

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

CARMEN VELAZQUEZ, et al.,

Plaintiffs,

97 Civ. 00182 (FB)

against

LEGAL SERVICES CORPORATION, et al.,

Defendants.

DAVID F. DOBBINS, et al.,

Plaintiffs,

01 Civ. 8371 (FB)

against

LEGAL SERVICES CORPORATION, et al.,

Defendants.

BRIEF OF AMICI CURIAE COUNCIL ON FOUNDATIONS, INC.; INDEPENDENT SECTOR;
AARP FOUNDATION; AKONADI FOUNDATION; ALLIANCE FOR CHILDREN AND
FAMILIES; ALLIANCE FOR JUSTICE; AMERICAN CANCER SOCIETY; THE AMERICANA
FOUNDATION; ARKANSAS COMMUNITY FOUNDATION, INC.; MARY REYNOLDS
BABCOCK FOUNDATION; BELLA VISTA FOUNDATION; BOEHM FOUNDATION; OTTO
BREMER FOUNDATION; THE BUNBURY COMPANY, INC.; CALHOUN COUNTY
COMMUNITY FOUNDATION; THE CALIFORNIA WELLNESS FOUNDATION; CHARITY
LOBBYING IN THE PUBLIC INTEREST; THE EDNA MCCONNELL CLARK FOUNDATION;
THE CAROL AND JAMES COLLINS FOUNDATION; COMMUNITY FOUNDATION OF
COLLIER COUNTY, INC.; THE COMMUNITY FOUNDATION OF HERKIMER & ONEIDA
COUNTIES, INC.; THE COMMUNITY FOUNDATION OF MUNCIE AND DELAWARE
COUNTY, INC.; COMMUNITY FOUNDATION OF NORTH CENTRAL WASHINGTON;
COMMUNITY FOUNDATION OF ST. JOSEPH COUNTY; THE COMMUNITY FOUNDATION
SERVING BOULDER COUNTY; THE COMMUNITY FOUNDATION SERVING COASTAL
SOUTH CAROLINA; THE COMMUNITY HEALTH FOUNDATION; COOPER FOUNDATION;
PETER C. CORNELL TRUST; NATHAN CUMMINGS FOUNDATION; THE CURRY
FOUNDATION; DADE COMMUNITY FOUNDATION, INC.; CHARLES H. DATER
FOUNDATION, INC.; DYER-IVES FOUNDATION; EDUCATION LAW CENTER OF PA; THE
SAMUEL S. FELS FUND; FENWICK FOUNDATION; FIRELIGHT FOUNDATION; ET AL.,
IN SUPPORT OF PLAINTIFFS

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COMPLETE LISTING OF AMICI CURIAE

AARP Foundation
Akonadi Foundation
Alliance for Children and Families
Alliance for Justice
American Cancer Society
The Americana Foundation
Arkansas Community Foundation, Inc.
Mary Reynolds Babcock Foundation
Bella Vista Foundation
Boehm Foundation
Otto Bremer Foundation
The Bunbury Company, Inc.
Calhoun County Community Foundation
The California Wellness Foundation
Charity Lobbying in the Public Interest
The Edna McConnell Clark Foundation
The Carol and James Collins Foundation
Community Foundation of Collier County, Inc.
The Community Foundation of Herkimer & Oneida Counties, Inc.
The Community Foundation of Muncie and Delaware County, Inc.
Community Foundation of North Central Washington
Community Foundation of St. Joseph County
The Community Foundation Serving Boulder County
The Community Foundation Serving Coastal South Carolina
The Community Health Foundation
Cooper Foundation
Peter C. Cornell Trust
Council on Foundations, Inc.
Nathan Cummings Foundation
The Curry Foundation
Dade Community Foundation, Inc.
Charles H. Dater Foundation, Inc.
Dyer-Ives Foundation
Education Law Center of PA
The Samuel S. Fels Fund
Fenwick Foundation
Firelight Foundation
Ella Fitzgerald Charitable Foundation
Florida Bar Foundation
Sheila Fortune Foundation
Foundation for Global Awakening
Georgia Center for Non-profits
Bernard F. & Alva B. Gimbel Foundation
William Caspar Graustein Memorial Fund
Greenville Foundation
Evelyn & Walter Haas, Jr. Fund
Halcyon Hill Foundation
The John Randolph Haynes and Dora Haynes Foundation
Hutchinson Community Foundation
Independent Sector
JJJ Foundation, Inc.
Jean B. & E.T. Juday Gift Fund
The Karl Kirchgessner Foundation
Samuel H. Kress Foundation
Albert Kunstadter Family Foundation
Legal Counsel for the Elderly
Maryland Association of Non-profit Organizations
S. Livingston Mather Charitable Trust
The McConnell Foundation
The Sisler McFawn Foundation
The McIntosh Foundation
Michigan Non-profit Association
The Minneapolis Foundation
Charles Stewart Mott Foundation
Jerome S. and Grace H. Murray Foundation
National Association of Independent Schools
National Association for Visually Handicapped
The National Committee for Responsive Philanthropy
National Council of Non-profit Associations
Nebraska Community Foundation, Inc.
New Hampshire Charitable Foundation
New York Regional Association of Grantmakers
North Carolina Center for Non-profits
North Carolinians Against Gun Violence Education Fund

COMPLETE LISTING OF AMICI CURIAE, Con't

Northern California Grantmakers
The A. Lindsay and Olive B. O'Connor
Foundation, Inc.
I.A. O'Shaughnessy Foundation
OMB Watch
Open Society Institute
Portsmouth General Hospital Foundation
The Elizabeth C. Quinlan Foundation, Inc.
The Remmer Family Foundation, Inc.
Rochester Area Community Foundation
Rockefeller Brothers Fund, Inc.
The Rockefeller Foundation
Helena Rubinstein Foundation
St. Luke's Health Initiatives
The Skillman Foundation
The Spartanburg County Foundation
Surdna Foundation, Inc.
Szekely Family Foundation
The Tow Foundation
Triangle Community Foundation
Volunteers of America, Inc.
Van Loben Sels / Rembe Rock Foundation
West End Revitalization Association – CDC
Wagnalls Memorial Foundation
Wallace Global Fund
Wolfensohn Family Foundation

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

Amici curiae adhere to the statements of facts and of the case submitted by Plaintiffs.

STATEMENT OF INTEREST¹

The foundations, non-profit organizations, and representatives of the larger philanthropic community that are participating in this case as amici seek to advise the Court on the vital importance of autonomy and discretion in enabling these institutions to fully function in civil society and to thereby improve peoples' lives and enhance American democracy. The amici comprise a broad cross-section of the "third sector," that part of American society, including charitable donors and non-profit organizations, which is distinct from government and business.² The critical functions that the third sector serves in society are profoundly threatened by the federal legal services provisions here at issue, which impose restrictions both on charitable funders of non-profit legal services programs, and on the non-profit legal services programs themselves as they undertake to spend their non-federal funds. The challenged legal services restrictions represent one example of government using the promise of public funds as a means of constraining the purposes to which charitable donors and non-profit organizations may dedicate their funds to advance their own values and goals. These funding restrictions thus illustrate a broader problem of governmental encroachment on the autonomy and discretion protected by the First Amendment.

Amici recognize the potentially wide implications of this case: the Court's ruling may guide future analyses of whether, in a wide variety of contexts, the government can adequately justify onerous conditions it seeks to impose on the use of charitable donations by non-

¹ The Open Society Institute, the AARP Foundation, Independent Sector, Council on Foundations, Inc., the Rockefeller Foundation, and a wide variety of other organizations comprise the 100 amici participating in this case. Individual statements of interest of many of the amici are set forth in Appendix A.

