only do these private plaintiffs lack standing to bring a claim seeking to vindicate the sovereignty of state and local governments, but the claim is without merit in any event. The Tenth Amendment prohibits only federal laws that commandeer state government or require states to enact particular provisions. The Program Integrity Regulation does not require state or local government to do anything, nor does it prohibit them from funding all manner of legal services. It therefore does not violate the Tenth Amendment.

2. On their cross-appeal, plaintiffs seek to have all of the district court's rulings that did not go their way vacated for no other reason than that plaintiffs no longer wish to pursue those claims. Declaring themselves satisfied with the district court's injunction, plaintiffs declare that if the preliminary injunction is affirmed, the substantive restrictions they challenge no longer cause them "injury in fact" and are not ripe for review. Yet if these claims are true, the lack of standing or ripeness merely provides another basis for dismissal of their underlying claims, and does not provide a basis for granting plaintiffs the affirmative relief of vacating the district court's dismissal of their claims. Nor have plaintiffs' claims been mooted through "happenstance." Plaintiffs have simply decided that, if they successfully defend the

injunction, they no longer wish to pursue their cross-appeal. The proper remedy in that situation is not vacatur, but dismissal of plaintiffs' conditional cross-appeal.

In any event, the arguments plaintiffs present in support of their cross appeal are without merit and must be rejected. The class action and attorneys' fees provisions that plaintiffs challenge are procedural devices and not constitutional entitlements. Moreover, unlike the provision invalidated in *Velazquez III*, these two provisions are viewpoint-neutral and do not attempt to insulate laws from judicial inquiry or exclude particular arguments from litigation in particular cases. The solicitation provision also is viewpoint neutral and reasonable. It precludes accepting employment on the basis of unsolicited advice, regardless of the subject matter of the litigation or the position one would take in that litigation. The district court thus correctly dismissed plaintiffs' challenges to these three provisions.

ARGUMENT

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

A. The Program Integrity Regulation Does Not “Discriminate” Against Secular Speech.

Neither the LSC Act nor the Program Integrity regulation mention religion or religious activity – either to exempt such activity from any of their provisions or to provide different treatment for religious organizations. Rather, the Program Integrity

Regulation applies to all organizations that receive LSC funds, regardless of their identity and the nature of their advocacy. A program that awards benefits to both religious and secular organizations on an equal basis plainly is constitutional. *See Agostini v. Felton*, 521 U.S. 203, 225-26 (1997); *Tilton v. Richardson*, 403 U.S. 672, 676 (1971).

Plaintiffs nevertheless argue that the Program Integrity Regulation is facially unconstitutional because it treats secular speech less favorably than religious speech. They base this argument not on anything in the LSC Act or the regulation itself, but upon a series of statutes and an Executive Order that post-date the Program Integrity Regulation. Referred to collectively as “charitable choice” provisions (or as “the Faith Based Initiative”), these provisions provide that religious organizations be given an opportunity to participate on an equal basis in various federal programs, provided those organizations meet certain requirements designed to avoid government sponsorship of religion. *See, e.g.*, 42 U.S.C. § 604a(j); *id.* § 9920(c), (d); *id.* § 300x-65; Exec. Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002). Plaintiffs do not challenge the charitable choice statutes or the Executive Order directly. Rather, they contend that the existence of these provisions renders the Program Integrity Regulation unconstitutional, because the Program Integrity Regulation provides for greater separation between a grant recipient and its controlled affiliate.

Plaintiffs' facial challenge is without merit. First, to the extent plaintiffs' suggest (Pl. Br. 36) that charitable choice provisions give religious organizations *carte blanche* to ignore stricter requirements in specific government grant programs (including the LSC program), that is simply not the case. All of the charitable choice provisions operate merely to level the playing field for religious organizations seeking to participate in government grant programs, permitting those organizations to compete on equal terms with secular organizations. *See* 42 U.S.C. § 604a(b); *id.* § 9920(a); *id.* § 300xx-65(a), (b); E.O. 13279, ¶ 2(b). Charitable choice provisions do not, as plaintiffs assert, provide favorable treatment to religious entities or religious speech. Rather, they merely ensure that religious organizations will not be improperly denied the opportunity to compete for government contracts or grants.

Nothing in any of the charitable choice provisions cited by plaintiffs permits religious organizations to bypass the specific rules of any particular program (with the exception of ensuring that the organization not be forced to abandon its religious character). In fact, these provisions contemplate that religious organizations will comply with the same rules that govern the programs to which they apply. The charitable choice provisions themselves make that fact clear. *See, e.g.*, 42 U.S.C. § 604a(h)(1) (any religious organization contracting under the program “shall be subject to the same regulations as other contractors to account in accord with

generally accepted auditing principles for the use of such funds provided under such programs”); 42 U.S.C. § 9920(d)(1) (any religious organization providing assistance in drug rehabilitation “shall be subject to the same regulations as other nongovernmental organization to account in accord with generally accepted accounting principles for the use of such funds provided under such program”); 42 U.S.C. § 300x-65(g)(1). And the White House Office of Faith-Based and Community Initiatives explained, “[f]aith-based organizations that receive Federal funding are held to the same standards as all other providers of services. For example, they must comply with the accounting requirements that apply to other organizations, and they must demonstrate that their organization serves the purposes of the program.” SPA 216.

Charitable choice provisions therefore do not alter or affect the operation of the LSC program or the Program Integrity Regulation. All recipients of LSC funds – whether religious organizations or secular ones – must comply with the Program Integrity Regulation. If a religious organization wishes to provide legal services for the poor under the LSC program, it must comply with the Program Integrity Regulation in the same manner as the plaintiffs here.

Plaintiffs' challenge is based upon the premise that any effort to accommodate religion carries with it the duty to provide similar accommodation for all other types

of protected expression. That premise is incorrect. Religious accommodations “need not 'come packaged with benefits to secular entities.’” *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2124 (2005) (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 338 (1987)). “There is no requirement that legislative protections for fundamental rights march in lockstep.” *Ibid.* (quoting *Madison v. Riter*, 355 F.3d 310, 318 (4th Cir. 2003)), *cert. denied*, 125 S. Ct. 2536 (2005).

