

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

DAVID F. DOBBINS, <u>et al.</u> ,))
)	
Plaintiffs,)	Civil Action No. 01-8371 (FB)
)	
v.)	
)	
LEGAL SERVICES CORPORATION,)	
)	
Defendant.)	

**MEMORANDUM OF LAW OF INTERVENOR-DEFENDANT UNITED STATES
OF AMERICA IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY
INJUNCTION AND IN SUPPORT OF MOTION OF INTERVENOR-DEFENDANT
UNITED STATES OF AMERICA TO DISMISS PLAINTIFFS' COMPLAINT**

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PRELIMINARY STATEMENT

This action is the latest challenge to the constitutionality of certain restrictions Congress placed on recipients of federal funds distributed by the Legal Services Corporation ("LSC"). Plaintiffs purport to bring "as applied" challenges to the program integrity regulations LSC promulgated in 1997, 45 C.F.R. § 1610.8, as well as three statutory restrictions of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321 (1996) ("1996 Act") -- the "solicitation" provision, 1996 Act § 504(a)(18), the "class action" provision, 1996 Act § 504(a)(7), and the "attorney fee" provision, 1996 Act § 504(a)(13) -- all of which were the subject of unsuccessful facial challenges in Velazquez v. Legal Services Corp., 985 F. Supp. 323 (E.D.N.Y. 1997). Pursuant to 28 U.S.C. § 2403(a), the United States has again moved to intervene to defend the constitutionality of these provisions.

As it did in Velazquez, the Court should reject these constitutional challenges. On the record presented, plaintiffs do not have standing to assert an "as applied" challenge to the program integrity regulations because the regulations have not been applied to a single plaintiff. Even if plaintiffs did have standing, they fail to present any evidence that the regulations impose an undue burden on the exercise of their constitutionally protected rights. The Second Circuit's holding that the program integrity regulations are facially constitutional because they provide an adequate alternative channel for protected expression thus controls this challenge.

Allowing for the creation of affiliate organizations through which plaintiffs may solicit clients, participate in class actions, and claim and retain attorney fees with non-LSC funds,

Congress legitimately decided not to continue to subsidize these activities. Given Congress' strong interest in promoting LSC's core mission of providing basic legal services to indigent persons, each of these three viewpoint-neutral funding restrictions easily passes constitutional muster. Consequently, the Court should deny plaintiffs' Motion for a preliminary injunction and dismiss their Complaint.

PRIOR LITIGATION

During the four-plus years since this Court denied plaintiffs' motion to preliminary enjoin enforcement of the program integrity regulations, see Velazquez v. Legal Services Corp. ("Velazquez I"), 985 F. Supp. 323 (E.D.N.Y. 1997), several noteworthy events have taken place.

The Ninth Circuit affirmed the conclusion of the United States District Court for the District of Hawaii that the LSC restrictions provide adequate alternative avenues for protected constitutional conduct. See Legal Aid Soc'y of Hawaii v. Legal Services Corp. ("LASH III"), 145 F.3d 1017 (9th Cir.), cert. denied, 525 U.S. 1015 (1998). The LASH III court ruled that plaintiffs' "unconstitutional conditions argument is without merit because neither the congressional enactments nor the implementing regulations infringe on First Amendment rights." Id. at 1024. The court explained that, consistent with Regen v. Taxation With Representation of Wash., 461 U.S. 540 (1983), and FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984), the LSC regulations "simply require that if a recipient wishes to engage in prohibited activities, it must establish an organization separate from the recipient in order to ensure that federal funds are not spent on prohibited activities." Id. at 1026. The probability that "the LSC restrictions may require additional compliance efforts by a recipient if it wishes

to engage in prohibited activities" did not alter the court's determination that these regulations do not impose unconstitutional conditions on the exercise of First Amendment rights. Id. at 1027.

Like the Ninth Circuit in LASH III, the Second Circuit affirmed that the program integrity regulations do not impose an unconstitutional condition on the exercise of plaintiffs' First Amendment rights. See Velazquez v. Legal Services Corp. ("Velazquez II"), 164 F.3d 757 (2d Cir. 1999). Looking to Taxation With Representation, League of Women Voters, and Rust v. Sullivan, 500 U.S. 173 (1991), for guidance, the Second Circuit reasoned that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." Id. at 766.

Although plaintiffs alleged that "the revised program integrity rules . . . impose 'extraordinary' burdens that impermissibly impede grantees from exercising their First Amendment rights to associate with clients, to lobby, and to litigate," and that the "costs of compliance . . . are 'so substantial' as to be prohibitive," id. at 767, the court found plaintiffs' assertions "insufficient to sustain a facial challenge," id. Finding that "[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," id., the court nonetheless left the door open for the instant challenge, stating: "Any grantee capable of demonstrating that the 1996 restrictions in fact unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act," id.

The court then evaluated plaintiffs' assertion that the 1996 Act discriminated against certain speech on the basis of viewpoint. See id. at 767-72. The court rejected this claim as to each challenged provision, with the exception of one sentence in § 504(a)(16) of the 1996 Act, which prohibited a grantee representing a client seeking specific relief from a welfare agency from arguing that "the rule that led to the denial of the client's benefits was unauthorized by the governing regulation, that the regulation was unauthorized by the statute, or that the regulation or statute was unauthorized by the Constitution." Velazquez II, 164 F.3d at 769. The court found that this provision constituted impermissible viewpoint-based discrimination, and thus unconstitutionally restricted freedom of speech, because it "restrict[ed] a grantee, seeking relief for a welfare applicant, from challenging existing law." Id. at 772.

Both plaintiffs and defendant petitioned the Supreme Court for a writ of certiorari. The Supreme Court granted defendant's petition challenging the Second Circuit's determination that the "suits-for-benefit" proviso of § 504(a)(16) constituted impermissible viewpoint-based discrimination. See Legal Services Corp. v. Velazquez, 529 U.S. 1052 (2000).

The Supreme Court affirmed the Second Circuit's determination that § 504(a)(16)'s provision prohibiting "legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law," Legal Services Corp. v. Velazquez ("Velazquez III"), 531 U.S. 533, 536-37 (2001), violates the First Amendment, see id. at 537. The Court was concerned that the restrictions would do more than simply prevent representation in certain classes of cases; the restrictions, the Court emphasized, would interfere with attorneys' advocacy of their clients by preventing them from making specific arguments in cases they were permitted to handle. See id. at 546-48. The

Court explained that the challenged provision "is designed to insulate the Government's interpretation of the Constitution from judicial challenge," *id.* at 548, and thus impermissibly "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power," *id.* at 545.

After striking the "suits for benefit" proviso of § 504(a)(16), the Supreme Court denied plaintiffs' petition challenging the portion of the Second Circuit's decision upholding the program integrity regulations. *See Velazquez v. Legal Services Corp.*, 532 U.S. 903 (2001).

On June 26, 2001, this Court held a status conference to determine how to proceed in *Velazquez*. *See* Transcript of Status Conference dated June 26, 2001, *Velazquez v. Legal Services Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997) (No. 97-00182). During the status conference, the Court stated that the first order of business would be for the parties to brief the issue of standing "before we go further in terms of as-applied challenges." *Id.* at 10.

Rather than address the issue of standing, on December 14, 2001, plaintiffs' counsel in *Velazquez* filed a new lawsuit on behalf of a new set of plaintiffs purporting to bring "as-applied" challenges to certain of the restrictions challenged in *Velazquez I* and *Velazquez II*. Plaintiffs include Legal Services of New York City ("LSNY"), an LSC grantee that both provides training for legal services lawyers and distributes the LSC funds it receives among LSC sub-grantees in the five boroughs of New York City, several LSC sub-grantees, several board members of these sub-grantees, private donors to certain plaintiff LSC sub-grantees, and a private attorney wishing to participate in class action litigation with a plaintiff LSC sub-grantee. *See* Complaint; Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction ("Pls.' PI Mem.") at 9-18.

In this action, plaintiffs challenge not only the program integrity regulations, 45 C.F.R. § 1610.8, but also the 1996 Act's restrictions on the use of LSC funds to solicit clients, 1996 Act § 504(a)(18); 45 C.F.R. § 1638, to participate in class actions, id. § 504(a)(7); 45 C.F.R. § 1617, and to receive attorney fees, id. § 504(a)(13); 45 C.F.R. § 1642. Plaintiffs argue that the program integrity regulations, impose an "undue burden" on LSC grantees within the meaning of the Second Circuit's decision in Velazquez II, deny private donors to LSC grantees First Amendment access to a "mixed public-private forum," and interfere with "important state and local functions" in violation of the Tenth Amendment. See Pls.' PI Mem. at 21-53. Plaintiffs also insist that the restriction prohibiting LSC grantees from soliciting clients violates their First Amendment speech and associational rights. See id. at 54-59. Finally, plaintiffs assert that the restrictions prohibiting LSC grantees from participating in class actions and from claiming or retaining court-ordered attorney fees "distort the basic function of the courts" in violation of the First, Fifth, and Tenth Amendments. See id. at 59-70.

Plaintiffs seek a preliminary injunction: "(1) enjoining LSC from enforcing its current restrictions on the use of non-LSC funds by LSC grantees; (2) enjoining the LSC ban on notifying prospective clients of their legal rights and then offering to represent them; and (3) enjoining the current LSC restrictions on participating in class actions and the claiming, or collecting and retaining, of court-ordered attorneys' fee awards in settings where resort to such techniques is crucial to the proper functioning of the judiciary." Id. at 70.