² See John H. Filer, The Filer Commission Report; Report of the Commission of Private Philanthropy and Public Needs, in The Non-profit Organization: The Essential Readings 70, 79 (David L. Geis et al., eds. 1990). See also Eleanor L. Brilliant, Private Charity and Public Inquiry: A History of the Filer and Peterson Commissions 2 (2000).

governmental entities also receiving federal funds. This case could, then, set the standard for determining under what circumstances Congress may encumber non-federal funds possessed by colleges and universities, museums, public broadcasters, social service providers and many other institutions that rely on the public-private partnership model -- even to a limited degree -- in order to carry out their work. The structure that Defendants seek to protect in this case demands actual physical separation between certain publicly and privately funded activities of legal services non-profit organizations; it is a scheme with the potential to cause havoc across the non-profit sector. Amici thus urge the Court to recognize that the legal services restrictions challenged here directly interfere with the First Amendment freedoms of charitable donors and non-profit organizations to determine the best, most effective and most appropriate way of targeting their funds in a variety of critically important public-private partnerships.

SUMMARY OF ARGUMENT

Amici respectfully submit this brief in support of Plaintiffs' challenge to the Legal Services Corporation ("LSC") restrictions prohibiting LSC non-profits from using non-federal funds to finance restricted forms of advocacy unless they establish an "objectively" separate legal program housed in a physically separate facility. 45 C.F.R. § 1610.8. Because they pose significant expense, burdens and obstacles, these restrictions effectively prohibit philanthropies and other charitable donors, as well as the recipients of charitable funds – namely non-profit organizations – from dedicating their funds toward particular program goals, prohibiting them from freely choosing what to fund and how to fund it.³ This infringement on classic First Amendment activity effectively prevents charitable donors and non-profit organizations from

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

exercising their full potential to partner with the government to invent new solutions to social problems and enhance democracy. To justify this burden on First Amendment activities, the government must show that the restrictions serve an extremely important governmental interest that cannot be advanced by less drastic means. Because the government fails to meet this standard, the restrictions are unduly burdensome, and thus violate the First Amendment.

ARGUMENT

THE CHALLENGED LEGAL SERVICES RESTRICTIONS INFRINGE ON THE FIRST AMENDMENT FREEDOM OF CHARITABLE DONORS AND NON-PROFIT ORGANIZATIONS TO EXERCISE DISCRETION IN DETERMINING HOW TO SPEND THEIR PRIVATE FUNDS.

A. The First Amendment protects the freedom of charitable donors to engage in charitable activities, and of non-profit organizations to use their private funds in the way they choose.

The First Amendment protects charitable donors' freedom to engage in charitable giving in the manner they deem necessary and appropriate. So, too, does it protect the freedom of non-profit organizations to designate their non-federal funds in a manner necessary to carry out their mission. The legal services restrictions challenged here infringe on the First Amendment freedoms of both donors and recipients.

That the First Amendment protects both the act of charitable giving and the use of funds by a charitable organization is, by now, clear. The Supreme Court has long-recognized the First Amendment freedom to solicit charitable funds. See Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 797 (1985); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633 (1980). The Court has recognized that this protection extends to protect the First Amendment freedoms of charitable donors, as well. Specifically, the First Amendment protects charitable solicitations because they involve a variety of speech interests, including "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." Village of Schaumburg 444 U.S. at 632. See also Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 959-60 (1984). Charitable donations

involve these speech interests, too, and thus fall within the scope of these protections. As the Court noted in Cornelius, an individual’s “contribution in response to a request for funds functions as a general expression of support for the recipient and its views.” Cornelius, 473 U.S. at 799. Indeed, “[a] decision to contribute money . . . is a matter of First Amendment concern -- not because money is speech (it is not); but because it enables speech.” Nixon v. Shrink Missouri Gov’t PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (citing Buckley v. Valeo, 424 U.S. 1, 24-25 (1976)) (discussing First Amendment protections attaching to campaign contributions).⁴ Indeed, the Court has recognized that “[i]ndependent expenditures constitute expression at the core of our electoral process and of the First Amendment freedoms.” Federal Election Comm’n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 251 (1986) (internal quotations omitted). See also Riley v. National Fed’n of the Blind, 487 U.S. 781 (1988) (invalidating restrictions on charitable fundraising); Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981) (invalidating limit on contributions in referendum campaign); Buckley, 424 U.S. at 21; Telco Communications v. Carbaugh, 885 F.2d 1225, 1230 (4th Cir. 1989) (quoting Cornelius).⁵

⁴ Amici do not express an opinion on the constitutionality of campaign finance legislation, which is a different issue governed by different principles.

⁵ Defendant-Intervenor United States’ argument that private donors have no protected interest is unsupported in the law. The district court opinion relied on by the Government, Southern Christian Leadership Conference v. Louisiana Sup. Ct., 61 F. Supp.2d 499, 509 (E.D. La. 1999), is inconsistent with Cornelius, Village of Schaumburg, and other Supreme Court cases, holding that charitable contributions are protected activity. The district court’s ruling regarding donor standing was not appealed, and thus was not addressed by the Fifth Circuit. See 252 F.3d 781 (5th Cir. 2001).

The other case relied on by the Government, FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986), actually recognizes the donors’ interests here at issue. In that case, the Court examined the constitutionality of the Federal Election Campaign Act provision prohibiting corporations from spending their general treasury funds in connection with any federal election, and requiring that any election expenditures be financed exclusively by voluntary contributions to a separate segregated fund. The Court declared that this provision was unconstitutional as applied to Massachusetts Citizens for Life (MCFL). Although the FEC had argued that the prohibition on spending treasury funds was necessary to prevent MCFL from dedicating an individual’s money to purposes the individual might not support, the Court held that people who contribute to MCFL are fully aware of and support MCFL’s political purposes and contribute

And just as the First Amendment protects the asking for and making of charitable donations, so does it protect the use of funds by a charitable organization. A charitable organization's ability to use donated funds is essential to its "continuing ability to communicate its ideas" and achieve its goals. Cornelius, 473 U.S. at 799. As the United States Court of Appeals for the Second Circuit has held, the imposition of restrictions on the use of non-federal funds, even short of an absolute ban, constitutes a violation of the First Amendment if those restrictions impose an "undue burden" on the free use of private funds by a recipient of governmental funding. Velazquez v. Legal Services Corporation, 164 F.3d 757, 767 (2nd Cir. 1999), aff'd, 531 U.S. 533 (2001).

Amici thus urge the Court to recognize that funding restrictions like the Legal Services Corporation ("LSC") regulations here at issue infringe on the First Amendment freedom of charitable donors to target their contributions in the manner that they deem most appropriate and infringe on the First Amendment freedom of non-profit organizations to dedicate their charitable funds to goals that they believe are necessary to fulfill their organizational mission.⁶ The

because they support those purposes. Although contributors may not know the exact use to which their money may be put, "individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor. In addition, an individual desiring more direct control over her money can simply earmark the contribution for a specific purpose" Id. at 261. This is precisely what private donors in this case seek to do: earmark their donations to be used by legal services programs in a specific way, precisely what the LSC restrictions prohibit.