In *Cutter*, for instance, the Supreme Court rejected a court of appeals' decision suggesting that the Religious Land-Use and Institutionalized Persons Act (RLUIPA) violates the Establishment Clause by “giving greater protection to religious rights than to other constitutionally protected rights.” *Id.* at 2123-24. Holding that “[o]ur decision in *Amos* counsels otherwise,” the Supreme Court observed: “Were the Court of Appeals' view the correct reading of our decisions, all manner of religious accommodations would fail,” including “Congressional permission for members of the military to wear religious apparel * * *.” *Id.* at 2124. The Court also noted that such an argument would mean that a state could not provide prison inmates with chaplains but not publicists or political consultants, and could not allow prisoners to assemble for worship but not for political rallies. *Ibid.*

Plaintiffs' argument would create the same result found inappropriate in *Cutter*. If plaintiffs are correct, Congress cannot provide for religious accommodation allowing the participation in grant programs without applying exactly the same standards to all other forms of expression.

Plaintiffs attempt to distinguish *Cutter* by contending (Pl. Br. 39) that in this case Congress has accommodated religion while simultaneously imposing burdens on secular speech. Yet the scenarios discussed in *Cutter* do the same. Thus, military regulations apply strict rules on uniforms, thereby imposing “significant burdens” on non-religious expression. Yet the *Cutter* Court recognized that Congress could accommodate religious expression (the wearing of religious apparel while in uniform) without lifting all military dress requirements to allow for other forms of expression. 125 S. Ct. at 2124.

Plaintiffs also are incorrect in suggesting (Pl. Br. 37) that *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), stands for the proposition that all differential treatment of religious expression violates the Constitution. Rather, the plurality held that the government conveys a “message of endorsement” when it “directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that *either* burdens nonbeneficiaries markedly *or cannot reasonably be seen as removing significant state-imposed deterrent to the free exercise of religion * * **.”

Id. at 15 (emphasis supplied). The various charitable choice statutes, along with the Executive Order, do not “direct a subsidy” to religious groups, but merely an attempt to remove government-imposed barriers that had prevented religious organizations from competing on a “level playing field” for federal dollars. Nothing in the First Amendment requires Congress, in attempting to lift this barrier, to apply the same standards to every other form of expression.

Plaintiffs' argument is truly staggering in its breadth. Under plaintiffs' approach, every time Congress provides an accommodation of religious exercise, it must scour the Statutes at Large in search of unrelated programs, and provide equal accommodations for all other forms of expression. The First Amendment simply does not require such an exercise. Plaintiffs' facial challenge therefore must be rejected.

B. The District Court Erred In Holding That the Program Integrity Regulation Violates The First Amendment By Posing an “Undue Burden” On Plaintiffs' Ability To Engage In Restricted Activities Through Affiliate Organizations.

In *Velazquez I*, the district court observed that under plaintiffs' interpretation of the law, the LSC 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 actions as that of their ‘affiliate,’ and keep accounting records to document this nominal separation.” *Velazquez v. Legal*

Services Corp., 985 F. Supp. 323, 339 (E.D.N.Y. 1997). The district court has since conducted an about-face, issuing an injunction that renders the LSC restrictions essentially meaningless. As plaintiffs themselves freely acknowledge (Pl. Br. 76-77), the district court injunction means that the substantive restrictions in the LSC Act have no effect whatsoever on their day-to-day operations. They are substantive restrictions on paper only, with no real world consequences.

As we demonstrated in our opening brief (at 31-42), the district court's injunction cannot stand. Although the court purported to decide an "as applied" challenge to the Program Integrity Regulation, it applied an "undue burden" test that strikes down the bulk of the regulation regardless of the particular circumstances of any of the plaintiffs. Plaintiffs' discussion of the "burdens" they face in fact confirms this point. In their "clarified proposal," and now in their brief (at 48-56), plaintiffs treat three disparate legal services organizations – with vast differences in size and resources – as if they suffer exactly the same burden. While plaintiffs add a few details and occasionally discuss one organization as an "example" – as if its situation automatically applied to all of them – at bottom they seek simply to relitigate their facial challenge to the Program Integrity Regulation. But, as plaintiffs concede (Pl. Br. 46), the Regulation is virtually identical to the one that withstood a facial challenge in *Rust v. Sullivan*, 500 U.S. 173 (1991); see also *Legal Aid Society of*

Hawaii v. Legal Services Corp, 145 F.3d 1017, 1024-26 (9th Cir.), *cert. denied*, 525 U.S. 1015 (1998) (*LASH*).

There is little doubt that plaintiffs (like many legal services organizations) have the resources to maintain affiliates in compliance with the Program Integrity Regulation – indeed, they make no attempt to dispute that here. Plaintiffs simply do not wish to do so. Like the district court, however, plaintiffs' effort to demonstrate an “undue burden” loses sight of the central question – whether the regulation effectively prohibits the creation of adequate alternative channels of expression.

1. Plaintiffs make no effort to defend the district court's reliance upon cases governing direct restrictions on commerce, voting rights, and abortion to determine how the “undue burden” standard should apply. They nevertheless defend the district court's approach by contending (Pl. Br. 39-47) that the undue burden standard is “firmly grounded” in Supreme Court jurisprudence. Upon examination, however, this so-called “firm” grounding rests largely upon plaintiffs' effort to cobble together a series of concurring (and even dissenting) opinions. The only majority opinion plaintiffs cite merely states that a particular requirement (separate incorporation) is “not unduly burdensome” – without purporting to adopt an “undue burden” test or to offer guidance on what would amount to an undue burden. *Regan v. Taxation With Representation* (“*TWR*”), 461 U.S. 540, 545 n.6 (1983). A mere statement that a

particular restriction is not an undue burden cannot reasonably be read as establishing a standard that anything that goes beyond the restriction at issue constitutes an impermissible “undue burden.” And the fact that three justices joined a concurring opinion suggesting that further restrictions would raise constitutional problems, *id.* at 552-53 (Blackmun, J. concurring), does not affect the true import of the Court's unanimous decision in that case.

Plaintiffs also attempt to combine concurring and dissenting opinions in *United States v. American Library Ass'n*, 539 U.S. 194 (2003), in order to show that a majority of justices on the Supreme Court favor a standard requiring a comparison between the extent of the burden and the government's interests. *See* Pl. Br. 44-45. Yet *American Library Ass'n* did not even address the existence of adequate alternative channels of expression, because the Court held that the statute did not impose a substantial burden on First Amendment rights at all. Justice Kennedy's concurrence, upon which plaintiffs rely heavily (Pl. Br. 44), did not purport to discuss the existence of alternative channels of expression, but instead merely found that if the statute imposed a “significant burden” on First Amendment activity it would be subject to an as-applied challenge. *See id.* at 214-14 (Kennedy, J., concurring).

At bottom, however, plaintiffs' attempt to defend the undue burden standard misses a larger point. However one describes the applicable test, the fact remains that

its ultimate goal is to determine whether the regulatory scheme leaves “adequate alternative channels” for the exercise of plaintiffs' rights. As the Ninth Circuit held in conjunction with the exact same regulation at issue here, the “proper constitutional test” focuses on “whether the regulations 'effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program.’” *LASH II*, 145 F.3d at 1026 (quoting *Rust*, 500 U.S. at 197 (1991)).