SUMMARY OF ARGUMENT

Plaintiffs' Motion should be denied and their Complaint should be dismissed because their constitutional challenges are without merit. Plaintiffs lack standing to bring "as applied"

challenges because the regulations have never been applied to any grantee named as a plaintiff. Not one of these grantees has submitted an application to LSC to determine whether it could establish an affiliate arrangement in compliance with the program integrity regulations. Given the highly flexible nature of the regulations and the way in which LSC has applied them, no grantee plaintiff can argue that making such an effort would be futile.

Because plaintiffs' "as applied" challenges consist of nothing more than speculation concerning the effects of the program integrity regulations and renewed assertions that the regulations are inherently unconstitutional, these challenges are controlled by the Second Circuit's decision in Velazquez II, which held that the regulations are not facially unconstitutional because they afford LSC grantees adequate alternative channels for protected expression.

Plaintiffs' cannot buttress their constitutional conditions argument by invoking the First Amendment rights of private donors and the Tenth Amendment rights of state and local governments. Private donors do not have a right to have the federal government ensure that donations they decide to make are used in what they believe to be the most "efficient" and "effective" manner. Similarly, any derivative financial effect a state or local government may suffer because LSC funds may no longer be available to subsidize certain forms of activity such organizations may wish to support would not amount to a violation of the Tenth Amendment.

Finally, Congress has not banned LSC lawyers from soliciting clients, participating in class actions, or receiving attorney fees; it has simply chosen not to fund these activities. Plaintiffs may pursue these activities through affiliates, which is all the Constitution requires.

In any event, given the viewpoint-neutral nature of these funding restrictions and Congress' well-defined interest in focusing scarce LSC funds on the core mission of providing basic legal services to indigent clients, the solicitation, class action, and attorney fee provisions easily pass constitutional muster.

STANDARDS

I. PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is "extraordinary relief" that should not be granted except in rare circumstances. Plaza Health Lab., Inc. v. Perales, 878 F.2d 577, 584 (2d Cir. 1989). When a plaintiff seeks to enjoin preliminarily a federal statute, it faces an even more daunting task. Because the "judicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise," Heart of Atlanta Motel, Inc. v. United States, 85 S. Ct. 1, 2 (1964) (Black, J.), it is ordinarily presumed that a challenged statute "should remain in effect pending a final decision on the merits," Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J.) (internal quotation marks and citation omitted). This presumption can be overcome only by a strong showing of both irreparable harm and a substantial likelihood of success on the merits. See Velazquez II, 164 F.3d at 763; Molloy v. Metropolitan Transp. Auth., 94 F.3d 808, 811 (2d Cir. 1996). This more rigorous standard of review "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." Able v. United States, 44 F.3d 128, 131 (2d Cir. 1995) (per curiam).

As this Court noted in Velazquez I, because an actual violation of First Amendment rights "almost certainly" amounts to "irreparable injury," the "key inquiry" for this Court now is whether the challenged restrictions of the 1996 Act and the program integrity regulations,

"as-applied" to plaintiffs here, violate the Constitution. See 985 F. Supp. at 338; Velazquez II, 165 F.3d at 767.

II. DISMISSAL STANDARD

Defendant-Intervenor United States moves this Court for an Order not only denying plaintiffs' Motion for a preliminary injunction, but also dismissing their Complaint. The United States moves pursuant to Federal Rule of Civil Procedure 12(b)(1) because plaintiffs lack standing to assert an "as-applied" challenge to the program integrity regulations, and pursuant to Rule 12(b)(6) because plaintiffs' challenges to the program integrity regulations and the three statutory provisions lack merit.

"In a motion to dismiss pursuant to Rule 12(b)(1), the defendant may challenge either the legal or factual sufficiency of the plaintiff's assertion of jurisdiction, or both." Robinson v. Malaysia, 269 F.3d 133, 140 (2d Cir. 2001). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the court lacks the statutory or constitutional power to adjudicate the case." Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996). Similarly, "[a] dismissal is warranted under Rule 12(b)(6) only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, 128 F.3d 59, 62-63 (2d Cir. 1997) (internal quotation marks and citations omitted). "In determining the adequacy of a claim under Rule 12(b)(6), consideration is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).

ARGUMENT

I. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED AND THEIR COMPLAINT DISMISSED BECAUSE NEITHER THE PROGRAM INTEGRITY REGULATIONS NOR THE THREE CHALLENGED STATUTORY PROVISIONS UNDULY BURDEN PLAINTIFFS' CONSTITUTIONAL RIGHTS.

A. The Program Integrity Regulations Do Not Unduly Burden The Exercise of Grantee Plaintiffs' First Amendment Rights.

Concluding that the program integrity regulations are not "unduly burdensome" on their face, the Second Circuit framed the issue for any as-applied challenge an LSC grantee may bring. See Velazquez II, 164 F.3d at 767. The task before the district court is to determine whether the LSC grantee bringing the as-applied challenge can demonstrate that the program integrity regulations "unduly burden its capacity to engage in protected First Amendment activity." Id.

The LSC grantee plaintiffs here argue that the program integrity regulations as applied to them unduly burden their First Amendment rights by requiring that they incur "extremely onerous programmatic, administrative and financial burdens" in order to conduct the activities restricted under the 1996 Act. See Pls.' PI Mem. at 34. Plaintiffs' claim fails for two reasons: first, plaintiffs lack standing to bring an as-applied challenge; second, plaintiffs' challenge is indistinguishable from that rejected by the Second Circuit in Velazquez II and hence is controlled by that decision.

1. Plaintiffs' Challenge Fails For Lack Of Standing.

It is well settled that an as-applied challenge to an allegedly unconstitutional policy generally cannot proceed until the challenged policy has actually been applied. See Prayze FM

v. FCC, 214 F.3d 245, 251 (2d Cir. 2000) (holding, in the context of an as-applied First Amendment challenge, that "[a]s a general rule, 'to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy'" (quoting Jackson-Bey v. Hanslmaier, 115 F.3d 1091, 1096 (2d Cir. 1997)); see also Madsen v. Boise State Univ., 976 F.2d 1219, 1220 (9th Cir. 1992). "This threshold requirement for standing may be excused only where a plaintiff makes a substantial showing that application for the benefit . . . would have been futile." Prayze FM, 214 F.3d at 251 (internal quotation marks and citation omitted). In order to establish standing, therefore, the grantee plaintiffs must demonstrate either that they have applied to LSC in an attempt to establish an affiliate arrangement and been rejected, or that such an application would be futile.

Plaintiffs can make neither demonstration. None of the grantee plaintiffs in this case allege that they have ever actually attempted to establish an affiliate arrangement and had LSC rebuff their plans. See Pls.' PI Mem. at 11-17, 18-37. Plaintiffs simply assert that, based on their own interpretation of the program integrity regulations, they believe that establishing a separate affiliate would be infeasible. See id. at 11-14, 16-17. Not one, however, has explored the possibility of associating with an existing unrestricted legal services provider or establishing a separate affiliate by seeking LSC's interpretation of how the regulations could be applied in their circumstances. Because no plaintiff here has "ever submitted any material for review. . . . [t]his case . . . simply does not raise any question of unconstitutional application of the Regulation[s] to any specific situation." Greer v. Spock, 424 U.S. 828, 840 (1976).¹

¹ Plaintiffs are free, at any time, to submit to LSC any proposal or question they have
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Nor can plaintiffs claim that seeking application of the program integrity regulations would be futile. While plaintiffs appear to believe that they could not possibly propose a feasible affiliate arrangement that LSC would approve, this pessimism is not warranted either by the regulations themselves or by the history of LSC's application of the regulations.

The program integrity regulations are highly flexible. They expressly provide that the specific requirements a grantee must fulfill in order to establish a sufficiently separate affiliate arrangement "will be determined on a case-by-case basis and will be based on the totality of the facts," and that none of the particular factors listed in the regulations will be determinative by itself. 45 C.F.R. § 1610.8(a)(3); see also 62 Fed. Reg. 27697-98. Hence, while plaintiffs complain that establishing a separate affiliate would require them to incur extremely onerous burdens, see Pls.' PI Mem. at 26-34, these claims rest on plaintiffs' speculation rather than the requirements of the regulations themselves.

Plaintiffs, for example, presume that the program integrity regulations require a highly intrusive degree of separation between grantee and affiliate facilities: they repeatedly charge that the regulations require grantees to "banish" or "wall off" their law reform activities from

¹(...continued)

regarding the establishment of an affiliate. See Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 62 Fed. Reg. 27,695, 27,698 n.1 ("[C]onsistent with the [LSC's] longstanding practice regarding compliance issues, individual recipients are welcome to submit all the relevant 'program integrity' information and request a review by the Corporation of any existing or contemplated relationship with an organization that engages in restricted activities."); Guidance in Applying the Program Integrity Standards ("Program Integrity Guidelines") (attached to Declarations in Support of Plaintiffs' Motion for Consolidation and a Preliminary Injunction ("Pls.' PI Decls.") at A, Ex. 34) at ¶ F (encouraging grantees to contact LSC with questions about the program integrity regulations); Pls.' PI Decl. A, Exs. 17-23, 27-28 (providing examples of advance proposals from grantees and responses from LSC).

their federally funded activities, see Pls.' PI Mem. at 24, 26; they complain of having to maintain separate offices with separate law libraries, computers, telephones, and office equipment, see id. at 31-32; they worry that grantee and affiliate attorneys housed in separate facilities will not be able to communicate effectively, see id. at 27, 29.