⁶ The unconstitutional conditions doctrine has long-held that the government may not require parties to forego their constitutional rights as a condition of receiving state funding or other assistance. That is, "[u]nconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference." Kathleen Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1422 (1989). Simply put, the government may not do indirectly what it may not do directly. This doctrine, however, does not implicate the ability of government to legislate appropriately to regulate the use of public funds in a way that meets a compelling governmental interest, for example, the eradication of invidious discrimination, such as on (but not limited to) grounds of race, gender, disability or age. Indeed, the Supreme Court has acknowledged Congress' powerful interest in assuring that "all of the

substantial burden these restrictions place on the First Amendment rights of donors and recipients clearly gives the donors and recipients standing to challenge them, though Defendants seek to challenge Plaintiffs' standing. First, the LSC non-profits have standing to assert their First Amendment challenges without, as Defendants suggest, having to attempt compliance with the legal services restrictions they challenge, once they have made the decision that the expense of doing so would be prohibitive and would undermine the effectiveness of their program. Should Defendants prevail on this argument, all non-profit organizations challenging government restrictions would be required to undertake potentially futile, substantial, onerous and expensive measures prior to bringing what may also be time-intensive and resource-consuming First Amendment litigation, thus thwarting both their ability to engage in the restricted activities they wish to challenge, and their ability to safeguard their First Amendment freedoms. See Munson, 467 U.S. at 956 (discussing need to lessen the "prudential limitations on standing" in the context of the First Amendment when there is a danger of chilling speech).

And, contrary to the Government's assertion, charitable donors have an independent basis for standing, apart from that of the LSC non-profits. The LSC restrictions threaten the freedom of Plaintiff charitable donors to make charitable donations in a cost- and programmatically effective manner to support the provision of a full range of legal services. See Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 392 (1988) (finding "injury in fact" requirement for standing met where plaintiffs alleged that government regulation, "aimed directly" at their First Amendment protected activity, would cause them "to take significant and costly compliance measures"); Meese v. Keene, 481 U.S. 465, 472 (1987) ("while the

operations of" an entity, "any part of which is extended Federal financial assistance," 42 U.S.C. § 2000d-4a, is operated on a non-discriminatory basis. See, e.g., U.S. v. Fordice, 505 U.S. 717, 732 (1992) (Title VI of the Civil Rights Act of 1964 imposes non-discrimination obligations consistent with the Fourteenth Amendment on recipients of federal funds). To the extent that the government has an interest rooted in legitimate national policy, such as adherence to the non-discrimination principle, it may require private non-profits acting in partnership with government to adhere to those specific legal requirements -- so long as they are consistent with constitutional limits discussed herein -- with regard to all of their funds, whether derived from sources federal or non-federal.

government action need not have a direct effect on the exercise of First Amendment rights . . . , it must have caused or must threaten to cause a direct injury to the plaintiffs”). See also Vannetta v. Kiesling, 899 F. Supp. 488, 493-94 (D. Or. 1995). As discussed, supra, this is a direct infringement of charitable donors’ First Amendment rights.

Given their plain interest in preserving their own First Amendment freedoms, the stakes are high for Plaintiffs, and so, too, for amici charitable donors and non-profit organizations. While this challenge arises in the context of legal services advocacy for the poor, amici recognize that the resolution of Plaintiffs’ claims may broadly affect philanthropic and non-profit endeavors in which the government is a partner. Should these restrictions stand, the First Amendment freedoms of all charitable donors and non-profit organizations will be threatened, and the causes and communities they serve will suffer as a result.

B. The activities of the third sector, including the activities of LSC non-profits and their charitable donors, are at the core of the First Amendment’s protected freedoms.

The First Amendment protects the fundamental freedom of speech to promote the free and unfettered exchange of ideas, allowing for the dissemination and development of all ideas, perspectives and voices. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964). It is most appropriate for the First Amendment to protect charitable donors’ freedom to give money, and to protect non-profit organizations’ freedom to use their private funds, in the manner they deem necessary and appropriate, since the functions that these institutions perform are at the core of First Amendment activities and values: they introduce new ideas and they support minority interests. And the third sector’s ability to perform both of these functions hinges on its ability to work in partnership with government and business while remaining sufficiently free from unnecessary government control.

Indeed, throughout American history, the third sector has played a pivotal role in society specifically because of its unique ability to act both in partnership with and with independence from government and business; charitable donors and non-profit organizations function in ways

that government and the business sector cannot or will not, contributing vital services and perspectives, often to collaborative efforts with the other two sectors. The functions served by the third sector are many, from developing public policy, initiating new ideas and processes and overseeing government, to relieving human misery, preserving democratic government and building community. See Filer Report, *supra*, at 84-88; Brian O’Connell, Philanthropy in Action 8 (1987). Above all, however, charitable donors and the non-profit organizations that they support have the unique and critical ability to advance new and creative solutions to societal problems and, in that way, to preserve, ensure and enhance democratic society. As such, they actualize core values of the First Amendment.

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

Because they need not generate profits, and because they are subject to neither the constraints of politics nor government bureaucracy, charitable donors and non-profits are free to experiment, take risks, and innovate. See Penina Kessler Leiber, 1601-2001: An Anniversary of Note, 62 U. Pitt. L. Rev. 731, 735 (2001). The value of the third sector’s contributions in this way is recognized across the political spectrum. For example, in recognition of the third sector’s unique ability to find new solutions, President George W. Bush supports a Faith-Based and Community Initiative policy that seeks to “honor” the non-profit sector: the “secular and religiously affiliated providers, civic groups, foundations and other grant-givers” that have “long been a vital and valued partner of government.” George W. Bush, Rallying the Armies of Compassion 3 (2001) <<http://www.whitehouse.gov/news/reports/faithbased.html>>. ⁷ Indeed, philanthropy has been characterized as a “beneficent and courageous pathfinder,” pioneering almost every cultural advance for the past three hundred years. Arnaud C. Marts, Philanthropy’s Role in Civilization: Its Contribution to Human Freedom 50 (1991). Public education, libraries, and preventative and educational health work have all evolved out of the historic interplay

⁷ Amici take no position on the constitutionality or the wisdom of the Faith-Based and Community Initiative policy.

between philanthropy and government. Id. at 51, 53. According to one commentator, philanthropy is a pioneering “minority movement:” it undertakes activities and causes that government will not or cannot undertake. Id. Another commentator describes the third sector as functioning “to support the search for a better way and to test different kinds of solutions. Then it tackles the often more difficult assignment of convincing the public about these solutions.” O’Connell, supra, at 95.

In this pioneering role, charitable donors and non-profit organizations are able to bring new ideas into public consciousness, shape public policy, set standards for government and public performance, and spur moral and social reform. See, e.g., Dean Rusk, The Role of the Foundation in American Life 14 (1961) (noting specifically that private institutions set standards for public performance in the area of higher education); The Report on the White House Conference on Philanthropy 20 (Oct. 1999), <<http://clinton4.nara.gov/media/pdf/philanthropyreport.pdf>>. (“Non-profits are uniquely able to identify problems and promote change at the community level.”). To name a few examples, the abolition of slavery, the clarification and protection of civil rights, the creation of public libraries, and the recognized need for equal opportunities for the disabled were all spurred by organized efforts of the third sector. See O’Connell, supra, at 3; Marts, supra, at 55; The Filer Report, supra, at 82.

Current examples of innovation by the third sector, in a vast array of contexts, abound. To name just a few, member organizations of amicus Independent Sector include a venture capital fund for public education that has as its mission the improvement of school leadership and student achievement, as well as an organization that seeks to improve treatment for Traumatic Brain Injury through educating healthcare professionals. See <<http://www.independentsector.org/members/MemberList.asp>>. Amicus Volunteers of America, through its GRACE program, works to ensure that inmates dying in prison receive appropriate care and pain management in a hospice-like setting, establishing their right to death with dignity and comfort while in a secure environment. See <<http://www.volunteersofamerica.org/>>. And the non-profit organization Americans for the Arts has as its mission increasing public and

private sector support for the arts, ensuring that children have access to high-quality arts education, and strengthening communities through the arts by providing arts industry research and information, professional development opportunities for community arts leaders, and annual events. See <<http://www.americansforthearts.org/aboutus/>>.