Thus, to the extent the “burden” imposed by the Program Integrity Regulation is relevant, it must be analyzed to determine whether the regulation “effectively prohibits” the creation of adequate alternative channels to engage in restricted activity. That is what the district court failed to do. And plaintiffs, despite asking this Court to create a conflict in the circuits on this issue, simply ignore the Ninth Circuit's decision in *LASH*.

Nor are plaintiffs correct in suggesting (Pl. Br. 47) that this Court in *Velazquez II* endorsed the district court's approach to establishing an “undue burden.” The Court merely left open the possibility that, “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.” *Velazquez v. Legal Services Corporation*, 164 F.3d 757, 767 (2d Cir. 1999). But far

from endorsing an “undue burden” test independent of the central inquiry whether the program effectively prohibits alternate channels of expression, the Court went on to caution: “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.” *Ibid.*

The latter observation serves as an important reminder of the nature of the inquiry. However one characterizes the appropriate test, an LSC grantee who has sufficient funding to provide the full range of restricted activity through an affiliate has not been “effectively prohibited” from engaging in protected expression.

2. In discussing the “burdens” associated with the Program Integrity Regulation (Pl. Br. 48-56), plaintiffs make no effort to dispute the fact that they have the resources to create and control affiliate organizations that meet the physical and financial separation requirements of the Program Integrity Regulation. Thus, plaintiffs base their entire discussion upon the incorrect premise that merely because creation of a physically separate affiliate will not be the most efficient method of delivering legal services, the regulation creates an impermissible “undue burden” on the exercise of their First Amendment rights.

a. Although plaintiffs discuss the costs of maintaining physical and financial separation under the Program Integrity Regulation, at no point do they attempt to

articulate a theory explaining how one determines when the financial burden become “undue.” Indeed, plaintiffs’ apparently believe that any financial burden is unacceptable, since “[e]very wasted dollar means an unmet legal need.” Pl. Br. 49. But the courts have uniformly rejected the notion that the First Amendment requires that alternative channels are not “adequate” merely because they cost money or require effort. In *LASH*, for instance, the court of appeals acknowledged that “[p]resumably, the restrictions make it more difficult to engage in prohibited activities,” but noted that “the fact that the LSC restrictions may require additional compliance efforts” was insufficient to warrant their invalidation. 165 F.3d at 1027; *see also Regan*, 461 U.S. at 550.

Under plaintiffs' approach, no amount of outside resources will be enough to permit creation of an affiliate. Plaintiffs therefore would render meaningless this Court's previous understanding of the nature of an as-applied challenge to the Program Integrity Regulation, under which “[i]t appears likely that LSC grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty.” *Velazquez II*, 164 F.3d at 767.

b. Plaintiffs’ discussion of the “programmatic costs” associated with compliance (Pl. Br. 51-52) fares no better. First, plaintiffs incorrectly assume that

maintaining separate offices amounts to placing attorneys in “isolation” and “prevents communication between and among them.” But nothing in the Program Integrity Regulation prevents lawyers from communicating with each other, as long as an LSC-funded lawyer does not work on restricted matters. While it might be more “effective” to have a stable of both LSC and non-LSC lawyers available in the same location, the First Amendment does not compel it.

Moreover, plaintiffs’ example of a migrant worker who may be unable to follow up on a referral after being told to go to the affiliate’s separate office (Pl. Br. 52) is based purely upon speculation. Nothing in the Program Integrity Regulation prevents the affiliate’s separate office from being located in close proximity to the LSC grantee. Since Farmworker Legal Services hasn’t even attempted to establish a separate office, the spectre of the misdirected client is an insufficient basis upon which to conclude that it cannot establish an affiliate in accordance with the regulation.

c. While plaintiffs decry the “administrative difficulties” accompanying the creation of a physically separate affiliate (Pl. Br. 52-54), their discussion falls far short of making the required showing that the government has “effectively prohibited” them from forming an affiliate. Indeed, plaintiffs merely posit questions concerning how cases could be staffed, without indicating that anyone even has

attempted to resolve these issues. As we noted in our opening brief (at 31), many legal services providers, both large and small, have successfully created affiliates under the Program Integrity Regulation. JA 900-02. Plainly the administrative difficulties of doing so are not insurmountable.

Plaintiffs' assertion (Pl. Br. 53) that lawyers often will not know until “the midst of litigation proceedings” whether a case will require work subject to the restrictions is unaccompanied by any explanation of how this is likely to occur. While the “suits for benefits” exception at issue in *Velazquez III* raised that concern, *see Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001), the bulk of the restrictions challenged here apply to entire classes of litigation or clients. There is little chance that the restrictions on participating in class actions, attempting to influence legislation, seeking attorneys' fees, or representing undocumented aliens will arise unexpectedly “in the midst of litigation.” And plaintiffs make no effort to show that, in the unlikely event their client is incarcerated during litigation (potentially triggering the provision that prohibits representation of incarcerated individuals), the LSC-funded lawyer will be unable to transfer representation to an affiliate.

d. Finally, plaintiffs are incorrect in asserting (Pl. Br. 56) that federal agencies implementing government “charitable choice” programs have acknowledged that

physical separation is an “unnecessarily harsh burden” in other circumstances. The agencies in those instances determined that requiring faith-based organizations to offer federally-funded services separately in time or location was sufficient to further the purpose of the programs – to allow religious organizations to compete for federal dollars consistent with the Establishment Clause. In that context, the agencies determined that proposals to require those groups to offer their programs “separately in both time and location” would be “legally unnecessary” and would “impose an unnecessarily harsh burden” on small religious organizations that may have access only to one location. *See* 68 Fed. Reg. 56,396, 56,400 (2003) (SPA 247); 68 Fed. Reg. 56,449, 56,453 (2003) (SPA 345); 68 Fed. Reg. 56,466, 56,457 (2003) (SPA 379).

Far from recognizing that physical separation is inherently suspect, these agencies merely concluded that requiring separation both in time and location was unnecessary to avoid a violation of the Establishment Clause. Plaintiffs' repeated attempts to piggy-back the charitable choice provisions should be rejected.