Given the flexibility of the regulations, such presumptions are unwarranted. The regulations do not specify what degree of separation is required between grantee and affiliate facilities or attorneys. The regulations merely list the degree of physical separation between facilities as one of several factors relevant to whether an affiliate arrangement is acceptable -- again, none of which is determinative by itself. See 45 C.F.R. § 1610.8(a)(3); 62 Fed. Reg. 27697-98. Likewise, LSC guidelines regarding the regulations stress that LSC has no bright-line rule against the sharing of facilities. See Program Integrity Guidelines (Pls.' PI Decl. A, Ex. 34) at ¶ D. While the guidelines state that grantees should be "cautious" about sharing facilities with their affiliates, especially if the facilities house shared personnel or are regularly visited by clients or the public, they make clear that, "standing alone, being housed in the same building, sharing a library or other common space that is not accessible to clients or the public may be permissible so long as there is appropriate signage, separate entrances and other forms of identification distinguishing the two organizations, and no recipient funds subsidize restricted activity." Id. at ¶ D.1.²

² The guidelines express similar flexibility as to other factors laid out in the program integrity regulations, such as the degree of separation between personnel and the keeping of separate accounting records. See Program Integrity Guidelines (Pls.' PI Decl. A, Ex. 34) at ¶¶ D.2-D.3.

Plaintiffs claims of hardship amount to mere speculation in light of the flexibility of the program integrity regulations. As the Ninth Circuit held in LASH III:

To support [their claims of hardship], appellants speculate as to how the LSC will apply the regulations. They assert that the "LSC's regulations allow 'affiliated' organizations to conduct restricted activities only in the limited sense of permitting overlapping boards of directors." They interpret the regulations as prohibiting "any sharing of staff or facilities." According to appellants, these regulations greatly increase the difficulty of providing legal services.

* * *

We disagree. . . . [Plaintiffs] do not present substantial evidence to support their assertions concerning how the LSC regulations will be interpreted and applied to recipients, and the text of the regulations does not support their categorical arguments.

* * *

For example, the program integrity regulations do not state that the organizations are limited to overlapping boards of directors, or that no sharing of staff is permissible. Instead, the regulations state that no factor is determinative and the LSC will make a case-by-case determination. We do not know under what circumstances the LSC will permit a person to work part-time at a recipient organization and part-time at an unrestricted organization.

145 F.3d at 1027 (citations omitted). Plaintiffs thus cannot claim futility based on the face of the regulations themselves.³

³ Grantee plaintiffs complain that the flexibility of the regulations itself deters them from attempting to establish an affiliate, arguing that if they guess wrong as to whether the regulations permit a certain interaction with an affiliate, then they risk losing their LSC funding. See Pls.' PI Mem. at 30-31. As noted in Velazquez I, this claim is specious, given that the regulations were made flexible in direct response to plaintiffs' former complaint that they were too rigid. See 985 F. Supp. at 341. In any event, plaintiffs have not been left simply to hazard a guess at what the regulations require before proceeding to establish an affiliate arrangement. LSC has explained that it will review grantees' proposals or answer their questions regarding relationships with affiliates in advance of any action being taken by the grantees. See, supra, n.1.

Nor can plaintiffs argue futility based on the history of the regulations' application. LSC's history of enforcing the program integrity regulations does not suggest that it would be futile for plaintiffs to attempt to establish an affiliate arrangement. As an initial matter, LSC does not even require grantees to obtain its approval before establishing an affiliate arrangement; its enforcement efforts are typically limited to obtaining good-faith certifications of compliance with the program integrity regulations from grantees themselves. See 45 C.F.R. § 1610.8(b); Declaration of Danilo A. Cardona (submitted with Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Legal Services Corporation's Motion to Dismiss). This fact alone undercuts any argument that LSC is likely to reject any affiliate arrangement plaintiffs propose. See Velazquez I, 985 F. Supp. at 341-42 ("LSC presumably will attach significant credence and presumptive validity to such certifications This will undoubtedly minimize the prospects of 'as applied' litigation challenges.").⁴

⁴ This fact also demonstrates that no inference can be drawn from the assertion of plaintiffs' counsel that "[i]n the almost five years since the regulations have been in effect, counsel are aware of only three LSC grantees that have established [separate affiliates]." Pls.' PI Mem. at 34 n.47. Counsel's representation is based on LSC's reviews of affiliate relationships. See id.; Pls. PI Decl. A ¶¶ 37-47. These reviews, however, cannot serve as an accurate basis for estimating the number of grantees that have established affiliates. These reviews are not routine practice; LSC grantees are not required to submit information about their affiliate relationships to LSC for review, nor are they required to inform LSC if they have established an affiliate relationship. See Declaration of Danilo A. Cardona. LSC grantees are required only to certify to LSC that they are in compliance with the program integrity regulations. See id.; 45 C.F.R. § 1610.8(b). Such certification provides no indication of whether a grantee has established an affiliate, because a grantee can comply with the regulations simply by not engaging in restricted activity. See Declaration of Danilo A. Cardona at ¶¶ 5-6. Because LSC has no way of knowing how many of its grantees have established separate affiliates, plaintiffs err in attempting to deduce such a number from the

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As for the handful of LSC grantees whose planned or existing affiliate relationship LSC has actually reviewed, all but one of these relationships received LSC's approval. See Pls.' PI Decl. A, Exs. 17-26, 27-28. In all of the approved relationships, the grantee and affiliate shared attorneys or support staff. See id. Exs. 18, 21-22, 26. In one relationship, the grantee and affiliate were located in the same building. See id. Ex. 26.⁵

The grantee plaintiffs thus cannot claim that attempting to establish a separate affiliate arrangement would be futile. Plaintiffs could easily submit proposals to LSC, laying out their individual circumstances and detailing in good faith what steps they are prepared to take toward establishing a separate affiliate. Given the flexibility evident in the regulations

⁴(...continued)
LSC documentation.

Moreover, media reports indicate that far more than "three" LSC grantees have established separate affiliates. According to one recent article, at least five grantees have established affiliate structures in the state of Virginia alone. See Wheatly Aycock, "Divide and Conquer: How Poverty Lawyers Are Overcoming Curbs on Federal Funds by Spinning Off New Organizations," Legal Times, Jan. 7, 2002.

⁵ This relationship was reviewed in the course of an LSC audit. See Pls.' PI Decl. A, Ex. 26. While LSC found that some violations of the program integrity regulations had occurred as a result of the relationship, it permitted the relationship to continue subject to certain modifications. See id. at 8. Notably, these modifications did not include relocation. See id. LSC concluded that the grantee and affiliate could continue operating within the same building, and that the separation required between them could be achieved relatively inexpensively by modifying intake procedures and time-sharing arrangements and by more clearly distinguishing the grantee from the affiliate in their representations to the public. See id. at 8-10.

As for the one proposed relationship that LSC rejected, it was clearly inadequate. The only form of objective separation that it proposed was a trivial differentiation in signage and letterhead. See Pls.' PI Decl. A, Exs. 27-28 (detailing submission and rejection of proposal by grantee Queens Legal Services Corporation ("QLSC") to establish affiliate titled "Queens Legal Services Corporation II").

themselves and in the history of their application, plaintiffs cannot reasonably claim that LSC would reject any affiliate relationship they might propose. See Prayze FM, 214 F.3d at 251 (finding no futility where rule on its face provided for waiver and history was not a reliable guide as to how agency would decide plaintiff's waiver request); Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 105-07 (D.C. Cir. 1986) (explaining that futility can be established only where an adverse decision by the agency is a certainty); Kittay v. Giuliani, 112 F. Supp. 2d 342, 350 (S.D.N.Y. 2000) (ruling that "at least one meaningful application . . . must be made in order to invoke the futility exception"), aff'd, 252 F.3d 645 (2d Cir. 2001). Consequently, the grantee plaintiffs lack standing to bring an as-applied challenge against the program integrity regulations.

The requirement that plaintiffs apply to establish an affiliate arrangement in order to have standing is firmly grounded in both constitutional and prudential considerations. As a constitutional matter, because plaintiffs have yet to propose, and LSC has yet to reject, any specific affiliate arrangements, plaintiffs' claims of injury remain too undefined and speculative at this point to frame a "case or controversy" admitting of intelligent judicial review. See Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000) (ruling that the "injury in fact" required for standing must be both "concrete and particularized" and "actual or imminent"); Transcript of Status Conference dated June 26, 2001 at 9, Velazquez v. Legal Services Corp., 985 F. Supp. 323 (E.D.N.Y. 1997) (No. 97-00182) ("Injury is not an amorphous concept. It has to be direct injury.").