Legal services programs, too, are paradigmatic of the third sector's ability to act in partnership with the government to pioneer new solutions. From their inception, legal services programs were a creative, collaborative endeavor. An outgrowth of the charitable Legal Aid movement pioneered by lawyers in the nineteenth century to address the legal needs of poor people, the formation of Legal Aid societies by leaders of the private bar enabled immigrants and other poor people to protect their rights through the legal system. See Martha F. Davis, Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973 15-17 (1993). Later, private contributors partnered with philanthropic organizations and government agencies to create legal services organizations that provided new and experimental services to the poor. For example, Mobilization for Youth (MFY) was conceived of as a non-profit agency providing comprehensive legal services in conjunction with other social services through the settlement house mechanism on New York's lower east side. Davis, supra, at 26-27. With money from the federal government, the Ford Foundation, New York City, the Columbia School of Social Work, and the Vera Institute for Justice, and time donated by the private bar and law students, MFY created a legal unit in the mid-1960s that was unique and innovative in its provision of legal services; by providing legal advice, engaging in strategic litigation, and empowering clients with the knowledge of and means to assert their legal rights, MFY was a pioneer in legal services to the poor. Id. at 28. Indeed, the federal legislation creating the Office of Economic Opportunity Legal Services Program in the mid 1960s was modeled, in part, on collaborative neighborhood lawyering programs, including MFY. See Earl Johnson, Jr., Justice and Reform: The Formative Years of the OEO Legal Services Program 21-70 (1974). Hence, the legal services movement, forged out of collaboration between the private and the public sectors, is a creative solution by the third sector to address the legal needs of the poor.

The third sector's ability to advance innovative and creative solutions to fill the void left by government and private sector inaction is at the center of the First Amendment's protections. By preserving an open marketplace of ideas, the First Amendment promotes the public's interest in receiving information and fosters its "discussion, debate, and [] dissemination." Pacific Gas & Elect. Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1, 8 (1986) (citations omitted). See also Young v. American Mini Theaters, 427 U.S. 50, 64 (1976) (the First Amendment protects speech and expression to permit "the continued building of our politics and culture and to assure self-fulfillment to each individual"). Unnecessary restrictions on the third sector's autonomy thus undermine the sector's ability to innovate and, in turn, frustrate a core purpose of the First Amendment.

2. The third sector enhances democracy.

By empowering individuals to participate in the civic culture and, in some cases, engaging in advocacy work directly, the third sector plays an essential role in another core First Amendment activity: shaping American democracy. The third sector "reflects an acceptance of responsibility by private individual citizens" and provides a "training ground" for their practice of democracy, allowing for direct citizen action. Rusk, supra, at 15. See also Brilliant, supra, at 5 (discussing how the character of American democracy has been shaped by the existence of the third sector). Charitable donors and non-profits play a critical role by providing the means for individuals, and particularly disenfranchised groups, to come together in community to "find answers and make democracy work." Robert Matthews Johnson, The First Charity xvii (1988). Indeed, as one commentator has noted, "one of the most vital aspects of private philanthropy is its relationship to the wholesomeness of a democracy in a free society." Rusk, supra, at 15.

One important way in which the third sector enhances democracy is by engaging in advocacy. Third sector advocacy has contributed mightily to many of the major social changes in our nation, including successful efforts to: protect women's rights, enforce child labor laws,

enact stricter laws against drunk driving and underage smoking, enforce tougher environmental restrictions so that Americans have safer drinking water and cleaner air, and protect civil rights, including those of older Americans and persons with disabilities. No matter the area in which non-profits are focused, their advocacy and lobbying ensure that more people have access to the political process. See J. Craig Jenkins, Non-profit Organizations and Policy Advocacy, in The Non-profit Sector 296, 302 (Walter W. Powell, ed., 1987). Although the efforts of non-profit groups to feed the homeless, comfort the sick, rehabilitate drug abusers, support community arts groups, preserve historic houses, protect wetlands from pollution, and shield neighborhoods from crime are all in the public interest, the direct beneficiaries of non-profit services—the homeless, the elderly, persons with disabilities, and children—are often shut out of the democratic process. Through non-profit lobbying, “civic balance” is created, “allowing the public interest to be incorporated into public policy.” See David Cohen, Being a Public Interest Lobbyist is Something to Write Home About, in The Non-profit Lobbying Guide, 2nd ed. 94 (Bob Smucker, ed., 1999).

Once civic balance is created, it is often necessary to protect it. The Minnesota Council of Non-profits found this to be the case when it launched a state-wide public education campaign called “Think Twice,” which educated the public about Minnesota’s intention to alleviate its impending budget deficit by freezing all funding for vital human services. Historically, the state of Minnesota and the non-profit community had a partnership in which the state contracted with non-profit groups to provide human services. Under the proposed funding freeze, not only would there be no new grant agreements, but the freeze would also apply to existing funding agreements that had not yet been fully executed, which meant that some non-profits that had budgeted against already approved grants would not receive their disbursements. Although this issue is far from settled, this grassroots public education campaign, along with direct lobbying of members of the Minnesota legislature, forced the policymakers to put the issue back on the table and find different ways of dealing with the state’s budget deficit. See <<http://www.mncn.org/>>.

In addition to raising the voices of the unheard, non-profit advocacy also brings issues of concern to the consciousness of policymakers. Health advocates, like amicus the American Heart Association and like the American Cancer Society, keep the importance of issues -- such as, for example, access to healthcare, prevention and early detection of illness, research for advancements of cures and new treatments, and the promotion of healthy lifestyles -- relevant to policymakers through consistent and sustained advocacy efforts on the local, state, and federal level. See <<http://www.americanheart.org/>> and <<http://www.cancer.org/>>. These organizations also provide policymakers with statistics and research that would allow a policymaker to build well-founded support in order to champion a particular regulatory or legislative cause. Without the efforts of groups like the American Heart Association, these important health issues could fade in importance in our political landscape even though coronary heart disease is the number one cause of death in America. See <<http://www.americanheart.org/presenter.html>>.

Likewise, non-profit legal services programs contribute to democracy. By providing access to the courts for low-income people, legal services programs protect the rights of individuals and minority groups that might be powerless at the ballot box; for those who are deprived of the franchise, including children, some immigrants, and many prisoners and former felons, access to the courts may be the only real means of political participation. See McCarthy v. Madigan, 503 U.S. 140, 153 (1992) (“the right to file a court action might be said to be [a prisoner’s] remaining most ‘fundamental political right’”) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)). Moreover, legal services lawyers engage in administrative and legislative advocacy and educate individuals about their legal rights. All of these activities, too, are essential for people to be able to fully participate in democracy.

Thus, the third sector creates civic balance so that public policy reflects the public interest, sustaining a vibrant and engaged citizenry. Indeed, allowing for increased participation by all segments of society, and providing a voice for underrepresented communities, the third sector ensures the presence of diversity and ideological differences in the public and political

fora, thus preserving and enhancing a fundamental aspect of democracy. Brilliant, supra, at 156. This is at the core of the First Amendment's protections: it is a bedrock principle that the First Amendment promotes democracy by "'assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" Legal Services Corp. v. Velazquez, 531 U.S. 533, 548 (2001) (quoting Sullivan, 376 U.S. at 269, in turn quoting Roth v. United States, 354 U.S. 476, 484 (1957)). Indeed, "[f]reedom of speech plays a fundamental role in a democracy." Massachusetts Citizens for Life, 479 U.S. at 264. See also Buckley, 424 U.S. at 14-15 ("the ability of the citizenry to make informed choices" in the political arena is essential); Pickering v. Bd. of Educ. of Tp. High Sch., 391 U.S. 563, 573 (1968) (free and unhindered debate on matters of public importance is a "core value" of the First Amendment); Mills v. Alabama, 384 U.S. 214, 218 (1966) (there is "practically universal agreement" that a major purpose of the First Amendment is "to protect the free discussion of governmental affairs").