3. Plaintiffs' assertion that the government lacks a legitimate interest in enforcing the Program Integrity Rule (Pl. Br. 57-64) also is without merit. When the government creates a program to fund a particular activity, it is entitled to “define the limits” of that program. *Rust*, 500 U.S. at 193. That interest encompasses the interest

of avoiding even the indirect subsidization of activity Congress does not wish to fund. *See id.* at 188; *see also Regan*, 461 U.S. at 544 (“TWR would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize.”). That interest also encompasses the congressional purpose of funding legal services organizations who agree to devote their energy and resources to providing the basic legal services funded by the statute. *See, e.g.*, H.R. Rep. No. 104-196, 104th Cong., 1st Sess. 121 (July 19, 1995). Congress can allocate funds to legal services providers that specialize in the areas of representation that Congress wishes to promote. *Cf. Velazquez II*, 164 F.3d at 765 (“Congress could fund a legal aid office but limit the scope of its practice to specific services such as representing the indigent in landlord-tenant disputes or in consumer fraud cases.”).¹

Plaintiffs seek to belittle this interest by characterizing it as treating restricted activity as a “communicable disease” from which LSC-funded attorneys must be

¹ Plaintiffs misinterpret this argument as an abandonment of the other government interests that support the Program Integrity Regulation. *See* Pl. Br. 63. However, as we made clear in our opening brief (at 23, 39), the interest we discuss here is “an important aspect” of the interests already asserted – one that, though raised below, was overlooked by the district court. The fact that we did not burden the Court with a duplicative discussion of the interests discussed in the LSC’s separate brief in no way indicates an admission that those interests are insufficient to support the Regulation.

“quarantined” to avoid distraction. Pl. Br. 63. But this hyperbole misses the point. The program’s “core mission” is the provision of the basic legal services outlined in the statute, and Congress rightly can require that LSC-funded attorneys focus on that mission.

These interests are crucial to the government's ability to define the limits of its program. Mere bookkeeping separation renders the purpose of the LSC statute meaningless. Instead of creating a program and “defining its limits,” LSC becomes just another customer, purchasing legal services on behalf of the poor from a full-service law firm that engages in all manner of legal representation, lobbying and any other activity it chooses.

It may well be that plaintiffs could operate an integrated legal services program that includes both restricted and unrestricted activities more efficiently if they ignored the requirements of the Program Integrity Regulation. And if plaintiffs believe that such a system would be a better use of federal dollars (by permitting “economies of scale,” for instance) (Pl. Br. 64), they are free to urge Congress to redefine the program to fund full-service legal providers in this manner. But it remains the government's prerogative to define the limits of its program. Under plaintiffs' argument, the limits of the program have no meaning whatsoever, and nothing in the First Amendment requires the federal government to subsidize plaintiffs' otherwise

restricted activities by defraying the costs associated with providing office space, equipment and personnel to engage in restricted activities.

Plaintiffs' attack on the government's interest in avoiding public confusion (Pl. Br. 59-62) also is flawed. The government has a "substantial interest" in preventing public confusion regarding whether the government supports a particular activity. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 395 (1984). And the government has a legitimate interest in ensuring "that grantees avoid creating the appearance that the Government is supporting [the restricted] activities" in a manner not authorized by Congress. *Rust*, 500 U.S. at 188.

Plaintiffs do not dispute the existence of such an interest, but assert that any public confusion can be eliminated through "disclaimers and signage" (Pl. Br. 60). Yet a sign at the grantee's offices and a disclaimer on its pleadings or business cards would be wholly inadequate. Even assuming that a client will avoid confusion, these "prophylactic measures" (JA 1055) do nothing to shape general public perceptions. Under the district court's injunction, an LSC-funded legal services provider could use the same lawyers in the same office to handle both restricted and non-restricted cases. If a citizen were to learn through the media that a particular provider is handling a major redistricting case, it is not only possible but highly probable that the citizen will not distinguish between the LSC grantee and its affiliate, and will believe the

litigation is being funded with a federal grant despite the statutory prohibition on such activity. To suppose the citizen will visit the grantee's office or read its stationery or pleadings in search of a disclaimer strains credulity.

This case stands in stark contrast to the cases cited by plaintiffs in which disclaimers would be appropriate. It may be plausible, for instance, for a state or a property owner to post a disclaimer at a particular fixed location, such as a shopping center or public park, where private expression is viewed by the public. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 769 (1995); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980). But that logic does not readily apply to the myriad activities performed by legal services providers operating in different settings and at different locations.

Plaintiffs also contend, yet again, that the existence of the “faith-based initiative” undermines the government’s endorsement concerns here. Plaintiffs simply ignore the fact, discussed extensively in our opening brief (at 43-46) that charitable choice programs serve a completely different purpose, and the separation provisions applicable in that context are designed simply to meet the minimum constitutional requirement set by the Establishment Clause, not to define the full measure of permissible government interests in deciding how to allocate scarce government funding.

Moreover, plaintiffs offer no reason to believe that the possibility for public confusion over endorsement of religion in the context of charitable choice is equivalent to the entirely different situation posed by the provision of legal services. In the former situation, the permissible and the prohibited activities are fundamentally different in character. Distinguishing between a federally-funded housing assistance program and a religious ceremony is hardly a difficult task, even if the two tasks are performed by the same provider. In the context of legal services, however, the restricted and unrestricted activities share the same basic character; both involve the provision of legal services, and the possibility of public confusion between the two activities is obviously greater.

C. Plaintiffs' Request To Modify The Injunction Should Be Rejected.

As part of their cross-appeal, plaintiffs assert that the district court erred in maintaining LSC's requirement of physical separation in areas open to the public (such as reception areas and conference rooms), arguing (Pl. Br. 66-67) that "signage and disclaimers" will be sufficient to meet the government's interests. In plaintiffs' view, even areas open to the public can be shared between an LSC grantee and its affiliate. As we have discussed, however, the use of these measures does not undermine the government's legitimate interest in preventing the public perception

that the government is funding activities that Congress did not wish to fund – an interest that is crucial to the integrity of the entire LSC program.

The same holds true for plaintiffs' attack on the district court's requirement that an attorney working for an LSC grantee must withdraw from representation if the client becomes ineligible or the case “comes to involve a restricted component” during the litigation. In plaintiffs' view, the same attorney can simply conduct business as usual, performing the same tasks in the same office under the auspices of the affiliate. The district court correctly determined that a simple “disclaimer” would be insufficient to avoid confusion, and plaintiffs offer nothing – short of the unsupported assertion that withdrawal would be “disruptive and unnecessary” (Pl. Br. 67) to question that holding.

D. Plaintiffs' Tenth Amendment Claim Was Properly Dismissed.

Seeking to revive their Tenth Amendment claim dismissed in the district court, plaintiffs contend (Pl. Br. 68-72) that the district court's injunction can be upheld on alternative “federalism” grounds. This argument is based upon the notion that the Program Integrity Regulation interferes with the ability of state and local governments to “assure that the lawyers they fund can represent clients effectively in order to enhance the administration of justice in their courts” (Pl. Br. 72). The district court correctly rejected this claim.