It is unknown what degree of separation from an affiliate the grantee plaintiffs would propose; it is likewise unknown whether LSC would determine that the program integrity

regulations would permit the formulation entailed in such a proposal. With these preliminaries unsettled, it is impossible to resolve the question at bar -- whether the regulations are "unduly burdensome" as applied to plaintiffs. See Doe v. Blum, 729 F.2d 186, 189-90 (2d Cir. 1984) (holding that plaintiffs lacked standing to assert constitutional challenge where plaintiffs did not allege that they had either submitted an application for or been denied participation in a federal program); see also Madsen, 976 F.2d at 1221 (holding that failure to require application and rejection "can leave the dispute between the parties too nebulous for judicial resolution, because the precise nature of [plaintiff's] asserted injury -- and the appropriate relief -- are unclear"); Kittay, 112 F. Supp. 2d at 349 ("[P]laintiff has failed to obtain a final -- or for that matter, any -- decision concerning the applicability of the Regulations . . . and, in effect, invites this Court to address important and potentially complex constitutional and regulatory issues in a vacuum.").⁶

Prudential considerations parallel these constitutional requirements. Requiring grantee plaintiffs to submit to LSC's application review process ensures that the parties have availed themselves of the opportunity to resolve, or at least narrow, their dispute informally --

⁶ Plaintiffs' representation that LSC "conceded" that "current grantees have standing" during the June 26 status conference, Pls.' PI Mem. at 18 n.19, is incorrect. LSC made no such concession; LSC merely recapitulated the language in Velazquez II stating that "any grantee capable of demonstrating that they're unduly burdened in its capacity to engage in First Amendment activity remains free to bring an as applied challenge." Transcript of Status Conference dated June 26, 2001 at 8, Velazquez v. Legal Services Corp., 985 F. Supp. 323 (E.D.N.Y. 1997) (No. 97-00182). LSC did not, and obviously could not, represent that the plaintiffs at bar -- who filed this case on December 14, 2001, well after the June 26 hearing -- meet this standard. In any event, a party cannot "concede" standing because "courts have an independent obligation to ensure that federal jurisdiction is not extended beyond its proper limits." Wight v. BankAmerica Corp., 219 F.3d 79, 90 (2d Cir. 2000).

specifically, by exploring ways in which the grantees might comply with the program integrity regulations while minimizing any undesired burdens. See Madsen, 976 F.2d at 1221-22 (citing 13A Wright, Miller & Cooper, Federal Practice and Procedure § 3532.1, at 114 (1984) (stating that the "refusal to decide [unripe cases] may itself be a healthy spur to inventive private or public planning that alters the course of possible conduct so as to achieve the desired ends in less troubling or more desirable fashion")).⁷

Without specific proposals having been put before it, LSC has not been sufficiently apprised of plaintiffs' specific circumstances, nor has LSC had the chance to resolve, or at least narrow, plaintiffs' concerns administratively. See Madsen, 976 F.2d at 1221 ("[A] formal application . . . assures that those in charge are aware of the problem and have a fair opportunity to resolve it."); Kittay, 112 F. Supp. 2d at 349 (holding that application requirement holds out the possibility that a mutually acceptable solution will be reached administratively, "thereby obviating any need to address . . . constitutional questions"); see also 13A Wright, Miller & Cooper, Federal Practice and Procedure § 3532.1 (2001) ("Defendants . . . should not be forced to bear the burdens of litigation without substantial justification, and in any event may find themselves unable to litigate intelligently if they are forced to grapple with hypothetical possibilities rather than immediate facts.").

2. Plaintiffs' Challenge Is Directly Controlled By The Second Circuit's Decision in Velazquez II.

⁷ Plaintiffs appear to have a number of questions about how the regulations would apply to them, yet they ask these questions rhetorically in their Memorandum, as if it were not possible to address them directly to LSC. See Pls.' PI Mem. at 30. LSC could answer each of these questions in the context of specific proposals submitted for review.

Putting aside the grantee plaintiffs' lack of standing, their arguments fail on the merits under Velazquez II. Plaintiffs argue that the program integrity regulations are subject to strict scrutiny, see Pls.' PI Mem. at 21-25, 35, and that the regulations fail this standard because they "inherently" impose "extremely onerous" burdens that cannot be justified by any compelling interest, see id. at 26-34. These arguments, however, are precisely the arguments that the Second Circuit rejected in Velazquez II. That case teaches, first, that the program integrity regulations are not subject to strict scrutiny, but instead are constitutional so long as they leave adequate alternative channels for protected expression, and, second, that the program integrity regulations do not "inherently" fail this standard.

(a) *Strict Scrutiny Does Not Apply.*

Like the plaintiffs at bar, the Velazquez plaintiffs asserted that the program integrity regulations are subject to strict scrutiny. See Pls.' PI Mem. at 25, 35; Brief for Plaintiffs-Appellants at 35-45, Velazquez II, 164 F.3d 757 (2d Cir. 1999) (No. 98-6006). The Second Circuit, however, did not apply this level of scrutiny in deciding the Velazquez plaintiffs' challenge to the program integrity regulations. Rather, looking to Taxation With Representation, League of Women Voters, and Rust, the court of appeals held that "Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." Velazquez II, 164 F.3d at 766. Or, as the court subsequently phrased the test, restrictions on government benefits are permissible so long as they do not "unduly burden" recipients' protected activities. Id. at 767.

As is evident from its plain terms, the standard the Second Circuit articulated cannot be equated with strict scrutiny. The standard requires only that LSC grantees be left with

"adequate" alternative channels for protected expression, not the least restrictive channels possible, which strict scrutiny would require. See id. at 766. Likewise, the standard does not demand that any burden accompanying LSC funds be narrowly tailored to serve a compelling governmental interest; it only requires that such burdens not be "undue." See id. at 765 (treating "undue" and "unreasonabl[e]" as interchangeable); The Random House Dictionary of the English Language 2066 (2d ed. 1987) (defining "undue" as "unwarranted; excessive"). The terminology of strict scrutiny is readily familiar to courts; the Second Circuit would have used that terminology had it intended to adopt strict scrutiny as the legal standard applicable to the program integrity regulations.⁸

Furthermore, none of the three cases that the Second Circuit relied upon indicate that the "adequate alternatives" test is somehow tantamount to strict scrutiny. Rather, in each of these cases, the Supreme Court recognized that where a restriction on governmental funds leaves open adequate alternative avenues for protected expression, the government has not meaningfully regulated the expression in the first place, let alone regulated it in a way that would trigger strict scrutiny. See Taxation With Representation, 461 U.S. at 544-49 (declining to apply strict scrutiny after finding that the statute allowed plaintiffs to lobby through an affiliate and thus did not "infringe[] any First Amendment rights or regulate[] any First Amendment activity"); League of Women Voters, 468 U.S. at 398-400 (explaining that if the statute had provided for an affiliate structure, it "would plainly be valid"); Rust, 500 U.S. at

⁸ Indeed, the Second Circuit did use such terminology in Velazquez II in analyzing the constitutionality of the viewpoint-based welfare reform provision of the 1996 Act. See 164 F.3d at 772.

198 (holding, without applying strict scrutiny, that the restrictions did not abridge free speech rights given the availability of an affiliate structure).⁹

⁹ Plaintiffs argue that when the unconstitutional conditions doctrine laid out in Taxation With Representation, League of Women Voters, and Rust is applied "in the unique context of a mixed public-private institution," "it is clear that [the program integrity regulations] must satisfy the most stringent standard of review." Pls.' PI Mem. at 22-23. It is not clear why the fact that some LSC grantees receive private funds implies that the program integrity regulations are subject to strict scrutiny. Indeed, the grantees in Rust were also public-private partnerships, see 500 U.S. at 178, yet that fact made no difference to the Court's analysis.

(b) *The Program Integrity Regulations Are Not "Inherently" Unduly Burdensome.*

Regardless of how the "adequate alternatives" test is interpreted, it is undisputed that the Second Circuit found the program integrity regulations to meet the test on their face. See Pls.' PI Mem. at 6. Plaintiffs, therefore, are precluded from arguing based on the face of the regulations alone that the regulations fail the "adequate alternatives" test. Yet, this is precisely their argument.

Given that LSC has made no determination as to how the program integrity regulations apply to the plaintiffs at bar, plaintiffs necessarily are left to complain of what the regulations require generally, on their face. The essence of plaintiffs' allegations is that, due to disadvantages "inherent" in operating objectively separate legal programs, the program integrity regulations are unduly burdensome as a categorical matter. See Pls.' PI Mem. at 26 (citing "enormous programmatic disadvantages inherent in the operation of 'objectively' separate legal programs"); id. at 28-29 (citing "obvious problems inherent in supervising multiple programs in multiple physical settings" and three particular problems that "must be shouldered in order to satisfy the LSC restrictions"); id. at 31-32 (stating categorically that the financial burden of establishing an objectively separate legal program is "substantial, indeed prohibitive").

Although plaintiffs repeatedly invoke the "as applied" label to describe their challenge, see, e.g., Pls.' PI Mem. at 9, 18, 36 n.48, they have merely attempted a second bite at the

facial challenge apply.¹⁰ Plaintiffs' declarations only attest to their own opinions that establishing a separate affiliate would be unduly burdensome. See, e.g., Pls.' PI Decl. E at ¶ 11 ("In my opinion, the cost of creating and sustaining a separate affiliate would be too great."); see id. Ex. G at ¶ 16 ("MFY's leadership has determined that establishing a redundant separate entity that complied with 45 C.F.R. § 1610 would impose administrative difficulties and programmatic and financial consequences that would constitute an undue burden."); see id. Ex. J at ¶ 14 ("LSNY believes that § 1610 forces programs to establish wasteful and cumbersome structures that do not advance clients' interests.").