The First Amendment assures open, free expression of ideas and concerns, enabling the innovation of ideas and solutions and the enhancement of citizen participation in American democracy. Protecting the third sector from unnecessary and overly burdensome government control is thus critical to the preservation of these core interests.

C. The challenged legal services restrictions infringe on the First Amendment freedoms of charitable donors and non-profit organizations to target and use their charitable funds in the manner they deem necessary and appropriate.

Government restrictions on private giving and the use of charitable funds can stifle the unique and historic role that the third sector plays in American society, infringe on the First Amendment freedoms of charitable donors and non-profit organizations, and cause potentially broad and damaging implications for all donors and non-profit organizations. To realize its full potential as an innovative problem solver and contributor to American democratic society, the third sector must retain sufficient freedom to utilize the resources of other sectors of society, particularly the government, while remaining free of unnecessary government control. The

challenged legal services restrictions illustrate the harms that result when the government overreaches by imposing unduly burdensome restrictions on private funds.

1. The third sector's ability to innovate and to enhance democracy hinges on its ability to act in partnership with the government, while remaining free of unnecessary, onerous restrictions.

The philanthropies and other private donors that provide funding to legal services programs, as well as organizations that receive both public and private funding to provide legal services for the poor, are part of a long tradition of charitable organizations providing critically needed services and solutions in concert with governmental programs and entities. See Alice Gresham Bullock, Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity, 6 Cornell J.L. Pub. Pol'y 325, 332 (1997); Lester M. Salamon, Partners in Public Service: The Scope and Theory of Government-Non-profit Relations, in The Non-profit Sector, supra, at 99. During the Colonial period, governments provided funds to private charitable educational institutions, hospitals, and social service agencies, enabling those institutions to provide services needed by the local communities. Salamon, Partners in Public Service, supra, at 100. Later, public officials relied upon private non-profit agencies to assist in addressing the social problems accompanying urbanization and industrialization. Id. For example, in 1898, New York City paid 57 percent of its own expenditures for the poor to private benevolent institutions to care for prisoners and paupers. Id. at 101.

These partnerships continue today: while government has no inherent obligation to provide funding for non-profit organizations, it nevertheless frequently collaborates with charitable funders and non-profits to devise and implement strategies for meeting community needs. The government-end of these partnerships take a “dizzying array” of forms: loans, loan guarantees, grants, contracts, insurance, tax expenditures, vouchers and more. See Lester M. Salamon, The New Governance and the Tools of Public Action: An Introduction, 28 Fordham Urb. L.J. 1611, 1612 (2001). See also Partnerships for a Stronger Civil Society, A Report to the President from the Interagency Task Force on Non-profits and Government 6 (Dec. 2000)

(hereinafter “Interagency Task Force Report on Non-profits and Government”). Government frequently partners with philanthropic entities to fund no n-profit organizations for the delivery of services and for research. See Stanley N. Katz, Philanthropy and Democracy: Which Comes First, Advancing Democracy 3 (1994). See also Salamon, Partners in Public Service, supra, at 99. For example, a key component of the federal welfare reform legislation enacted in 1996 was block grants enabling states to allocate federal funds to a host of public, private, and non-profit entities for the delivery of social services, including for the creation of welfare-to-work programs. See, e.g., 42 U.S.C. § 603(a)(5). Private-public partnerships arise in fields such as education and the arts, as well. To name just one example, recently enacted federal legislation, the No Child Left Behind Act of 2001, provides state block grants for local educational agencies, community-based organizations, and other private or public entities to provide opportunities for academic enrichment, youth development activities, art, music and recreation programs, and drug and violence prevention programs. No Child Left behind Act of 2001, Pub. L. No. 107-110, Title VI, Part B, 115 Stat. 1425 (2002).

As government spending for social welfare and services declines, there is increasing pressure on charitable donors and non-profit organizations to address the unmet need that invariably results. Charitable donors and non-profit organizations cannot be expected to fulfill the necessary role of government in ensuring that the needs of the underserved are met. To do so would divert resources from the innovative and creative work of the third sector to band-aid emergency response efforts.⁸ Nevertheless, Congress has made clear that it relies upon private contributors, including philanthropies, to “fill the gap” in providing for the social and economic welfare of the poor and other beneficiaries. For example, during the debate over welfare reform

⁸ For example, it is estimated that a 120 percent increase is needed in charitable contributions in 2002 in order to make up for the projected gap in government support after recent budgetary cuts for social welfare spending. Alice Gresham Bullock, Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle and Low-Income Generosity, 6 Cornell J. L. & Pub. Pol’y 325, 328-29 (1997). It is thus critical to accept what philanthropy cannot do while appreciating and valuing the important role that it plays in American society. See O’Connell, supra, at 7 (1987).

in the mid-1990s, contemporaneous with the introduction of the challenged legal services restrictions, then-Speaker of the House Newt Gingrich stated that non-profit charities are “more effective than government bureaucracies,” as they “get more done at less cost.” Dana Milbank, U.S. Charities Fear They Will Be Overwhelmed, Not Empowered by Republican Welfare Cutbacks, *The Wall Street Journal*, Nov. 7, 1995, at A-24. Likewise, President George W. Bush, in his Faith-Based and Community Initiative proposal, highlights the need to capitalize on the growth of the charitable sector and recognize and build upon the role that charitable organizations play. George W. Bush, Rallying the Armies of Compassion, *supra*, at 7 (2001).

Legal services organizations are a classic, and highly effective, collaboration between the public, private and charitable sectors. In creating the legal services program in 1974, Congress established a partnership between and among the federal, state and local governments, and the third sector. While the government provides funds to LSC non-profits, the day to day management of each LSC grantee, including ownership and control of the program’s real and personal property, and the hiring and supervising of staff lawyers, is left to the non-profit local grantee. See Velazquez, 531 U.S. at 536 (noting the private/public nature of the legal services partnership). Moreover, the government actively encourages private funding of LSC non-profits; one criterion that LSC uses when awarding grants is “[t]he applicant’s capacity to develop and increase non-Corporation resources.” 45 C.F.R. § 1634.9(a)(7). And, indeed, LSC non-profits have been highly successful in raising private funds. See LSC, Press Kit: Q&A (“LSC’s non-profits leverage funds to raise \$299 million annually in other government and private funding”), attached to Abel Decl. in Support of Plaintiffs’ Motion for a Preliminary Injunction, Ex. 30. This has been true throughout the history of the LSC, and particularly since the budget cuts and restrictions of 1995 and 1996. As with all social welfare programs, as government funding for legal services continues to erode, the need for increased collaboration with private donors becomes even more critical.⁹

⁹ Private donors and philanthropies also form partnerships with government to provide legal services through the creation of post-graduate fellowships, whereby private non-profits,

The third sector thus aims to address the needs of society by acting in concert with the government. As independent and innovative entities, charitable funders and non-profit organizations are able to use their resources to maximize those of the government, by, for example, contributing their expertise, creative potential and ability to maximize resources. The unique role that the third sector plays in American society and in partnership with the government, however, hinges on its independence from governmental control; in order for third sector entities to reach their full potential, they must have the autonomy to act on their organizational mandates in accordance with their expert judgment.