1. First, plaintiffs lack standing to pursue a Tenth Amendment claim seeking to vindicate the sovereignty of state and local governments. In *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 144 (1939), the Supreme Court stated in unambiguous terms that private parties lack standing to sue to vindicate the rights of the states under the Tenth Amendment. In that case, a number of public utility corporations sued to prevent the newly-created Tennessee Valley Authority (TVA) from competing with them by generating or selling electricity. The utilities alleged, among other things, that the statute creating the TVA violated the Tenth Amendment by “permitting federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment.” *Id.* at 143. The Supreme Court affirmed the district court's dismissal of this claim, stating that “the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment.” *See also The Vermont Assembly of Home Health Agencies, Inc. v. Shalala*, 18 F. Supp. 2d 355, 370 (D. Vt. 1998) (explaining that although the “Second Circuit extends Tenth Amendment standing to include municipalities or their arms, to the extent they have been delegated sovereign powers by the State,” it has not held that Tenth Amendment standing extends to private individuals).

Tennessee Electric controls here. The primary plaintiffs are private individuals or organizations that provide legal services. While the *Velazquez* plaintiffs include

several individual public officials, all of these plaintiffs sue in their personal capacities and therefore lack standing to assert the purported rights of the governmental bodies they serve. *See Karcher v. May*, 484 U.S. 72, 77 (1987); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544-45 (1986). Accordingly, plaintiffs lack standing to pursue a Tenth Amendment claim that seeks to vindicate the sovereign rights of state and local governments.

The district court, following the lead of the Seventh Circuit in *Gillespie v. City of Indianapolis*, 185 F.3d 693, 700-03 (7th Cir. 1999), concluded that *Tennessee Electric* could be disregarded because it has been eroded by subsequent Supreme Court precedent. *But see United States v. Parker*, 362 F.3d 1279, 1284-85 (10th Cir.), *cert. denied*, 125 S. Ct. 88 (2004); *Mountain States Legal Foundation v. Costle*, 630 F.2d 754, 761-62 (10th Cir. 1980).² However, district courts and courts of appeals are not free to conclude that controlling Supreme Court precedent is no longer valid. The Supreme Court has cautioned: “If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Rodriguez de*

² The Supreme Court recently granted certiorari to resolve the conflict, but declined to address the issue after deciding the case on alternate grounds. *Pierce County v. Guillen*, 537 U.S. 129, 148 n.10 (2003).

Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); *see also Tenet v. Doe*, 125 S. Ct. 1230, 1237 (2005) (same).

2. In any event, plaintiffs' Tenth Amendment claim fails on the merits.³ The Tenth Amendment protects the system of dual federal-state sovereignty. *Printz v. United States*, 521 U.S. 898, 918 (1997). But not every federal action that imposes burdens upon state or local governments constitutes an intrusion on state sovereignty in violation of the Tenth Amendment. “Federal statutes validly enacted under one of Congress's enumerated powers * * * cannot violate the Tenth Amendment unless they commandeer the states' executive officials, or legislative processes.” *Connecticut v. Physicians Health Servs.*, 287 F.3d 110, 122 (2d Cir. 2002) (internal citations omitted).

Thus, federal actions that “encourage” or “provide incentives” for States to adopt certain policies do not violate the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 174-76 (1992). For instance, Congress may “attach conditions on the receipt of federal funds,” *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), and that does not violate the Tenth Amendment even though those conditions “may

³ As we discuss in the following section (pp. 33-36, *infra*), plaintiffs' suggestion that this Court should vacate the district court's dismissal of its Tenth Amendment claim if it upholds the preliminary injunction on First Amendment grounds is without merit.

influence a State's legislative choices.” *New York*, 505 U.S. at 167. And action that merely causes a State to expend funds does not thereby violate the Tenth Amendment. *See Hodel v. Virginia Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 292 n.33 (1981) (“[E]ven if it is true that the [federal statute's] requirements will have a measurable impact on Virginia's economy, this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment.”).

Applying these principles, this Court has repeatedly upheld federal statutes that do not impose affirmative duties on state or local governments even if those statutes conflict with – or directly frustrate – state policy. In *Cellular Phone Taskforce v. Federal Communications Comm'n*, 205 F.3d 82 (2d Cir. 2000), for instance, this Court held that a statute that expressly prohibited state and local governments from regulating the placement, construction or modification of wireless service facilities on the basis of the health effects of radio frequency radiation did not violate the Tenth Amendment. The Court held that the federalism concerns embodied in the Tenth Amendment were not transgressed because “[t]he statute does not commandeer local authorities to administer a federal program,” and because “[s]tate and local governments are not required to approve or prohibit anything.” *Id.* at 96.

Similarly, in *Physicians Health Services*, this Court upheld a federal statutory provision that limited states' power to sue as *parens patriae* to “protect its interest in

the health and well-being of its citizens.” 287 F.3d at 113. The Court concluded that the statute “does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them. It therefore does not violate the Tenth Amendment.” *Id.* at 122.

And in *United States v. Milstein*, 401 F.3d 53, 68-69 (2d Cir. 2005), this Court rejected a Tenth Amendment challenge to the Prescription Drug Marketing Act, which requires any wholesaler of prescription drugs who wishes to engage in interstate distribution to be licensed in the state from which the drugs are shipped, in accordance with a state licensing scheme that complies with federal guidelines. The Court found no Tenth Amendment violation, noting that “a state is allowed to choose not to create a licensing framework pursuant to federal guidelines,” even though that would mean its wholesale distributors would not be able to distribute prescription drugs to other states. “That consequence, though it may move a state to adopt the necessary licensing framework in order to encourage companies to do business in the state, does not transform the provision of the PDMA into a legislative scheme that is mandatory or coercive.” *Id.* at 69.

Under these precedents, the Program Integrity Regulation is plainly valid. The regulation contains no coercive element that applies to the state or local governments. It does not forbid state and local governments from funding all manner of legal

services, nor does it compel them to provide funding. States and localities remain free to fund legal services in any manner they wish. They can choose to enact restrictions that parallel the federal scheme; they can choose to donate to LSC recipients to aid in the creation of affiliates to engage in restricted activity; or they can choose to fund separate mechanisms for rendering legal services to the poor.

