Nos. 99-603 and 99-960

In the Supreme Court of the United States

LEGAL SERVICES CORPORATION, PETITIONER

v.

CARMEN VELAZQUEZ, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

CARMEN VELAZQUEZ, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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A. THE WELFARE CLAIM PROVISO IN SECTION 504(a)(16) OF THE 1996 APPROPRIATIONS ACT IS FULLY CONSISTENT WITH THE FIRST AMENDMENT

1. Respondents contend (Br. 12-14, 19-24, 30) that the proviso to Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, 110 Stat. 1321-55, restricting the types of representation of welfare claimants that an LSC fund recipient may accept, violates the First Amendment because it allocates subsidies on the basis of viewpoint and suppresses a particular perspective. Respondents rely on cases holding that, when the government creates a public forum, it may not limit access to that forum on a viewpoint discriminatory basis. Resp. Br. 10-14. Respondents fundamentally misconceive the nature of the LSC program.

a. The cases upon which respondents rely did not involve programs at all similar to the LSC program. In *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 120 S. Ct. 1346 (2000), for instance, the Court considered a program adopted by a state university "for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students." *Id.* at 1354. In that setting, the Court concluded that its public forum cases furnished a "close analogy," and that the viewpoint neutrality standard of those cases therefore should apply. *Id.* at 1354. Similarly, in *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), the Court invalidated a university's effort to exclude all religious speech from a program funding student activities, finding that the program "expends funds to encourage a diversity of views from private speakers," 515 U.S. at 834,

and therefore was subject to scrutiny under the Court's public forum cases, see *id.* at 829-830.[1]

The public forum doctrine is inapplicable here. The LSC program was not designed to facilitate a debate or free exchange of ideas among the recipients of federal funds for the benefit of the larger community, as in *Southworth* and *Rosenberger*. Indeed, LSC funds are not furnished to facilitate the public expression of the recipients' own views at all. Rather, the LSC was established to enable fund recipients to provide a particular professional service—legal representation—to particular individuals, namely, to indigent persons in certain types of legal proceedings before an agency or in court. See *Legal Aid Soc'y of Haw.* v. *Legal Servs. Corp.*, 145 F.3d 1017, 1028 (9th Cir.) (White, J.) ("Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas."), cert. denied, 525 U.S. 1015 (1998). Although lawyers, in furnishing those services, present legal and factual arguments on behalf of their clients, those focused submissions are made under structured rules and are presented for their independent legal significance in governmental decision-making processes, not as an act of self-expression (by either lawyer or client) of the sort that the Court's free speech cases have addressed.

Issues concerning the attorney-client relationship, the role of counsel in litigation, access to courts, suing the government, and the availability of government-funded counsel have typically been dealt with by reference to rules of ethics, court rules, statutes, and doctrines such as sovereign immunity. To the extent the Constitution speaks to those issues,

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[1] *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 675-676 (1998), also cited by respondents (Br. 11, 13-14), involved the standards applicable to a candidate's access to a political debate on a public television station—a setting far removed from the furnishing of legal services to an individual client.

it is primarily through the Due Process Clause, not the First Amendment. See, *e.g.*, *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985) (in a case involving the individual interest in presenting a benefits claim, "appellees' First Amendment arguments, at base, are really inseparable from their due process claims"); *Lassiter* v. *Department of Social Servs.*, 452 U.S. 18 (1981) (Due Process Clause does not require government-funded counsel in parental-status termination proceeding); *Ortwein* v. *Schwab*, 410 U.S. 656, 658-660 & n.5 (1973) (Due Process Clause does not prohibit filing fee for judicial review of welfare benefits denial; First Amendment furnishes no independent basis for claim); *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970) (Due Process Clause does not require government-funded counsel in welfare hearing). Accordingly, although an attorney's ability to accept particular cases is often restricted by a wide array of laws and rules, such measures generally are not viewed as raising First Amendment issues.[2] If they were, rules governing attorney ethics and conflicts of interests, and state and federal restrictions like Federal Rule of Civil Procedure 11, which prohibit attorneys from filing complaints unless they are certified by the attorney as meeting certain standards, would be subject to heightened scrutiny. But such laws and rules are instead treated as reasonable limitations on an attorney's ability to provide legal representation in certain circumstances. Section 504(a)(16) should be viewed in a similar manner and as not triggering distinct First Amendment scrutiny. As this Court observed in *Walters*,