Indeed, freedom and autonomy from government control encourages and enables the third sector to realize its full creative and innovative potential:

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

philanthropies, other private donors and private law firms support recent law school graduates to work at public interest jobs full-time, often for two years, and often at entities that receive some government funding. These fellowships enable new lawyers to develop placements in cooperation with sponsoring legal organizations, including government-funded legal services organizations, to create innovative projects which “encourage rethinking poverty law practice.” See Louise G. Trubek, Poverty Lawyering in a New Millennium, 17 Yale L. & Pol’y Rev. 461, 465 (1998). See also William Dean, The Role of the Private Bar, 25 Fordham Urb. L.J. 865, 870-71 (1998) (discussing Skadden Fellowship foundation and Open Society/National Association for Public Interest Law Partner Fellowship programs).

In addition to fellowship programs, some private law firms sponsor rotation programs, whereby lawyers from the firm work full-time, for several months, at non-profit legal services organizations. Id. at 870. For example, the law firms of Cleary, Gottlieb, Stein & Hamilton and Willkie, Farr & Gallagher send firm lawyers to participate in externships at Plaintiff MFY Legal Services representing low-income clients. See <http://www.cgsh.com/probono.htm>; <http://www.nysba.org/public/probono/reports/externship.html>. The law firms of LeBoeuf, Lamb, Greene & MacRae and Kramer, Levin, Naftalis & Frankel send lawyers to Plaintiff South Brooklyn Legal Service’s housing law unit for four-month rotations. See <http://www.sbls.org/probono.htm>. All of these programs enhance the provision of legal services to underrepresented groups by providing legal services programs with the capacity to serve more people, as well as by encouraging new lawyers to experiment by creating innovative projects to improve the legal representation of their clients. Trubek, supra, at 465-66.

Albert Sacks, The Role of Philanthropy: An Institutional View, in Foundations Under Fire 66, 73 (Thomas Reeves, ed. 1970). As one of the founders of amicus Independent Sector has noted, it is precisely because non-profits and charitable donors are free from the “leveling forces” of commerce and politics that they are able to “serve as the guardians of intellectual and artistic freedom.” O’Connell, supra, at 5. And in laying out the blueprint for his Faith-Based and Community Initiative, President Bush agreed that government must not harm the efforts of foundations and non-profit organizations by over-regulation. Rallying the Armies of Compassion, supra, at 7. The third sector’s ability to fulfill its critical function in society hinges, then, in part on its ability to maintain its independence, and thereby its innovative and creative edge, while acting in partnership with government.

2. The challenged legal services restrictions require “objective” and physical separation between publicly funded and privately funded categories of advocacy, which prevents charitable donors and non-profit organizations from exercising their full potential to partner with the government in innovative and pioneering ways.

Non-profit organizations that rely upon a mix of public and private funds cannot fully and effectively function while maintaining physical separation between their publicly and privately funded activity. Imagine, for example, the impracticality of requiring a research institution that receives both foundation funding and government grants to segregate its research facilities and faculties based on the origins of their grants. Practical and logistical difficulties aside, such an arrangement would prevent the collaboration, coordination and progress which is inherent in joining such resources. The challenged legal services restrictions, then, exemplify how physical separation requirements directly impede charitable donors’ and non-profit organizations’ ability to fulfill their organizational missions. These restrictions thwart the rights of charitable donors to dedicate their funds toward particular program goals, preventing private funders from choosing who and how to fund. Likewise, they curtail the ability of a non-profit organization to determine how best to use its non-federal funds. The restrictions thus constitute an infringement on the First Amendment freedoms of charitable donors and non-profit organizations.

Specifically, the challenged legal services restrictions prohibit LSC-funded non-profit organizations from spending their non-LSC funds on restricted forms of advocacy unless grantee programs establish objective, physical separation between the grantee program and another entity engaging in restricted activity. 45 C.F.R. § 1610.8. The separation must be both physical and financial: “[m]ere bookkeeping separation of LSC funds from other funds is not sufficient.” 45 C.F.R. § 1610.8(a)(3). Pursuant to this standard, private funds provided to LSC-funded programs must become encumbered by LSC restrictions on certain forms of advocacy, see note 3, supra, or be squandered on wasteful separate and duplicative facilities, rather than be responsibly spent on legal advocacy for low income clients.¹⁰ Thus, the restrictions thwart the ability of the LSC non-profit to use funding it has received from non-federal sources in an effective manner consistent with the organization’s purpose. The costs of complying with the separation required by the LSC restrictions are, in many instances, prohibitive or would be programmatically ineffective or counter-productive.

Indeed, as Plaintiffs discuss in detail in their Memorandum of Law in Support of Plaintiffs’ Motion for a Preliminary Injunction, the objective physical separation requirement imposes severe administrative, financial and programmatic costs on LSC non-profit organizations. Pls.’ Mem., at 25-34. The costs are so high, in fact, that no legal services program serving New York City has been able to develop a plan consistent with the regulation to establish objectively separate legal programs housed in physically separate offices in order to utilize private resources to deliver otherwise forbidden forms of legal representation to indigent clients. Id. at 34. The program integrity regulations, then, are significantly more burdensome and onerous than the mere separate incorporation and record-keeping requirements of a 501(c)(3) organization setting up a sister 501(c)(4) to engage in otherwise restricted lobbying activities. See Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 n.6 (1983). In

¹⁰ A third alternative, still less fulfilling of the non-profit’s rights, is that it may forfeit the funds altogether.

fact, unlike the plaintiffs in Taxation With Representation, Plaintiffs in this case have shown that the regulations are so burdensome as to be prohibitive. See id.

Thus, in the legal services context, a charitable donor may be faced with the choice of giving money to an LSC non-profit knowing that the money will be subject to restrictions that run contrary to the donor's goals, spending some of the charitable donation to establish and maintain a separate, unrestricted affiliate of the LSC non-profit (despite the tension with the foundation's duty to spend its funds economically), or giving the money to a different organization, even when the organization will not be able to use the money as well as the legal services office. And the LSC non-profit is deprived of the use of the charitable donor's funds, or is prohibited from using the funds in the manner it determines to be most effective for achieving its mission. In short, these far-reaching government restrictions prevent donors from spending their money, and non-profit organizations from using private funds, in the manner they deem necessary and appropriate, and thereby threaten to undermine the very purpose for which the philanthropies and non-profit organizations were created. Because the objective physical separation required by LSC for engaging in prohibited activity is inevitably burdensome, the restrictions infringe on charitable donors' First Amendment right to support and fund programs, and non-profit organizations' First Amendment right to use non-federal funds, in the manner they deem necessary and appropriate. See Massachusetts Citizens for Life, 479 U.S. at 255 (First Amendment is infringed where a separation requirement which does not remove all opportunities for private spending nevertheless imposes a requirement so burdensome that its "practical effect may be to discourage protected speech").

3. The restrictions at issue here are unduly burdensome and thus violate the First Amendment.

Because they infringe on the First Amendment freedoms of charitable donors and non-profit organizations, the challenged legal services restrictions must be justified by a compelling governmental interest. See, e.g., Massachusetts Citizens for Life, Inc., 479 U.S. at 256.

Specifically, to justify burdens on the First Amendment activities described here, the government must show: (1) an extremely important government interest, (2) that cannot be advanced by less drastic means. See, e.g., United States v. Playboy Entertainment Group, 529 U.S. 803, 812-13 (2000); Reno v. ACLU, 521 U.S. 844, 874-75 (1997); City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994). The government fails to meet this standard here. Though the challenged legal services restrictions do not wholly prohibit charitable donations to LSC non-profits or the use of charitable donations by LSC non-profits, because of the onerous, burdensome nature of the physical separation requirement, the constitutional analysis is the same. Playboy Entertainment Group, 529 U.S. at 812; Massachusetts Citizens for Life, 479 U.S. at 263.