Thus, contrary to plaintiffs' contentions (Pl. Br. 70) a state or local government remains free to “fund lawyers of its choice to conduct outreach to the homeless and domestic violence victims,” to maintain a system of attorney discipline, and to manage its court system in any way it sees fit. At bottom, plaintiffs' claim boils down to the contention that the Program Integrity Regulation makes it less efficient for states and localities to fund legal services for the poor. *See* Pl. Br. 70 (asserting that the regulation interferes with a state's interest in “ensuring that its funding is used in the most effective and efficient manner”). The Tenth Amendment, however, prohibits only federal laws that commandeer state government or require states to enact particular provisions. It does not invalidate federal laws that merely make it more difficult for states to meet their goals in the most efficient manner possible, much less federal laws that merely attach conditions on the provision of federal funds voluntarily accepted by their recipients. The district court thus properly rejected plaintiffs' Tenth Amendment claim.

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' FACIAL CHALLENGES TO THE CLASS ACTION, ATTORNEYS' FEES, AND SOLICITATION RESTRICTIONS.

A. Plaintiffs' Request For Vacatur Must Be Rejected.

In the district court, plaintiffs argued that the restrictions on bringing class actions, seeking attorneys' fees, and soliciting clients violate their First Amendment rights. These facial challenges were not limited to the application of these restrictions to non-LSC funds. Rather, plaintiffs asserted that these restrictions are invalid even as applied to LSC funds, regardless of the Program Integrity Regulation. The district granted the defendants' motion to dismiss these claims, holding that they “are not legally cognizable.” JA 1065.

In their cross-appeal, plaintiffs now assert that this Court must vacate the order dismissing their claims without reaching the merits of the district court's decision. Declaring themselves satisfied with the district court's preliminary injunction invalidating the Program Integrity Rule, plaintiffs contend that, as long as the injunction remains in place, the restrictions on LSC funds no longer cause them “injury in fact” and that their claims are no longer “ripe for determination.” Pl. Br. 76-77. They insist that the doctrine articulated in *United States v. Munsingwear*, 340

U.S. 36 (1950), which requires vacatur when a case on appeal is mooted through “happenstance,” requires vacatur here.

Plaintiffs' claim is patently without merit. Far from merely seeking to avoid adjudication of claims not necessary to the decision, plaintiffs seek to revive claims already dismissed on the ground that jurisdictional flaws prevent those claims as well. However, if plaintiffs truly are not suffering “injury in fact” (and therefore lack standing), or if their claims truly are not ripe for review, that is not a ground for affirmative relief on appeal, but is in fact an additional ground justifying dismissal of their claims. And if these claims truly were moot, any vacatur would necessarily be accompanied by dismissal, and would not (as plaintiffs request) merely leave their claims on hold to relitigate at a time of their own choosing. *See Alan Guttmacher Inst. v. McPherson*, 805 F.2d 1088, 1094 (2d Cir. 1986) (“if this case were really moot, it would normally be our obligation to remand with directions to vacate the judgment *and dismiss the complaint.*”) (emphasis added).

Of course, plaintiffs' facial challenge to the class action, attorney's fees, and solicitation restrictions is not unripe or moot in any real sense. The preliminary injunction does not eliminate these restrictions; it merely makes it easier for plaintiffs to avoid them. Plaintiffs' complaint in both cases, however, expressly challenged these restrictions as they apply to federal funds. JA 108-09, 129.

If these claims are moot or unripe, it is only because plaintiffs have decided they do not wish to pursue them. That is precisely the sort of situation in which vacatur is inappropriate. Granting vacatur here in these circumstances “would be to allow a party to eliminate its loss without an appeal and to deprive the winning party of the judicial protection it has fairly won.” *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381, 383 (2d Cir. 1993).

Indeed, the Supreme Court has made clear that a losing party cannot obtain vacatur simply by forfeiting his claim on appeal. Vacatur under the *Munsingwear* doctrine is appropriate only when a party's legitimate attempt to appeal “is frustrated by the vagaries of circumstance * * *.” *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). Where a party simply gives up his or her claim, “the case stands no differently than it would if jurisdiction were lacking because the losing party failed to appeal at all.” *Id.* at 25-26; *see Karcher*, 484 U.S. at 83. To allow a party “to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would – quite apart from any considerations of fairness to the parties – disturb the orderly operation of the federal judicial system.” *Bonner Mall*, 513 U.S. at 27.

Plaintiffs' argument here is better understood as seeking to maintain a conditional cross-appeal; they seek affirmative relief on appeal only if the appellants

are successful and the preliminary injunction is no longer in effect. Where a party brings a conditional cross-appeal, however, that party is not entitled to wipe out all adverse rulings made by the district court if the initial appeal fails. Rather, the proper remedy is simply to dismiss the cross-appeal. *See In re Austrian & German Bank Holocaust Litigation*, 317 F.3d 91, 105 n.18 (2d Cir. 2003); *Wilson v. City of New York*, 89 F.3d 32, 39 (2d Cir. 1996). Plaintiffs' attempt to obtain affirmative relief without reaching the merits therefore should be rejected. If this Court affirms the district court's preliminary injunction, it should dismiss plaintiff's cross-appeal.

B. The Class Action and Attorneys' Fees Restrictions Do Not Violate the First Amendment.

The LSC Acts also provide that no funds may be provided to a recipient who “initiates or participates in a class action suit,” or who “claims (or whose employee claims), or collects and retains, attorneys’ fees * * *.” 1996 Act, § 504(a)(7), (11). The district court correctly dismissed plaintiffs’ First Amendment challenges to these two provisions.

1. First, plaintiffs' attempt to convert these two procedural devices into constitutional rights must be rejected. While the right of association encompasses the right of individuals to associate for purposes of vindicating their legal rights, *see NAACP v. Button*, 371 U.S. 415, 437 (1963), plaintiffs have cited no case in which

that right includes the use of particular procedural devices. Indeed, federal rules impose numerous impediments to jurisdiction, *see, e.g.*, 28 U.S.C. § 1332 (minimum amount in controversy for diversity jurisdiction), and courts have wide discretion to deny class certification. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). In addition, attorneys' fees statutes vary depending upon the policy Congress seeks to vindicate. *See, e.g.*, 28 U.S.C. § 2412(d) (allowing a prevailing party to recover attorneys' fees against the federal government unless the position of the United States was "substantially justified"); Fed. R. Civ. P. 68 (governing the award of attorneys' fees after a party rejects an "offer of judgment.").

Under plaintiffs' theory, each of these rules implicates constitutional rights and therefore must be justified by a compelling interest. There is no support for such an approach. Indeed, the only court to address the issue to our knowledge expressly declined to transform these procedural devices into "constitutional entitlement[s]." *Legal Aid Society of Hawaii v. LSC*, 961 F. Supp. 1402, 1410-11 (D. Hawaii 1997), *aff'd*, 145 F.3d 1017 (9th Cir. 1998).