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[2] In cases such as *Brotherhood of R.R. Trainmen* v. *Virginia*, 377 U.S. 1 (1964), relied upon by respondents (Br. 15-16), "the First Amendment interest at stake was primarily the right to associate collectively for the common good," not, as here, "the individual interest in best prosecuting a claim," *Walters*, 473 U.S. at 335. And *NAACP* v. *Button*, 371 U.S. 415 (1963), and its progeny, also relied upon by respondents (see Br. 14-15), involved the First Amendment rights of an organization to use litigation to promote its own political goals. Congress surely was not required to fund any political goals LSC fund recipients may have in their own right.

473 U.S. at 335 & n.13, "the constitutional analysis of a regulation that restricts core political speech * * * will differ from the constitutional analysis of a restriction on the available resources of a claimant in Government benefit proceedings."

A different analysis is not required on the ground that the Section 504(a)(16) proviso affords a greater likelihood of free legal representation to a certain type of litigant (a welfare claimant seeking benefits under the existing welfare system, who can hope to be one of those represented by an LSC fund recipient lawyer) than to another type of litigant (a welfare claimant seeking relief that involves a challenge to existing welfare reform law, who must find free representation elsewhere). Congress often acts in a way that favors one type of litigant over another, sometimes based on the nature of the litigant's legal claim. See, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997) ("citizen-suit provision * * * favor[s] environmentalists in that it covers all private violations of the [Endangered Species Act] but not all failures of the Secretary to meet his administrative responsibilities"); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978) (award of attorney's fees under Title VII to prevailing plaintiff is governed by more favorable standard than standard governing award of attorney's fees to prevailing defendant); *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 & n.2 (1983) (same differential standards govern attorney's fees awards under 42 U.S.C. 1988); cf. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) (statute allows handlers of dairy products to seek judicial review of administrative order but does not allow ultimate consumer to seek judicial review of same order). And far from calling for the strictest of scrutiny, as respondents assert (Br. 12), special rules in suits against the government are common, as demonstrated most prominently by the doctrine of sovereign immunity, which can limit the type of relief that can be obtained against the government or bar such suits altogether.

b. Respondents take issue (Br. 22-27) with our position that the Section 504(a)(16) proviso represents a legitimate instance of Congress defining the scope of a funding program by subsidizing some services but not others. They assert (*id.* at 22) that our position reduces the First Amendment analysis to an "exercise in semantics," because "virtually every viewpoint discriminatory allocation of a speech subsidy can be repackaged semantically as a decision to fund one 'program' or 'service' rather than another." Respondents' objection overlooks the express holding of *Rust* v. *Sullivan*, 500 U.S. 173 (1991), that Congress does not engage in viewpoint discrimination by "refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194-195. That is precisely what Congress has done here.

Respondents err in contending (Br. 18-21, 27) that the holding in *Rust* applies only where the government itself is the speaker. The analysis in *Rust* did not rely on that proposition. The Court held that the government does not violate the Constitution when it "selectively fund[s] a program to *encourage certain activities* it believes to be in the public interest, without at the same time funding an alternative program that seeks to deal with the problem in another way." 500 U.S. at 193 (emphasis added). Indeed, respondents concede (*id.* at 19 n.17) that "the true speaker in *Rust* was not the government." Nor, contrary to respondents' assertion (*id.* at 12-14, 18 n.16), have this Court's subsequent cases limited *Rust* in the manner respondents propose or otherwise suggested that the standards governing a public forum apply to all government-funded speech except when the government itself is the speaker.[3]