The Second Circuit rejected this very argument in ruling against the Velazquez plaintiffs' facial challenge. As the Second Circuit stated:

Plaintiffs contend that . . . the 1996 Act is unlawful. They point to the "immensely wasteful" program integrity requirements of separate offices,

¹⁰ In the Complaint and the Notice of Motion for Consolidation and a Preliminary Injunction, as well as in their Memorandum of Law, plaintiffs request relief from the program integrity regulations for LSC grantees and donors generally. See Compl. ¶ 45 ("[P]laintiffs respectfully request the Court to . . . declare that the [program integrity restrictions], which forbid legal services lawyers employed by an LSC grantee from using non-federal funds to represent clients in connection with activities proscribed by those provisions, unless the LSC grantee establishes and maintains programmaticaly flawed, administratively burdensome, and fiscally wasteful physically separate legal programs that receive no funding from LSC, impose an undue burden on the use of private, state and local funds by LSC grantees."); Notice of Motion for Consolidation and a Preliminary Injunction ¶ 2 (requesting that the Court preliminarily enjoin LSC from disciplining "any person or entity" for violating the program integrity restrictions); Pls.' PI Mem. at 70 (same). Were this truly an as-applied challenge, plaintiffs' prayer for relief properly would be for plaintiffs alone. See Sanjour v. EPA, 56 F.3d 85, 92 n.10 (D.C. Cir. 1995) ("The usual distinction between 'as-applied' and 'facial' challenges is that the former ask only that the reviewing court declare the challenged statute or regulation unconstitutional on the facts of the particular case; the latter, in contrast, request that the court go beyond the facts before it to consider whether, given all of the challenged provision's potential applications, the legislation creates such a risk of curtailing protected conduct as to be constitutionally unacceptable 'on its face.'").

equipment, libraries and personnel that grantees must meet in order to be able to speak through affiliates. Plaintiffs allege that the revised program integrity rules -- although virtually identical to those approved in Rust -- impose "extraordinary" burdens that impermissibly impede grantees from exercising their First Amendment rights to associate with clients, to lobby, and to litigate. The costs of compliance, they argue, are "so substantial" as to be prohibitive.

* * *

We find that plaintiffs' allegations are insufficient to sustain a facial challenge. . . . Any grantee capable of demonstrating that the 1996 restrictions in fact unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act. But plaintiffs present little evidence to support their predictions regarding how seriously the 1996 Act will affect grantees generally, and they provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms. It appears likely that LSC grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty.

Velazquez II, 164 F.3d at 767 (citations omitted). Plaintiffs cannot now posit as fact the allegations rejected in Velazquez II simply by reiterating them in sworn declarations.

The Second Circuit was obviously aware that establishing an affiliate arrangement would entail a certain amount of cost and effort. Finding these presumptive burdens not to be undue, the Second Circuit held that it appears likely that grantees with substantial non-federal funding -- such as grantee plaintiffs here¹¹ -- can establish separate affiliates "without serious difficulty." Id.; see also LASH III, 145 F.3d at 1027 (holding that it is not "constitutionally

¹¹ Grantee plaintiffs have available substantial non-federal funding with which to establish affiliate arrangements. See Pls.' PI Mem. at 11 (stating that non-federal funding accounts for 70% of plaintiff MFY's budget and by itself would permit MFY "to provide a full spectrum of legal services to the poor"); id. at 13 (stating that non-federal funding accounts for 67% of plaintiff South Brooklyn Legal Services's budget); id. at 14-15 (stating that non-federal funding accounts for 62% of plaintiff LSNY's budget and 58% of plaintiff Bronx Legal Services' budget).

significant" that plaintiffs must "expend effort to comply with the restrictions"); Legal Aid Soc'y of Hawaii v. Legal Services Corp. ("LASH II"), 981 F. Supp. 1288, 1295 (D. Haw. 1997) ("The unconstitutional conditions doctrine does not require regulations to eliminate all practical difficulties in pursuing the alternative channels in order to pass constitutional muster. If it did, few regulations concerning the use of congressional money would be constitutional."), aff'd, 145 F.3d 1017 (9th Cir.), cert. denied, 525 U.S. 1015 (1998).

Contrary to plaintiffs' assertions, see Pls.' PI Mem. at 8 (arguing that Velazquez III effected a "dramatic change" in the "legal landscape" governing this case); id. at 22 (asserting that "[t]he Velazquez Court ruled that since government does not speak in a legal services context, Rust does not govern this case"), the Supreme Court's decision in Velazquez III has not upset in any way the Second Circuit's decision upholding the program integrity regulations against facial attack. While plaintiffs are correct that the Supreme Court's Velazquez III opinion held that the government does not speak through LSC-funded programs, see 531 U.S. at 542, they fail to explain how this holding represents any departure from the Second Circuit's opinion in Velazquez II. The Second Circuit's opinion did not rely on any "government speech" justification borrowed from Rust. In fact, the court specifically noted that "the justification that prevailed in Rust -- avoiding the distortion or dilution of the very government message advanced by the program -- [does not] have any bearing here." Velazquez II, 164 F.3d at 766. Instead, the Second Circuit's holding rested on a much broader basis: reading Taxation With Representation, League of Women Voters, and Rust together, the Second Circuit held that the program integrity regulations need only leave LSC grantees an "adequate alternative avenue" for protected expression, and that they meet this test on their face. Id. at

766-67. The Supreme Court's reading of Rust in Velazquez III does not conflict with this conclusion in any way.¹²

In short, Velazquez II controls this issue, as it does the whole of plaintiffs' challenge to the program integrity regulations. Because plaintiffs raise no issues of fact or law that were not settled in Velazquez II, their challenge must be rejected as a matter of law.

B. The Program Integrity Regulations Do Not Interfere with Private Donor Plaintiffs' First Amendment Rights.

Plaintiffs argue that program integrity regulations interfere with private donors' "First Amendment access to a mixed public-private forum." Pls.' PI Mem. at 38.¹³ On the record presented, plaintiffs do not have standing to make this argument. Any injury the program integrity regulations may impose upon private donor plaintiffs is derivative of the injury potentially suffered by the LSC grantees to which these plaintiffs wish to donate. See Pls.' PI

¹² Plaintiffs' reliance on Velazquez III is also misplaced simply because Velazquez III did not address the program integrity regulations. The Court's holding in Velazquez III answered the separate question whether Congress may deny funding for certain viewpoints (constitutional challenges to welfare laws) if it agrees to subsidize certain legal claims (claims for welfare benefits). See Velazquez III, 531 U.S. at 537-40; see also Velazquez II, 164 F.3d at 767. The Supreme Court held that once Congress funds legal representation in a case, it may not deny funding for "all the reasonable and well-grounded arguments necessary for proper resolution of the case." Velazquez III, 531 U.S. at 545. By contrast, plaintiffs' challenge to the program integrity regulations does not raise a question of whether Congress must subsidize certain speech. The only question is what degree of separation Congress can require between activities it subsidizes and those it does not. Velazquez III did not address this question. In fact, *after* it decided Velazquez III, the Supreme Court denied plaintiffs' petition for certiorari challenging the portion of the Second Circuit's decision upholding the program integrity regulations. See Velazquez v. Legal Services Corp., 532 U.S. 903 (2001).

¹³ Plaintiffs in Velazquez I made an identical argument. See Memorandum of Law in Support of Motion for Preliminary Injunction at 17-18, Velazquez v. Legal Services Corp., 985 F. Supp. 323 (E.D.N.Y. 1997) (No. 97-00182) ("Velazquez I PI Mem.>").

Mem. at 18 n.19 (asserting that they have standing "as current and future donors to LSC grantees whose ability to ensure that LSC grantees are able to use their donations in a cost-efficient and programmatically effective manner to provide a full range of legal services to clients is impaired by the LSC restrictions"). As discussed above, see, supra, § I.A.1., however, the program integrity regulations have not been applied to any LSC grantee organization to which plaintiffs have indicated a desire to donate. As with grantee plaintiffs, therefore, private donor plaintiffs' assertion that their rights have been impaired is nothing more than speculation at this point.