2. Even assuming that these provisions implicate plaintiffs' First Amendment rights, their claims fail. The Supreme Court recognized in *Velazquez III* that "Congress was not required to fund an LSC attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal representations or

relationships.” 531 U.S. at 548. Thus, Congress's choice here must be respected as long as the provisions are reasonable and viewpoint neutral. *See Regan*, 461 U.S. at 550.

Both provisions apply “without regard to the content of the regulated speech,” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and therefore are viewpoint neutral *a fortiori*. Congress determined that LSC grantees should not participate in any class action suits – regardless of the subject matter of litigation, the identity of the class, or the viewpoint of the lawyers or his or her client. The same is true with respect to attorneys' fees. Regardless of the particular viewpoint of the attorney or the client, and regardless of the subject matter of the litigation, the LSC grantee cannot seek or retain attorneys' fees.

As viewpoint-neutral provisions, the class action and attorneys' fees restrictions “need only be *reasonable*; [they] need not be the most reasonable or the only reasonable limitation.” *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 808 (1985) (emphasis in original); *see Boy Scouts of America v. Wyman*, 335 F.3d 80, 97 (2d Cir. 2003) (quoting *Cornelius*), *cert. denied*, 541 U.S. 903 (2004).

The class action provision reflects the rationale determination that LSC-funded lawyers should focus on providing “basic legal aid to poor individuals.” H.R. Rep.

No. 104-196, at 120; *see also* 141 Cong. Rec. S14605 (daily ed. Sept. 29, 1995) (Remarks of Sen. Stephens). Such matters include child support cases, housing matters, spousal abuse, divorce and custody cases, as well as “such basic legal needs as assisting veterans to obtain their benefits, helping victims of natural disasters to qualify for assistance, and advising low-income individuals on methods to deal with creditors to avoid bankruptcy.” S. Rep. No. 104-392, 104th Cong., 2d Sess. 3 (1996). Congress heard testimony raising concerns that LSC-funded lawyers were straying from providing basic legal aid and instead were attempting to “socially engineer our laws and rules” by “actively recruiting clients” and “creating claims” in “impact litigation.” *Id.* at 4.

Congress believed that these activities “do not serve the core function of providing basic legal representation to poor individuals” and in fact “only further drain much needed resources from the program's core mission--to provide basic legal aid to poor individuals.” H.R. Rep. No. 104-196, at 120. As the House Report concluded: “The Committee understands that advocacy on behalf of poor individuals for social and political change is an important function in a democratic society. However, the Committee does not believe such advocacy is an appropriate use of Federal funds. The Committee notes that there are hundreds of private organizations which can and do fulfill this advocacy role.” *Ibid.*

With respect to the attorneys' fees provision, Congress determined that “[f]ederally-funded legal aid programs should serve as a catalyst, not a replacement, for private bar activity. The Committee believes that cases which provide an opportunity for the collection of attorneys fees can be serviced by the private bar.” H.R. Rep. No. 104-196, at 120. In addition, Congress stressed that LSC grantees “are supported by public resources in order to provide free legal aid to their clients. Therefore the Committee believes it is inappropriate for attorneys fees to be collected for free legal aid.” *Ibid*; see also S. Rep. No. 104-392, at 8 (noting that “[d]efendants pay Federal taxes, which subsidize the salaries of LCS attorneys,” and should “not also be required, as a matter of course, to pay for the LCS attorneys who represent the plaintiff.”). Plaintiffs may disagree with Congress's view that cases with the potential for recovery of attorneys' fees should be handled by the private bar, but that disagreement does not render the provision unreasonable or unconstitutional.

3. Plaintiffs contend (Pl. Br. 79-82) that the class action and attorneys' fees restrictions violate their First Amendment rights because they impair the judicial function. This argument, however, is based upon the incorrect view that the Supreme Court's decision in *Velazquez III* creates an entirely new First Amendment right, invalidating even viewpoint-neutral restrictions that assertedly “distort” the normal

functioning of the legal system. *Velazquez III* cannot bear the weight that plaintiffs attempt to assign to it.

In *Velazquez III*, the Supreme Court invalidated a viewpoint-based restriction (the “suits for benefits” exception), finding that the provision “sifts out cases presenting constitutional challenges in order to insulate the government's laws from judicial inquiry,” and that it “is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories the Congress finds unacceptable but which by their nature are within the province of the courts to consider.” 531 U.S. at 546. But the Court drew a clear distinction between precluding specific arguments or legal theories in particular cases and deciding not to fund particular subject areas or procedural devices.

Thus, “Congress was not required to fund an LSC attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal representations and relationships.” *Velazquez III*, 531 U.S. at 548. What Congress cannot do, however, is “define the scope of the litigation it funds to exclude certain vital theories and ideas.” *Ibid.* That is, “[a] major concern of the [*Velazquez III*] Court was that the restrictions would do more than simply prevent representation in certain classes of cases; the restrictions, the Court noted, would interfere with attorneys' advocacy of their clients by preventing them from making certain

arguments in particular cases.” *Southern Christian Leadership Conf. v. Supreme Court of the State of Louisiana*, 252 F.3d 781, 791 (5th Cir. 2001). Unlike the viewpoint-based restriction at issue in *Velazquez III*, the restrictions at issue here are not only viewpoint-neutral, but also content-neutral as well.

Moreover, the class action and attorneys' fees provisions do not have an effect on the judicial system that is in any way analogous to the “suits for benefits” provision at issue in *Velazquez III*. Neither provision attempts to “insulate the government's laws from judicial inquiry” or “exclude from litigation those arguments and theories Congress finds unacceptable.” The class action provision eliminates an entire class of cases, regardless of viewpoint, and the attorneys' fees provision merely governs the remuneration LSC-funded lawyers may claim and retain. These provisions merely reflect the fact that Congress has determined not to fund “the whole range of legal representations and relationships.” *Velazquez III*, 531 U.S. at 548.