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[3] In *Rosenberger*, the Court did not describe *Rust* as a case in which the government itself was actually speaking; it said that the government "used private speakers to transmit specific information pertaining to its own program," 515 U.S. at 833—a program making federal funds available for professional family planning counseling that was conducted by the

The First Amendment provides that Congress shall make no law "abridging the freedom of speech." That freedom is presumptively "abridged" when the government directly regulates private speech, or limits access on the basis of content or viewpoint to a forum it has established for free private expression. But government subsidies, like private donations, *expand* the opportunity for private expression. Thus, even in the context of ordinary free expression, they

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recipients of the funds, not the government. Significantly, moreover, after noting that in situations involving a governmental message, the government may take appropriate steps to ensure that the message is not garbled or distorted by the grantee, *ibid.*, the Court stated that "[i]t does not follow * * * that viewpoint-based restrictions are proper when the University does not itself speak *or subsidize transmittal of a message it favors* but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 834 (emphasis added). The emphasized passage makes it clear that *Rosenberger* did not hold that the government is foreclosed from subsidizing private expression that it favors, where it has refrained from establishing what is, in essence, a public forum for the free expression of a broad range of private views. Accord 515 U.S. at 829-830.

Similarly, in *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), the Court reiterated what it said *Rust* "held": that Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest," and that, in doing so, "the Government has not discriminated on the basis of viewpoint," *id.* at 588 (quoting 500 U.S. at 193); and the Court in *Finley* distinguished *Rosenberger* as a case in which the Government "indiscriminately 'encourage[d] a diversity of views from private speakers,'" *id.* at 586 (quoting 515 U.S. at 834). (Respondents' quotation from *Finley* (see Resp. Br. 18 n.16) is from the dissenting opinion in that case.)

In *Southworth*, although the Court cited *Rust* following its statement that public forum analysis would not apply where the university speaks, 120 S. Ct. at 1357, the Court did not thereby imply that the central principle of *Rust*—that in a broad range of situations the government may selectively fund a program to encourage certain activities—had been abandoned and replaced with a rule that the government may favor a particular message *only* when the government itself does the speaking. Indeed, in addition to citing *Rust* in connection with its statement concerning speech by the university itself, the Court also cited *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), a case that indisputably involved expressive activity (lobbying) by private entities, not the government. Accord 120 S. Ct. at 1354.

do not, absent more, "abridge" the freedom of speech of those persons who are not subsidized. See *Lyng* v. *Automobile Workers*, 485 U.S. 360, 368 (1988) ("a legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right") (quoting *Regan* v. *Taxation With Representation*, 461 U.S. 540, 549 (1983)); see also *Regan*, 461 U.S. at 546. *A fortiori* that is so in the specialized setting of government funding of representation in litigation.

c. Even if the Court were to apply notions of viewpoint neutrality in the present setting, respondents could not prevail. Their argument that the Section 504(a)(16) proviso discriminates against a particular viewpoint in the allocation of federal funding is based on a misunderstanding of the proviso. Respondents characterize it as protecting an undefined, monolithic "government viewpoint." But the proviso does not operate in that manner.

The proviso prohibits legal representation of an individual welfare claimant by an LSC fund recipient where the relief sought challenges "existing law." § 504(a)(16), 110 Stat. 1321-55; 45 C.F.R. 1639.4 (U.S. Br. App. 29a). LSC has defined "existing law" to mean "Federal, State or local statutory laws or ordinances which are enacted as an effort to reform a Federal or State welfare system and regulations issued pursuant thereto that have been formally promulgated pursuant to public notice and comment procedures." 45 C.F.R. 1639.2(b) (U.S. Br. App. 28a-29a).[4]