Even if the private donor plaintiffs' did have standing to challenge the program integrity regulations, their challenge is precluded by Velazquez II. The Second Circuit rejected the argument that the regulations interfere with the First Amendment rights of LSC grantees, explaining that "the First Amendment tolerates this restriction" because the regulations provide "adequate alternative avenues for expression through affiliates." Velazquez II, 164 F.3d at 766-67; see also Velazquez I, 985 F. Supp. at 340-44. Because the affiliate alternative would allow legal services organizations to spend "non-federal funds" in precisely the manner that the private donor plaintiffs desire, their claims fail for the same reasons as the claims of the grantees. See Taxation With Representation, 461 U.S. at 546 (ruling that given the possibility of creating an affiliate, "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for . . . [this activity]"). As the United States District Court for the District of Hawaii stated, "under LSC regulations, all donors of contributions exceeding \$250 must be notified of the restrictions and presumably, if dissatisfied with the restrictions, can place their

money elsewhere (e.g. with the federally funded organization's affiliate)." LASH II, 981 F. Supp. at 1300.¹⁴

The LASH II court's observation underscores the fundamental flaw in private donor plaintiffs' claim: the right they assert simply does not exist. Plaintiffs explain that "here, a private donor wishes to fund First Amendment activity by legal services lawyers on the premises of a mixed public-private legal services program." Pls.' PI Mem. at 38; see also id. at 22 (explaining that private donors' claims rests on the "correlative right of private donors[] to assure that their privately funded speech is not banished to physically and intellectually isolated settings"). While private donors may have a right to donate money to an LSC grantee, see Pls.' PI Mem. at 22 n.20, the First Amendment does not encompass private donors plaintiffs' desire to require that a donee engage in specified forms of advocacy, conducted by lawyers with specific knowledge and skills, funded by both public and private contributions, working in a single facility. See FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 259-61 (1986) (explaining that donors give up control over their donations as soon as the money is donated); Southern Christian Leadership Conference v. Supreme Court of La., 61 F. Supp. 2d 499, 509 (E.D. La. 1999) (concluding that a donor does not have a "constitutional right to demand that funds he supplies be expended in a certain way"), aff'd, 252 F3d 781 (5th Cir.), cert. denied, 122 S. Ct. 464 (2001).

¹⁴ In this context, private donor plaintiff New York Foundation concedes that it has continued to make contributions to an LSC grantee in the face of the challenged restrictions. See Pls.' PI Decl. H, ¶ 10. The other private donor plaintiffs similarly make no allegation that they have suspended their donations. See id. at B, F. Moreover, not one private donor plaintiff alleges that any money contributed has been left unspent or returned because the donee was unable to spend it in a manner consistent with the terms of the donation.

Plaintiffs provide no support for the existence of such a right. The cases plaintiffs do point to in this respect -- NAACP v. Button, 371 U.S. 415 (1963); In re Primus, 436 U.S. 412 (1978); and Riley v. National Fed'n of the Blind of N.C., 487 U.S. 781 (1988), see Pls.' PI Mem. at 18 n.19, 22 n.20 -- stand for the uncontested, and irrelevant, proposition that the solicitation of charitable contributions, and certain prospective litigants, is protected speech. See Riley, 487 U.S. at 789; In re Primus, 436 U.S. at 431-32; Button, 371 U.S. at 428-29. Private donor plaintiffs here, however, assert not the right to solicit contributions, but instead the right to demand that the federal government provide an organization of their choice, constituted in a manner they approve, engaging in activity they favor, to which they prefer to donate. See Pls.' PI Mem. at 18 n.19, 22, 38.¹⁵

Finally, plaintiffs' "mixed public-private forum" argument is crafted from whole cloth and is without merit. Contrary to plaintiffs' assertions, see Pls.' PI Mem. at 38, an LSC

¹⁵ The remaining cases plaintiffs point to in support of their argument, see City of Ladue v. Gilleo, 512 U.S. 43 (1994), Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977), Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995), International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992), Niemotko v. Maryland, 340 U.S. 268 (1951), Burson v. Freeman, 504 U.S. 191 (1992), Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996), Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986), Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y., 447 U.S. 530 (1980), and Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991), see Pls.' PI Mem. at 38-47, are inapposite. Not one of these cases concerns the rights of donors to federally funded programs. Unlike the provisions at issue in City of Ladue, 512 U.S. at 45, Linmark, 431 U.S. at 86, Capitol Square, 515 U.S. 757-59, Krishna Consciousness, 505 U.S. at 674-77, Niemotko, 340 U.S. at 269-70, Burson, 504 U.S. at 193-96, Denver, 518 U.S. at 753-60, and Consolidated Edison, 447 U.S. at 532, moreover, the program integrity regulations neither block nor prohibit First Amendment expression. Nor do the regulations in any way single out First Amendment speech for a viewpoint based burden, see Pacific Gas, 475 U.S. at 20-21, or a financial burden, see Simon & Shuster, 502 U.S. at 123.

grantee is not a forum for private donors' speech. As the Ninth Circuit made clear in LASH III, "the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas." 145 F.3d at 1028. The Supreme Court refined this point in Velazquez III, stating that "Congress funded LSC grantees to provide attorneys to represent the interests of indigent clients. . . . The LSC lawyer . . . speaks on behalf of his or her private indigent client." 531 U.S. at 542. Plaintiffs' attempt to create a "mixed public-private forum," Pls.' PI Mem. at 41-42, from the fact that certain LSC grantees constitute "public-private partnerships" that receive both public and private funding, see id. at 23 & n.21, is thus untenable.

C. The Program Integrity Regulations Do Not Implicate the Tenth Amendment.

Like their attempt to invoke the rights of private donors, plaintiffs' attempt to enlist the Tenth Amendment and "fundamental principles of federalism," Pls.' PI Mem. at 47, lacks merit.

Plaintiffs do not have standing to make a Tenth Amendment argument here because there are no states or localities named as plaintiffs. See Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 144 (1939) (ruling that appellants, which did not include a state or state officers suing in their official capacity, did not have standing to make a Tenth Amendment challenge); The Vermont Assembly of Home Health Agencies, Inc. v. Shalala, 18 F. Supp. 2d 355, 370-71 (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," the Second Circuit has not extended Tenth Amendment standing to individuals).¹⁶

Moreover, because the program integrity regulations have not been applied to a grantee receiving funds from an as yet unnamed state or local government, any potential injury derived from "state and local efforts to aid LSC grantees . . . be[ing] expended on wasteful attempts to establish and maintain burdensome separate entities," Pls.' PI Mem. at 48, is purely conjectural at this point. Plaintiffs here make no argument, and present no evidence, concerning the program integrity regulations' effect on a specific state or locality. See id. at 47-53. Instead, reasserting the facial challenge advanced in Velazquez, see Velazquez I PI Mem. at 17-18, plaintiffs make unsupported predictions concerning the potential effect of the program integrity regulations, see Pls.' PI Mem. at 49 (hypothesizing that "[i]f state and local grants are subjected to the Congressional ban on delivering 'restricted' legal services, state-funded lawyers will be unable to provide adequate representation in many cases"); id. (predicting that "if state and local government seek to establish an 'objectively' separate legal program in a separate physical facility to deliver the otherwise 'restricted' legal services, they

¹⁶ Even if this matter is consolidated with the Velazquez matter, in which several individual public officials are named as plaintiffs, because these plaintiffs sue in their personal capacities and not as official representatives, they lack standing to assert the purported rights of the governmental bodies on which they serve. See Karcher v. May, 484 U.S. 72, 77-78 (1987); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 544-45 (1986); cf. Raines v. Byrd, 521 U.S. 811, 830 (1997) (holding that "individual members of Congress do not have a sufficient personal stake in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing" (internal quotation marks omitted)). Moreover, even if a personal injury to individual public officials existed, it would not be "arguably within the zone of interests," Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 127 (1995) (internal quotation marks and citation omitted), protected by the Tenth Amendment.

will be forced to waste scarce resources, shoulder impossible administrative burdens, and accept a programmatically undesirable structure"). Plaintiffs thus present no evidence that would support a finding of a "concrete or particularized" injury necessary to establish standing. See, supra, § I.A.1.

Even if plaintiffs did have standing, just as the program integrity regulations do not infringe upon the First Amendment rights of LSC grantees or private donor plaintiffs, the regulations do not implicate the Tenth Amendment. Contrary to plaintiffs' assertions, the federal government has neither "'issue[d] directives requiring the states to address particular problems, nor commanded the States' officers . . . to administer or enforce a federal regulatory program.'" Pls.' PI Mem. at 51 (quoting United States v. Printz, 521 U.S. 898, 935 (1997)). Nor has the federal government here "'require[d] the States to govern according to Congress' instructions.'" Id. (quoting New York v. United States, 505 U.S. 144, 162 (1992)).¹⁷

The program integrity regulations leave states and localities that desire to fund restricted activities free to donate to the affiliate of an LSC grantee. See LASH III, 145 F.3d at 1028. State and local governments may also donate their funds to extant organizations that do not accept federal funds. Alternatively, they may use their funds to create new legal services organizations. The situation facing states and localities is no worse than what they would face if the LSC discontinued funding legal services for the indigent. See Taxation With Representation, 461 U.S. at 549 (explaining that "appropriations . . . are also 'a matter of

¹⁷ In any event, the Supreme Court has made clear that "Congress may attach conditions on the receipt of federal funds" and these conditions may permissibly "influence a State's legislative choices," New York, 505 U.S. at 167 (quoting South Dakota v. Dole, 483 U.S. 203, 207 (1987)).

grace [that] Congress can, of course, disallow . . . as it chooses'") (quoting Commissioner v. Sullivan, 356 U.S. 27 (1958)).

Plaintiffs' complaint that, rather than being able to rely on LSC to subsidize activities states and localities may wish to support, these governments may now face the decision of having to fund certain activities on their own, see Pls.' PI Mem. at 48, 52, is unavailing. The Supreme Court has ruled that economic impact, "standing alone, is insufficient to establish a violation of the Tenth Amendment." Hodel v. Virginia Surface Mining & Recl. Assn., Inc., 452 U.S. 264, 292 n.33 (1981); see also FERC v. Mississippi, 456 U.S. 742, 770 n.33 (1982) ("[I]n a Tenth Amendment challenge to congressional activity, 'the determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States.'") (quoting Hodel, 452 U.S. at 292 n.33); United States v. Onslow County Bd. of Educ., 728 F.2d 628, 640 (4th Cir. 1984) (explaining that "an adverse impact on state and local economies alone is insufficient to establish a Tenth Amendment violation"); accord Taxation With Representation, 461 U.S. at 550 ("Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'") (quoting Harris v McRae, 448 U.S. 297, 318 (1980)).