The government asserts two interests justifying imposition of an objective physical separation requirement on LSC non-profits that wish to use non-federal funds to support categories of restricted advocacy: ensuring that government funds are not spent on prohibited activities, and preventing the public perception that government funding is being spent on prohibited activities.¹¹ The first interest can be adequately satisfied by keeping separate books, in accordance with generally accepted principles of accounting, and by publicly disclosing how funds are used. See Village of Schaumburg, 444 U.S. at 637-38 (“Efforts to promote disclosure of the finances of charitable organizations [] may assist in preventing fraud by informing the public of the ways in which their contributions will be employed.”)

¹¹ In its most recent papers, the government also asserts that it has an interest in avoiding the indirect subsidization of prohibited activities. Legal Services Corp. Br. in Opposition, at 4. It is unclear, however, what the government means by this. If the government means that it wants to frustrate the ability of LSC non-profits to create economies of scale by using the same administrative and other systems for its LSC funded as for its charitably-funded activities, that simply is not a legitimate government interest; the government has no interest in erecting barriers as a means of discouraging non-profits from engaging in First Amendment protected activity where there is no cost to the government from the non-profits engaging in that activity. If what the government means is that it does not want to fund the things that legal services offices would do anyway, thus freeing up legal services programs’ charitable funding to be used for prohibited activities, then this is also inconsistent with Congress’ previous determination, in the lobbying context, that it can provide subsidies to non-profit organizations engaging in non-lobbying activities without indirectly subsidizing their lobbying activities, merely by requiring audits and adherence to certain accounting principles. See discussion of OMB Circular A-122, infra.

With respect to the second interest, as Plaintiffs argue in their Brief in Support of Preliminary Injunction, after Velazquez, 531 U.S. 533, it is clear that legal services lawyers speak for their clients and not for the government. Indeed, as the Court stated in Velazquez in the legal services context, “[t]he advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept.” Id. at 542-43. In light of this holding, the government faces a difficult challenge in asserting that objective, physical separation is necessary to prevent public confusion about the governmental message. Government is not the speaker. Id. A governmental interest in preventing public confusion is a very weak justification for rules that interrupt public-private partnerships at a fundamental level. Also, LSC grantees are able to deploy appropriate signage to prevent public confusion and protect the government's claimed interest. The government is hard-pressed, then, to justify a separation scheme that deeply harms the important third sector function, when such a simple solution is available.

Moreover, in other contexts, the government has determined that it can contribute funds to a private/public partnership without creating the perception that it is endorsing all of the privately-funded activities. For example since 1984, federal grant rules have prohibited federal grantees from using federal funds, either directly or indirectly, for a variety of advocacy-related activities and costs. Neither physical nor organizational separation is required. Instead, the Office of Management and Budget's Circular A-122 defines unallowable costs and establishes clear procedures for allocating expenses. See OMB Circular A-122, Cost Principles for Non-Profit Organizations, Attachment B, Selected Items of Cost, No. 25 (June 1, 1998). One cost item, lobbying, is covered by the Legal Service Corporation restrictions at issue in this case.¹²

¹² Circular A-122 defines unallowable lobbying costs as: (1) attempts to influence legislation in Congress or state legislatures by direct contact with legislators; (2) grassroots appeals that have a “reasonably foreseeable consequence of leading to concerted action;” (3) legislative liaison work, including attending hearings, tracking and analyzing bills; (4) gathering and publicizing information about actions of elected officials; (5) research and nonpartisan analysis made in knowing preparation for lobbying; (6) referendum campaigns; and (6) “electioneering,” including helping candidates, parties or PACs. See OMB Circular A-122,

Grantees are required to track and allocate direct costs so that unallowable costs are not charged to federal grants. Employees use time sheets to track time spent lobbying, so that a portion of salary and related costs is not charged to the federal grant. In addition, the portion of administrative costs, known as “indirect costs,” which supports lobbying is determined and subtracted from the costs charged to the federal grant. When the grantee submits its indirect cost proposal to the government, it must show that lobbying costs are not being charged to the grant, and must show where these costs have been charged. Id.

Federal grantees are also prohibited from using government funds to lobby the legislative or executive branches regarding the grant, including awards or renewals. See 31 U.S.C. § 1352. Congress simply requires any non-profit applying for a federal grant of more than \$100,000 to disclose lobbying expenses paid for with private funds and to certify that no federal grant funds will be used for lobbying. Id. Federal restrictions on use of grant funds are enforced through grant audits pursuant to the Office of Management and Budget’s Circular A-133, which applies to grants over \$25,000. Grant audits are more extensive than traditional audits, examining both financial and non-financial factors. For example, an A-133 audit looks at internal control procedures for complying with grant rules, program effectiveness, client eligibility and efficiency of resource use. In the case of grants of \$100,000 or more, the audit will examine the entire organization, not just the federally funded activity.

Clearly, then, Congress believes that it can satisfy its need to keep federal funds separate from lobbying-related activities and costs by requiring organizations to adhere to generally accepted principles of accounting and by subjecting federal grantees to audits. There is, consequently, no justification for LSC to require legal services officers to do so much more, and particularly to create objectively physically separate facilities. Whatever interests the government may have in ensuring that the funding that it contributes to legal services is not spent on prohibited activity and is not perceived by the public as being spent on prohibited activities

Attachment B, Selected Items of Cost, No. 25. These rules apply identically to all grantees, including universities and hospitals. The principles also extend to government contracts.

are easily met by significantly less onerous restrictions than those at issue here. There is simply no legitimate explanation for these burdensome restrictions which justifies the infringement on charitable donors' and non-profit organizations' First Amendment rights that results from these restrictions. See F.C.C. v. League of Women Voters, 468 U.S. 364, 400 (1984) (governmental concern of prohibiting the mixing of government funds with private sources is met by requiring a separate accounting arrangement, such as that currently permitted between 501(c)(3) and 501(c)(4) organizations, but not by regulations that effectively prohibit the protected activity); Regan v. Taxation With Representation, 461 U.S. 540, 544-45 (1983) (government's interest in not subsidizing certain activities is met by requiring bookkeeping and legal separation between government-subsidized activities and the constitutionally protected activities that the government does not want to subsidize).

CONCLUSION

For the foregoing reasons, and those stated by Plaintiffs in this action, amici curiae respectfully urge the court to enjoin the Legal Services Corporation from enforcing its requirement that LSC non-profits use non-federal funds to engage in restricted activities only if they do so through physically and "objectively" separate entities.

Respectfully submitted,

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Dated: June 18, 2002

**APPENDIX A:
STATEMENTS OF INTERESTS OF INDIVIDUAL AMICI**

The following individual statements of interest are a sampling of the many organizations participating as amicus in this case.

AARP Foundation

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

Alliance for Children and Families

The Alliance for Children and Families is a non-profit, membership association that represents more than 350 child- and family-serving agencies operating in the 50 states and Canada. We advocate for children, families and community-supportive policies in collaboration with our member agency network. Our interest in this case stems from our belief that the advocacy rights of non-profits as well as our freedom to use private funds for any law-abiding purpose need to be protected.

Alliance for Justice

The Alliance for Justice is an association of nearly 60 civil rights, women's, consumer, legal, environmental, and public interest organizations. It works to advance the cause of justice for all Americans, strengthen the non-profit sector's influence on public policy, and train and inspire the next generation of public interest advocates. The Alliance believes that non-profit organizations have a unique and necessary role to play in the process of generating and supporting sound, effective, and just public policy. We provide training and technical assistance for foundations wishing to support non-profit public policy work and for non-profits doing such work. The Alliance's interest in the case is that our members, the non-profit consumers of our training and technical assistance services, and other non-profits have the leeway to use non-governmental funds to bring their constituents' voices to policymakers.