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[4] LSC regulations define "an effort to reform a Federal or State welfare system" to include the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (except for its child support enforcement provisions) and "subsequent legislation enacted by Congress or the States to implement, replace or modify key components" of PRWORA, or "by States to replace or modify key components of their General Assistance or similar means-tested programs conducted by States or by counties with State funding or under State mandates." 45 C.F.R. 1639.2(a) (U.S. Br. App. 28a). In adopting that definition, LSC explained that Congress was considering Section 504(a)(16) while it was also considering PRWORA. See 62 Fed. Reg. 30,764-30,765 (1997). Thus, LSC's interpre-

Thus, the Section 504(a)(16) proviso precludes a welfare claimant from being represented by an LSC fund recipient where the claimant seeks relief that challenges any state or federal welfare reform law. That prohibition applies regardless of the "viewpoint" of the challenged law or the person challenging it—*e.g.*, whether the law being challenged was enacted to reform a welfare system to the advantage of welfare claimants or to their disadvantage. Respondents nonetheless charge that the proviso "is openly premised on hostility toward legal arguments challenging a particular government viewpoint." Resp. Br. 30. That is not true—even if we accept for present purposes the strained hypothesis that the text of a duly enacted law is properly characterized as a "viewpoint" in this context. For example, the proviso prohibits representation by an LSC fund recipient not only in a case where a welfare claimant seeks relief challenging a federal welfare reform statute, but also in a case where a welfare claimant relies on the same federal welfare reform statute and seeks relief challenging a state welfare reform law or regulation as inconsistent with the federal statute. Also, the proviso precludes representation by an LSC fund recipient where the relief sought challenges the welfare reform law "in effect on the date of the initiation of the representation," § 504(a)(16), 110 Stat. 1321-55, even though that law may include provisions that are directly contrary to those in another welfare reform law in effect on the date representation was initiated in another case.

In sum, the Section 504(a)(16) proviso is properly regarded not as resting on a hostility to a particular "viewpoint," but rather as furthering Congress's legitimate purpose of ensuring that federal funds and federally subsidized attorneys are not directed to efforts to upset the reforms of

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tation furthers Congress's intent in enacting PRWORA "to increase the flexibility of States" in operating welfare systems, 42 U.S.C. 601(a) (Supp. IV 1998); see *Saenz* v. *Roe*, 526 U.S. 489 (1999), by precluding federal subsidization of lawsuits challenging such welfare reform systems.

welfare laws that have recently been put in place by Congress and the States. See note 4, *supra*. That purpose is justified by Congress's determination that there is a need to focus the limited resources of LSC fund recipients on providing representation in run-of-the-mine individual claims for benefits under those laws, because such cases are specifically calculated to obtain benefits for persons who are entitled to receive them, are less time-consuming and less expensive than challenges to the welfare programs themselves, and are less likely to attract other lawyers. See U.S. Br. 25-27. Moreover, a limitation on federal subsidies of counsel, like a decision not to enact a fee-shifting statute or a decision to invoke sovereign immunity, necessarily reflects a judgment regarding the need for an apportionment of incentives in a particular context, and may also take into account considerations of respect and comity between the federal and state governments, as reflected here in the devolution of authority to the States under PRWORA. Cf. *Alden* v. *Maine*, 527 U.S. 706, 754 (1999).

2. Respondents also contend (Br. 14-17, 27) that the Section 504(a)(16) proviso violates the First Amendment rights of attorneys employed by LSC fund recipients because it impermissibly intrudes on their associational relationship with their clients. Respondents acknowledge that Congress is not generally obligated to furnish welfare claimants with a free lawyer (*id*. at 16), but they contend that, "once Congress elects to fund a lawyer-client relationship," the government cannot "manipulate the expressive associational activities of the participants" (*id*. at 16-17).