Plaintiffs thus cannot use the Tenth Amendment to require the federal government to fund legal services organizations in such a way that ensures that state and localities' "legal services funding is used in the most economically efficient manner." Pls.' PI Mem. at 50.¹⁸

¹⁸ Plaintiffs' reliance on Gregory v. Ashcroft, 501 U.S. 452, 460, 464 (1991), Nix v.
(continued...)

D. The Solicitation Provision, the Class Action Provision, and the Attorney Fee Provision Are Permissible Restrictions on Recipients of LSC Funds.

In addition to challenging the program integrity regulations, plaintiffs challenge three statutory restrictions: the "solicitation" restriction, 1996 Act § 504(a)(18); 45 C.F.R. § 1638, the "class action" restriction, 1996 Act § 504(a)(7); 45 C.F.R. § 1617, and the "attorney fee" restriction, 1996 Act § 504(a)(13); 45 C.F.R. § 1642. Plaintiffs' challenge to each of these provisions lacks merit.

¹⁸(...continued)

Whiteside, 475 U.S. 157, 165 (1986), Erdmann v. Stevens, 458 F.2d 1205, 1210 (2d Cir. 1972), Hardware Dealers' Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158 (1931), Mondou v. New York, 223 U.S. 1, 56 (1912), and Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982), see Pls.' PI Mem. at 51-53, is misplaced. The program integrity regulations have not barred or forbidden state and local governments from funding legal services lawyers, from regulating state courts, from disciplining lawyers, or from receiving information. The program integrity restrictions leave state and local governments free to fund legal services lawyers to engage in any activity such lawyers deem appropriate, including activity Congress has decided not to fund.

1. The Solicitation Provision.

Plaintiffs first challenge the solicitation provision, arguing that under NAACP v. Button, 371 U.S. 415 (1963), and In re Primus, 436 U.S. 412 (1978), Congress cannot "prohibit qualified lawyers from engaging in pro bono outreach to disadvantaged persons . . . and then offering to represent them But Congress's so-called 'solicitation restriction' does precisely that." Pls.' PI Mem. at 54.

As a preliminary matter, plaintiffs exaggerate the scope of the solicitation restriction. The implementing regulation indicates that the solicitation restriction merely prohibits LSC grantees from representing or referring an individual after having given him personal, unsolicited advice "to obtain counsel or take legal action." See 45 C.F.R. §§ 1638.2-1638.3. Contrary to plaintiffs' repeated representations, see Pls.' PI Mem. at 54, 56, the solicitation restriction does not prohibit LSC grantees from engaging in "outreach" activities aimed at educating communities about their legal rights and informing them of the availability of the grantees' services. LSC regulations explicitly state:

[The solicitation 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 service announcements, maintaining an ongoing presence in a courthouse to provide advice at the invitation of the court, disseminating community legal education publications, and giving presentations to groups that request them.

45 C.F.R. § 1638.4(a).¹⁹

¹⁹ Likewise, plaintiffs err in suggesting that the solicitation restriction will interfere with the functioning of state laws aimed at ensuring that vulnerable populations receive legal representation even though they are unable to seek it out. See Pls.' PI Mem. at 49. Not only
(continued...)

More fundamentally, plaintiffs' challenge to the solicitation restriction fails because it rests on a misapplication of Button and Primus. These two cases in no way circumscribe the limitations the government may place on legal programs that the government itself subsidizes. These cases concern direct regulation of the legal profession generally and its impact on pro bono legal organizations, such as the NAACP in Button and the ACLU in Primus, in particular. See Button, 371 U.S. at 425-26; Primus, 436 U.S. at 418-22. At issue in these cases was whether state ethical rules prohibiting lawyers from soliciting clients were constitutional as applied to such organizations. The Court found that, unlike solicitation of clients for pecuniary gain, solicitation of clients by pro bono legal organizations is political speech protected by the First Amendment and hence cannot be banned by a broadly sweeping rule. See Button, 371 U.S. at 443-44; Primus, 436 U.S. at 434-38.²⁰

¹⁹(...continued)

is plaintiffs' suggestion erroneous as a matter of law for the reasons discussed in reference to the plaintiffs' Tenth Amendment challenge, see, supra, § I.C, but it is false as a matter of fact because LSC's solicitation regulation explicitly acknowledges the state laws and the special populations with which plaintiffs are concerned. See 45 C.F.R. § 1638.4(c) ("This part does not prohibit representation or referral of clients by recipients pursuant to a statutory or private ombudsman program that provides investigatory and 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.").

²⁰ The other cases on which plaintiffs rely -- Brotherhood of RR Trainmen v. Virginia, 377 U.S. 1 (1964), United Mine Workers of Am. v. Illinois State Bar Ass'n, 389 U.S. 217 (1967), and United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971), see Pls.' PI Mem. at 55-59 -- are inapposite. They concern not the rights of lawyers to solicit clients, but the rights of unions (or other collective organizations) to supply counsel to their own members. See United Transportation Union, 401 U.S. at 580-81; United Mine Workers, 389 U.S. at 221-22; Brotherhood, 377 U.S. at 5-6. Plaintiffs are not collective organizations and they do not seek to supply counsel to any of their "members."

Certainly, to the extent established in Button and Primus, the solicitation of clients by pro bono legal organizations is protected speech that Congress cannot ban outright. In this respect, however, the solicitation of clients is no different from many other activities that the 1996 Act restricts -- namely, lobbying, conducting advocacy training, supporting or opposing redistricting measures, participating in abortion-related litigation, and representing aliens, prisoners, or persons evicted from public housing for alleged drug activity. See 1996 Act, §§ 504(a)(1)-(5), (10)-(12). Each of these activities constitutes protected speech that Congress cannot ban outright.

What plaintiffs' argument ignores is that Congress has not directly banned solicitation any more than it has these other activities. It simply has chosen not to include solicitation within the scope of LSC-funded programs. LSC grantees remain free to solicit clients through a separate affiliate, as they remain free to lobby, conduct advocacy training, or pursue any of the activities restricted under the 1996 Act. In the context of a governmentally subsidized program, this is all that the Constitution requires. See Velazquez II, 164 F.3d at 766 ("Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression."); id. at 768 (rejecting challenge to lobbying provisions in 1996 Act because such provisions "merely prohibit[] 'a project grantee . . . from engaging in activities outside the project's scope'" (quoting Rust, 500 U.S. at 194); see also LASH III, 145 F.3d at 1025 ("[T]he LSC regulations do not force a recipient to give up prohibited activities; 'they merely require that the [recipient] keep such activities separate and distinct from [LSC] activities.'" (quoting Rust, 500 U.S. at 196)).

Given that plaintiffs may solicit clients through an affiliate organization, the only question is whether the solicitation restriction passes rationality review. See Taxation With Representation, 461 U.S. at 549-50 (applying rationality review to Congress's decision not to subsidize lobbying after finding that such decision does not meaningfully abridge First Amendment right to lobby). The solicitation restriction clearly passes this test. The restriction serves a legitimate purpose: it ensures that LSC grantees focus on providing routine services to core legal aid constituencies. As made clear in the legislative history of the 1996 Act, Congress thought it wasteful and distracting for LSC grantees to recruit new clients given that the grantees are already overburdened with existing indigent clients in need of basic legal assistance. See H.R. Rep. No. 104-196, 104th Cong., 2d Sess., 120-21 (1996); S. Rep. No. 104-392, 104th Cong., 2d Sess., 3, 8 (1996). It is within Congress's power to ensure, in this way, that LSC grantees hew to the Congressional priorities for which LSC funds are intended. See, e.g., Rust, 500 U.S. at 194 ("Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.").

2. The Class Action And Attorney Fee Provisions.

Plaintiffs assert that the class action and attorney fee provisions discriminate on the basis of viewpoint and "violate important principles of separation of powers and federalism." Pls. PI Mem. at 65, 66. Plaintiffs in Velazquez advanced a virtually identical challenge to both the class action and attorney fee provisions. See Plaintiffs' Supplemental Memorandum of Law at 8-16, Velazquez v. Legal Services Corp., 985 F. Supp. 323 (E.D.N.Y. 1997) (No. 97-00182). Although plaintiffs here characterize their challenge "as-applied," Pls.' PI Mem. at

60, they proffer virtually the same documentation as did the unsuccessful Velazquez plaintiffs concerning the effects of the class action and attorney fee provisions. Compare Declarations and Affidavits in Support of Plaintiffs' Motion for Class Certification and Preliminary Injunction at A, ¶¶ 4, 15, 22, 37; C, ¶¶ 5, 9; F, ¶¶ 6, 10, 11; K, ¶¶ 7, 8; M, ¶ 15, Velazquez v. Legal Services Corp., 985 F. Supp. 323 (E.D.N.Y. 1997) (No. 97-00182) and Supplemental Affidavit and Declarations in Support of Plaintiffs' Motion for Class Certification and Preliminary Injunction at A, ¶ 17; C, ¶¶ 4-29; D, ¶ 1, Velazquez v. Legal Services Corp., 985 F. Supp. 323 (E.D.N.Y. 1997) (No. 97-00182), with Pls. PI Decls. at C, ¶¶ 23-40; D, ¶¶ 15-16; E, ¶¶ 16-17; K, ¶¶ 38-42; N, ¶¶ 9-11, 14-15. In fact, to support their challenge to the class action provision, plaintiffs here place primary reliance on the experience of a plaintiff in Velazquez, who is not a plaintiff in this action. See Pls.' PI Mem. at 61, 62, 63, 64 (discussing the potential effect of the class action provision on attorney Zelhoff).