Bernard F. and Alva B. Gimbel Foundation

The Gimbel Foundation's interest in this case is both narrowly and broadly focused. We support a number of organizations which provide legal services to poor clients. In addition, we are concerned with the outcome of this case as it relates to funding for other kinds of organizations which rely on a mix of public and private funding. The Gimbel Foundation looks very carefully

at the finances of the organizations it funds. We encourage economies of scale and do not make grants to organizations with disproportionately large overhead costs, no matter how good their programs; the requirement that restricted activities be housed in separate facilities with separate staff makes it impossible for organizations to meet those expectations. Finally, a critical part of our grantmaking strategy is looking for opportunities to leverage public funds with our much smaller private funds. The outcome of this case directly affects our ability to carry out our grantmaking in a way that is both effective and fiscally responsible.

Charity Lobbying in the Public Interest

CLPI's mission is to educate charities about the important and appropriate role lobbying can play in achieving their missions. CLPI is concerned about this case because we are interested in protecting the freedom of non-profits to use their private funds for lobbying if they choose to do so.

Charles Stewart Mott Foundation

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

Council on Foundations

The Council on Foundations is a membership association of 2,100 grantmaking foundations and corporations worldwide. Since 1949, we have served the public good by promoting and enhancing responsible and effective philanthropy. Council members have assets of \$270 billion and make annual charitable grants in excess of \$18 billion. Many of our organizations engage in public-private partnerships, and we are concerned that this case might set a precedent emboldening the government to encumber the funds that our members donate to non-profits that also receive some government funding.

Edna McConnell Clark Foundation

The Edna McConnell Clark Foundation focuses on strengthening non-profit youth development organizations so they can better serve more young people with high quality programs. The Foundation's approach to grantmaking is called Institution and Field Building (IFB). Key to the IFB approach is a comprehensive, multistage process used to identify promising youth development organizations, assess their overall capabilities, and subsequently invest in the growth of those organizations most capable of benefiting from this kind of support. We are concerned that this case might set a precedent that unnecessarily encumbers our grantees' use of private funds.

Florida Bar Foundation

The Florida Bar Foundation is a non-profit Florida corporation, established in 1956 by Florida lawyers and the Supreme Court of Florida. The mission of the Florida Bar Foundation is to foster law-related public interest programs on behalf of Florida's legal profession. Among our many activities, we distribute the funds generated by the Interest on Trust Account program created by the Florida Supreme Court, as well as funds contributed by the legal community in Florida, to legal services programs in Florida. Some of our grantees also receive funding from the federal Legal Services Corporation (LSC) and from other government sources. We are consequently concerned about restrictions that may encumber grantees' use of non-federal funds. We are also concerned that this case might set an unfortunate precedent for other government funders to similarly restrict the ability of non-profit groups to use private funds.

Independent Sector

Independent Sector is a coalition of over 700 leading non-profits, foundations, and corporate philanthropy programs with the mission of promoting, strengthening, and advancing the non-profit and philanthropic community to foster private initiative for the public good. Our members include non-profits that receive both government and philanthropic funding, and also foundations and corporate philanthropies that donate to non-profits that also receive some government funding. We are concerned about the ability of the non-profit and philanthropic sector to use their private funds freely and to engage in advocacy on public policy issues.

Legal Counsel for the Elderly

Legal Counsel for the Elderly, Inc. (LCE) is a non-profit organization incorporated in the District of Columbia, which is sponsored by the AARP Foundation and AARP. Currently, LCE receives no funding from the Legal Services Corporation (LSC). LCE annually provides free and reduced fee legal services to about 7,000 residents of the District of Columbia, including residents of nursing homes and group homes. It is dedicated to providing legal services to low and moderate income older persons in the District of Columbia by training and educating others concerning the legal rights of older persons, and by testing methods of providing free and low cost legal and advocacy services to older persons.

Michigan Non-profit Association

To protect the First Amendment rights of Michigan charitable organizations, the Michigan Non-profit Association is interested in participating in the case of Dobbins v. Legal Services Corporation. The Michigan Non-profit Association, with over 650 members across the state, promotes the awareness and effectiveness of Michigan's non-profit sector and advances the cause of volunteerism and philanthropy in the state.

Nathan Cummings Foundation

The Nathan Cummings Foundation is rooted in the Jewish tradition and committed to democratic values and social justice, including fairness, diversity, and community. We seek to build a

socially and economically just society that values nature and protects the ecological balance for future generations; promotes humane health care; and fosters arts and culture that enriches communities. Because our organization gives money to non-profit groups that also receive federal dollars, we are concerned about restrictions that may encumber grantees use of private funds.

National Association of Independent Schools

The National Association of Independent Schools is a voluntary membership, non-profit organization that represents over 1100 independent pre-collegiate schools nationwide. Our mission is to serve and strengthen our member schools and associations by articulating and promoting high standards of educational quality and ethical behavior, by working to preserve their independence to serve the democratic society from which that independence derives, and by advocating broad access for students in affirming the principles of equity and justice. Our member schools and associations often rely on public-private partnerships, and we are concerned that this case might set a precedent emboldening the government to encumber our grantees' use of private funds.

National Council of Non-profit Associations

The National Council of Non-profit Associations (NCNA) is a membership organization of state and regional associations of non-profits that work to promote and increase the capacity of the non-profit sector. As one of its guiding principles, NCNA supports and encourages non-profit advocacy as a means for civic engagement in the democratic process and to support non-profits' missions and the people and causes they serve. The restrictions at issue in this case pose a direct affront to this principle.

OMB Watch

In all our work, we are guided by the belief that improving access to our governmental decision-makers and energizing citizen participation will lead to a more just, equitable and accountable government, which will ultimately strengthen our civil society. To a large extent, we work with and through the non-profit sector because of its vital place in our communities and our faith that the sector can play a powerful role in revitalizing our democratic principles.

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

Open Society Institute

The Open Society Institute (OSI) is a private operating and grantmaking foundation, created and funded by George Soros, that promotes the development of open society around the world. OSI's U.S. Programs seek to strengthen democracy in the United States by addressing barriers to opportunity and justice, broadening public discussion about such barriers, and assisting marginalized groups to participate equally in civil society and to make their voices heard. OSI's U.S. programs support initiatives in a range of areas, including access to justice for low and moderate income people. The restrictions on the work of U.S. federally-funded lawyers for the poor pose critical threats to the ability of poor people to obtain relief through the courts. A core objective of the Access to Justice grantmaking program of OSI's Program on Law & Society is to educate the public about the devastating impact of the restrictions and, ultimately, to roll back the restrictions. Supporting challenges to the restrictions is one of our primary vehicles to advance our programmatic objectives in this area.

Rockefeller Foundation

The Rockefeller Foundation is a knowledge-based, global foundation with a commitment to enrich and sustain the lives and livelihoods of poor and excluded people throughout the world. The value of private philanthropic funds is that they can be used to support a wide variety of activities. The Foundation believes that publicly-supported charities like LSC non-profits are entitled to this private support to fund the full range of their activities. The Foundation is accordingly concerned that the government has placed limits on non-profit organizations' ability to carry out their purposes - including participation in advocacy on public policy issues - using private funds.

Rockefeller Brothers Fund

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

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

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

Volunteers of America

Volunteers of America is one of the nation's largest and most comprehensive charitable human service organizations, providing services to children and youth at risk, the elderly, the disabled, the homeless, and other people in need across the country. Funding for these programs is provided through both grants and contracts with the federal, state, and local government agencies as well as charitable donations and foundation grants. Volunteers of America advocacy seeks to advance social justice by creating more effective public policies that address the root causes of poverty and other social problems in the United States.