Under plaintiffs' interpretation, however, Congress would in fact be required to fund the “whole range of legal representations and relationships,” because the failure to do so improperly “distorts” the legal system. Such a broad reading of *Velazquez III* would invalidate a host of statutes and procedural rules. *See, e.g., Mezibov v. Allen*, 411 F.3d 712, 720 n.7 (6th Cir. 2005) (noting that a broad reading of *Velazquez III* “would call into question the rules of several circuits that forbid

citation to unpublished legal opinions”). By turning every procedural device into a colorable constitutional requirement, plaintiffs would radically deprive Congress of its traditional authority over these matters. *See Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 262 (1975) (“[I]t is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.”); *United States v. Horn*, 29 F.3d 754, 766 (1st Cir. 1994) (“[T]here is nothing sacrosanct about the courts' power to impose sanctions. Congress has wide-ranging authority to limit supervisory powers generally. This includes the authority to place restrictions on courts' inherent powers to shift fees.”); *Johnson v. West Suburban Bank*, 225 F.3d 366, 377-78 (3d Cir. 2000) (holding that Congress may impose restrictions that have the effect of eliminating class actions in certain categories of cases). To our knowledge, no decision has construed *Velazquez III* so broadly. Plaintiffs' challenge to the class action and attorneys' fees provisions therefore must be rejected.

C. The Solicitation Restriction Is Not An Impermissible Viewpoint-Based Restriction.

The LSC Act states that an LSC grantee may not “accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should

obtain counsel or take legal action, and will not refer such nonattorney to another person or entity * * * that is receiving financial assistance provided by the [LSC].” 1996 Act, § 504(a)(18). Congress enacted this provision to prevent legal services lawyers from recruiting clients “at a time when [LSC] and the legal aid community continue to testify that they must turn away eligible clients due to lack of resources.” H.R. Rep. No. 104-196, at 121. The district court correctly dismissed plaintiffs’ claims that this provision violates their First Amendment rights.

1. First, as the district court recognized (JA 1026), plaintiffs “greatly overstate the restriction’s reach” in trying to demonstrate that it violates their First Amendment rights. The provision does not, as plaintiffs suggest (Pl. Br. 82), prohibit all unsolicited advice “to take legal action and retain counsel.” Rather, an LSC grantee may not “*accept employment* resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action,” and may not circumvent that restriction by referring the potential client directly to another LSC grantee. Act, § 504(a)(18) (emphasis added). Any LSC grantee may share his or her opinion on a person’s legal rights. Moreover, plaintiffs can procure clients through unsolicited advice that is not rendered in person, and can procure clients by providing advice solicited by the client.

In addition, the solicitation provision does not prohibit “outreach and education” as plaintiffs claim (Pl. Br. 83 n.51). In fact, the regulations make clear that the restriction “does not prohibit recipients or their employees from providing information regarding legal rights and responsibilities or providing information regarding the recipient's services and intake procedures through community legal education activities such as outreach, public services announcements, maintaining an ongoing presence in a courthouse to provide advice at the invitation of the courts, disseminating community legal education publications, and giving presentations to groups that request them.” 45 C.F.R. § 1638.4(a). If an individual requests legal advice on the basis of such an outreach or educational program, the recipient may represent that person. *Id.* § 1638.4(b).

The regulations also expressly allow legal services lawyers to inform persons who are unable to seek legal assistance on their own that they have a case. Thus, the rule “does not prohibit representation or referral of clients by recipients pursuant to a statutory or private ombudsman program that provides investigatory or referral services and/or legal assistance on behalf of persons who are unable to seek assistance on their own, including those who are institutionalized or are physically or mentally disabled.” *Id.* § 1638.4(c).

2. Plaintiffs' contention (Pl. Br. 83) that the restriction against solicitation is not viewpoint neutral is incorrect. The provision applies regardless of the subject matter of the potential litigation or the position one would seek to take in that litigation. For instance, if a dispute arises between two individuals, both of whom would be eligible for LSC-funded legal services, the provision would prohibit the act of soliciting either individual. That is, both sides of the potential litigation would be subject to the anti-solicitation provision.

Plaintiffs nevertheless contend (Pl. Br. 83) that the provision is viewpoint-based because it prohibits an LSC grantee from accepting representation if the grantee expresses the viewpoint that a particular individual should retain a lawyer to protect those rights. As the district court observed, however, that is a far cry from “targeting a particular ideology, opinion or perspective.” JA 1027. A provision that is not content-based on its face, it is viewpoint-neutral unless it *targets* a particular viewpoint. *Wyman*, 335 F.3d at 94; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

Amicus New York County Lawyers' Association contends (NYCLA Br. 31) that the restriction is viewpoint-based because “the lawsuits of poor people do advance a particular viewpoint.” Such a contention belies the simplistic, and somewhat insulting, notion that all poor people hold the same viewpoint. Indeed,

while some litigation may fit into the mold of “the poor” versus the rich (or the government), it bears noting that LSC-funded lawyers provide representation in family cases such as adoption, divorce, child custody, and spousal abuse claims. But even if that unsupported assertion were correct, it would not convert the solicitation provision into a viewpoint-based provision. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 (1994) (“the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based”); *ibid.* (“That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order.”).

Indeed, by NYCLA’s logic, *every* restriction on legal services for the poor is viewpoint-based – including the restrictions this Court explicitly found to be viewpoint-neutral in *Velazquez II*. For instance, LSC-funded lawyers would seek to advance “the unique goals of the poor” in lobbying legislatures or agencies. Yet this Court recognized that restrictions on lobbying are viewpoint-neutral. *Velazquez II*, 164 F.3d at 768. Similarly, the general restriction on participating in litigation “involving an effort to reform a * * * welfare system” would be viewpoint-based under NYCLA’s theory, because the LSC-funded attorney would always represent the particular viewpoint of “the poor” in this litigation. Yet this Court concluded that the

restriction is viewpoint neutral because if litigation involving an effort to reform a welfare system occurs, “one ‘participates’ in it whether one is on the side seeking reform or the side opposing it.” *Id.* at 768-69.

Because the solicitation restriction is viewpoint-neutral, it must be upheld as long as it is reasonable. *Wyman*, 335 F.3d at 97. The solicitation provision meets that standard. Congress heard testimony relating instances in which LSC-funded legal services organizations turned away needy clients due to lack of resources. H.R. Rep. No. 104-196, at 121. Congress found it unacceptable that an LSC-funded lawyer would turn away a client who walks through the door seeking help, while actively recruiting clients at the same time.

Contrary to the contention of amicus NYCLA, this interest is not simply a matter of preventing LSC grant recipients from spending time on recruiting activities. It is a matter of ensuring that LSC grantees serve the interests of the clients who come to them seeking legal aid, rather than their own agenda by turning those clients away in favor of recruited clients. While plaintiffs and amici may disagree with the policy choice made by Congress in this instance, the solicitation provision easily withstands First Amendment scrutiny.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed insofar as it enjoins operation and enforcement of the Program Integrity Regulation, and affirmed as to the district court's remaining holdings.

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

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

The Brief was prepared using Corel Wordperfect 12.0. It is proportionately spaced in 14-point type, and contains 10,689 words.

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