a. The fundamental flaw in that line of argument is that Congress has elected *not* to fund a lawyer-client relationship between an attorney employed by an LSC fund recipient and a welfare claimant who seeks relief that would invalidate existing welfare reform laws and regulations. Section 504(a)(16) does not bar an attorney employed by an LSC fund recipient from expressing to a person seeking legal

assistance (or to anyone else) his or her views regarding any legal issue, including that a welfare reform law or regulation is unlawful or unconstitutional. But the LSC Act and appropriations provisions do not allow that attorney to agree to provide legal representation, under the auspices of an LSC fund recipient, to all potential clients or to pursue all potential claims. Lawyers employed by an LSC fund recipient accordingly are obliged to describe to a potential client at the outset the statutory limitations on LSC-funded representation, including the Section 504(a)(16) proviso, and to decline to provide legal representation in cases covered by that (or other) restrictions. The attorney is free, however, to refer a potential client to another attorney who is not subject to the LSC restriction.[5]

The fact that the proviso precludes an attorney employed by an LSC fund recipient from forming, within the confines of an LSC-funded program, an attorney-client relationship with a potential client for purposes of a particular lawsuit does not violate the First Amendment. That limitation is a condition of the attorney's employment by a recipient of

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[5] Respondents complain (Br. 24-26) that it is "often" impossible for an LSC fund recipient lawyer to know at "the outset of an attorney-client relationship" whether representation of a welfare claimant will involve a challenge to existing law. Respondents offer no empirical support for that assertion, and ethical considerations may well require an attorney to resolve any such doubts at the outset against undertaking the representation. See ABA Comm. on Ethics & Prof. Resp., Formal Op. 96-399 (1996). But even if respondents' speculation proved to be accurate, that would not render Section 504(a)(16) unconstitutional. It would simply mean that a lawyer who had accepted representation would have to withdraw if he continued to be supported by LSC funds. While the rules of ethics would then speak to the manner in which the withdrawal would be accomplished, those ethical considerations do not present matters of constitutional dimension. Cf. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 633 n.10 (1989). Moreover, speculation about particular cases is insufficient to sustain a facial constitutional challenge—a "'manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *Finley*, 524 at 569; see also *Hill* v. *Colorado*, 120 S. Ct. 2480, 2498 (2000).

federal funds and is a condition to which the attorney freely agrees when he or she accepts that employment. Thus, respondents' claim of unrestricted associational rights and their reliance (Resp. Br. 14-16, 27-28) on cases such as *NAACP* v. *Button*, 371 U.S. 415 (1963), are misplaced. In none of those cases did the attorneys or the organization claim the right to federal funding to subsidize their First Amendment activities. See also note 2, *supra*. Moreover, as respondents concede (Br. 39), an attorney employed by an LSC fund recipient is not prohibited from exercising whatever right he or she has to associate with clients outside of the LSC program.

b. There is no merit to respondents' argument (Br. 16-17) that *Rust* supports their attorney-client associational claim. Although the Court observed in *Rust* that one could argue, by analogy to the university setting, that "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government," 500 U.S. at 200, the Court declared that it "need not resolve that question" because the challenged regulations did not "significantly impinge upon the doctor-patient relationship." *Ibid.*

Both of the reasons the Court gave for that conclusion in *Rust* apply with equal force here. First, the Court noted that "[n]othing in [the regulations] requires a doctor to represent as his own any opinion that he does not in fact hold." 500 U.S. at 200. That is unquestionably the case with respect to a lawyer employed by a recipient of LSC funds. Second, the Court observed that the doctor-patient relationship established by the federally funded program was not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Ibid.* The same is true under the LSC program. That program allows the establishment of an attorney-client relationship to pursue a client's rights with regard to certain categories of legal

issues. See, *e.g.*, 42 U.S.C. 2996e; 42 U.S.C. 2996f(b) (1994 & Supp. IV 1998). Those relationships are not so all-encompassing, however, as to justify an expectation on the part of a client that he or she is entitled to comprehensive legal representation for all possible welfare claims. More importantly, LSC fund recipients remain free to inform clients of the limitations on the legal representation that they can provide, and, unlike in *Rust*, they may refer individuals who need other types of representation to other attorneys or offices, including any affiliate organization.