Both this Court and the Second Circuit rejected the Velazquez plaintiffs' challenge to the class action and attorney fee provisions. This Court concluded that the provisions challenged did not violate the constitution because "plaintiffs are not absolutely precluded from engaging in prohibited activities and, furthermore, have no constitutional entitlement to the benefits provided by the legal services program." Velazquez I, 985 F. Supp. at 344. The Second Circuit rejected plaintiffs' argument that the challenged provisions "encroach upon the autonomy and professional judgments of LSC lawyers." Velazquez II, 164 F.3d at 764-65 (internal quotation marks omitted); see also Pls.' PI Mem. at 6 (conceding that the Second Circuit "upheld the facial constitutionality of the remaining challenged restrictions, such as the ban on participating in class actions and the ban on receiving court-awarded legal fees,

reasoning that those restrictions did not appear on their face to impose a viewpoint based limitation on a subsidized lawyer's courtroom advocacy").

Plaintiffs' attempt to circumvent binding precedent by seeking to engraft the Supreme Court's analysis in Velazquez III onto this Court's evaluation of these provisions is unavailing. Plaintiffs do not argue that they have a right to receive attorney fees, and, in fact, concede that they do not "possess an inherent right to participate in class actions." Pls.' PI Mem. at 64 n.66; see also Velazquez I, 985 F. Supp. at 344; LASH I, 961 F. Supp. at 1410-11 (concluding that neither the class action nor the attorney fee provision implicate constitutional rights). This alone distinguishes plaintiffs challenge here from that considered by the Supreme Court in Velazquez III, where § 504(a)(16) "exclude[d] LSC representation in cases which 'involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation,'" 531 U.S. at 538 (quoting 1996 Act § 504(a)(16)).

In any event, the Supreme Court has made clear that "there is no right to have speech subsidized by the government." FEC, 479 U.S. at 256 n.9. The Velazquez III Court explained that "Congress was not required to fund an LSC attorney to represent indigent clients; and it when it did so, it was not required to fund the whole range of legal representations or relationships." 531 U.S. at 548. Given the alternative of an affiliate through which grantees may participate in class actions and claim and retain attorney fees with non-LSC funds, therefore, "Congress has not infringed any First Amendment rights or regulated any First Amendment activity; it has simply chosen not to pay for . . . [such activity]." Taxation With Representation, 461 U.S. at 546.

Unlike the provision struck down by the Supreme Court and the Second Circuit, moreover, both the class action and the attorney fee provisions are viewpoint-neutral, subject-matter restrictions. The Supreme Court and the Second Circuit premised their determination that § 504(a)(16) of the 1996 Act was unconstitutional on the fact that it constituted viewpoint discrimination. See Velazquez III, 531 U.S. at 546; Velazquez II, 164 F.3d at 769-70. The Supreme Court explained that § 504(a)(16) "sifts out cases presenting constitutional challenges in order to insulate the government's laws from judicial inquiry," Velazquez III, 531 U.S. at 546, and "is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories that Congress finds unacceptable but which by their nature are within the province of the courts to consider," id.

Neither the class action nor the attorney fee provision "insulate the government's laws from judicial inquiry" or "exclude from litigation those arguments and theories Congress finds unacceptable." Section 504(a)(7) pertains to classes of cases legal services layers may engage in with LSC funds. Section 504(a)(13) pertains to remuneration such lawyers may claim or retain. Like the numerous provisions the Second Circuit upheld in Velazquez II, 164 F.3d at 768-69, the class action and attorney fee provisions prohibit "grantees' involvement in these activities [with LSC funds] regardless of the side of the issue." Velazquez III, 531 U.S. at 539.

The Supreme Court has stated that where, as here, "governmental provision of subsidies is not aimed at the suppression of dangerous ideas, its power to encourage actions deemed to be in the public interest is necessarily far broader." Taxation With Representation, 461 U.S. at 550 (internal quotation marks and citations omitted). Like the subject matter

restrictions upheld by the Second Circuit in Velazquez II, the provisions at issue here "properly confine[] LSC program to the limited and legitimate purposes for which it was created." 164 F.3d at 768 (internal quotation marks and citation omitted). The core mission of the LSC is to "provide basic legal aid to poor individuals." H.R. Rep. No. 104-196, 121 (1996); see also S. Rep. No. 104-392, 8 (1996) ("[L]egal services mission . . . is to provide basic legal services to low-income Americans."). Participating in class actions diverts scarce government funds from this fundamental objective. See S. Rep. No. 104-392, 8 (determining to focus resources on "basic legal assistance" in order to "meet the legal needs of the poor"). Similarly, Congress legitimately determined that because LSC "grantees are supported by public resources in order to provide free legal aid to their clients. . . . [I]t is inappropriate for attorneys fees to be collected for free legal aid." H.R. Rep. No. 104-196, 120. Congress explained that because "[f]ederally-funded legal aid programs should serve as a catalyst, not a replacement, for private bar activity. . . . [C]ases which provide the opportunity for the collection of attorneys fees can be serviced by the private bar." Id.

Finally, contrary to plaintiffs' assertions, see Pls.' PI Mem. at 59-69, the class action and attorney fee provisions do not have an effect on the judiciary in any way analogous to § 504(a)(16). In Velazquez III, the Supreme Court was concerned that § 504(a)(16)'s viewpoint based restriction would cause "[t]he courts and the public . . . to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute, avoided all reference to questions of statutory validity and constitutional authority." 531 U.S. at 546;

Southern Christian Leadership Conference v. Supreme Court of La., 252 F.3d 781, 791 (5th Cir.) (indicating that 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"), cert. denied, 122 S. Ct. 464 (2001).

Unlike arguments addressing "statutory validity and constitutional authority," Velazquez III, 531 U.S. at 546, no court has held that engaging in class actions or claiming and retaining attorney fees are "speech and expression upon which courts must depend for the proper exercise of the judicial power," id. at 545.²¹ Because they do implicate the proper exercise of the judicial power, the provisions at issue here do not amount to a "scheme" that is "inconsistent with accepted separation-of-powers principles." Id. at 546. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 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, 767 (1st Cir. 1994) ("[T]here is nothing sacrosanct about the courts'

²¹ Contrary to plaintiffs' assertions, see Pls.' PI Mem. at 66-69, § 504(a)(13) does not even implicate the power of courts to control proceedings involving LSC funded attorneys. Although LSC funded lawyers may not claim or retain attorney fees, a court may still order these lawyers' adversaries to pay attorney fees. The court may then place these fees in a trust account or do with them as it deems appropriate. As plaintiffs admit, see Pls.' PI Mem. at 66 n.68, moreover, grantees may still claim and retain "[p]ayments received as a result of sanctions imposed by a court for violations of court rules or practices, or statutes relating to court practice, including Rule 11 of discovery rules of the Federal Rules of Civil Procedure, or similar State court rules or practices, or statutes." 45 C.F.R. § 1642.2(b)(3). Courts therefore may still sanction parties in litigation in which LSC attorneys participate, and the "incentives" inherent in fees, Pls.' PI Mem. at 66, remain unimpaired.

power to impose sanctions. Congress has wide-ranging authority to limit supervisory powers generally. This includes the authority to place restrictions on courts' inherent power to shift fees.") (citations omitted); see also Johnson v. West Suburban Bank, 225 F.3d 366, 377-78 (3d Cir. 2000) (ruling that Congress may impose restrictions that have the effect of eliminating class actions in certain categories of cases); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 8 U.S.C. § 1252(e)(1)(B)) (prohibiting any court from certifying a class action in the context of reviewing immigrant removal orders).²²

CONCLUSION

For the foregoing reasons, plaintiffs' Motion for a preliminary injunction should be denied and their Complaint should be dismissed.

²² Plaintiffs contend that the class action and attorney fee provisions interfere "with the functioning of the state courts in violation of federalism." Pls.' PI Mem. at 64; see also id. at 66. Because plaintiffs provide absolutely no support for this assertion, it does not require a lengthy response. Congress may prohibit certain class actions from being litigated in state courts, see Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 168 F. Supp. 2d 1352, 1355, 1356 (M.D. Fla. 2001); In re Livent, Inc. Noteholders Securities Litig., 151 F. Supp. 2d 371, 442 (S.D.N.Y. 2001), and it may prohibit courts from awarding attorney fees, see Alyeska, 421 U.S. at 262; cf. 28 U.S.C. §§ 1738A, 1738B (establishing detailed rules for state court systems in child custody cases).

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2002, I caused a true and accurate copy of the foregoing Memorandum of Law of Intervenor-Defendant United States of America in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Motion of Intervenor-Defendant United States of America to Dismiss Plaintiffs' Complaint to be served by Federal Express overnight delivery service on the following persons:

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