B. RESPONDENTS' CHALLENGES TO THE REGULATIONS ALLOWING FUND RECIPIENTS TO ESTABLISH SEPARATE ENTITIES TO ENGAGE IN RESTRICTED ACTIVITIES USING NON-FEDERAL FUNDS DO NOT WARRANT REVIEW AND ARE WITHOUT MERIT

Respondents argue, in the alternative, that, even if the statutory limitation on the use of federal funds is constitutional, the restriction on the use by an LSC fund recipient of non-federal funds to provide representation in challenges to existing welfare reform laws places an unconstitutional condition on its receipt of federal funds because Congress did not leave open adequate alternative channels for LSC fund recipients to exercise their own First Amendment rights. Yet at the same time, respondents challenge, as beyond LSC's authority, the LSC regulations that *allow* an LSC fund recipient to provide for the furnishing of restricted services through the use of non-LSC funds by establishing a separate organization for that purpose.

As we point out in our opening brief (at 23 n.11), respondents have sought review of the Second Circuit's rejection of those contentions in their certiorari petition in No. 99-604, *Velazquez* v. *Legal Services Corp.*. The Court has not granted that petition, however, and the court of appeals' decision in that regard does not merit review by this Court be-

cause it is in accord with the decision of the Ninth Circuit in *Legal Aid Soc'y of Haw.*, 145 F.3d at 1024-1029, does not conflict with the ruling of any other circuit, and is supported by this Court's decisions in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), *Regan*, and *Rust*, which held that such separate-entity requirements are consistent with the First Amendment. Respondents nevertheless seek to have the Court consider their contentions here by asserting (Br. 33 n.32) that they furnish an alternative ground for affirmance of that portion of the Second Circuit's judgment that held Section 504(a)(16) unconstitutional. The logic of respondents' contentions, however, would invalidate all of the restrictions in Section 504(a), not simply the welfare benefits proviso to Section 504(a)(16), and, moreover, the Second Circuit's reasoning with respect to Section 504(a)(16) appears to apply to both LSC and non-LSC funds.[6] But whether or not these factors would preclude the Court from considering respondents' arguments as alternative grounds for affirmance of the Second Circuit's judgment concerning Section 504(a)(16) (see R. Stern et al., *Supreme Court Procedure* § 6.35, at 365-367 (7th ed. 1993)), the Court should decline to do so as a matter of discretion since, as we have said, they do not warrant review. See *United States* v. *Nobles*, 422 U.S. 225, 241-242 n.16 (1975).

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[6] The district court ruled on respondents' motion for a preliminary injunction, which sought to prevent LSC "from disciplining any person or entity, including but not limited to dismissal or termination or suspension of funding, for using *non-federal* funds to * * * challenge the constitutionality of welfare statutes, to challenge the legality of welfare regulations or statutes." J.A. 48 (emphasis added). The court of appeals' decision was rendered on interlocutory appeal of that order under 28 U.S.C. 1292(a)(1), and it might therefore be argued that the court of appeals' judgment is confined in that sense to the application of the funding restrictions to non-federal funds. As respondents recognize (Br. 5), however, the court of appeals' reasoning would invalidate the proviso to Section 504(a)(16) as applied to federal and non-federal funds alike.

If the Court does reach those arguments, they are without merit. Respondents argue, first, that contrary to LSC's regulations, the statute *prohibits* the furnishing of restricted services through a separate affiliate, and therefore imposes an unconstitutional condition on the receipt of federal funds by prohibiting a recipient altogether from engaging in such services, even with nonfederal funds. Second, respondents argue that, even if LSC's regulations are based on a valid construction of the statute, the requirement of complete institutional separation imposes an impermissible burden on the use of nonfederal funds. Both arguments are mistaken.

1. The court of appeals correctly held that the LSC regulations, which were issued after notice-and-comment rulemaking, rest on a reasonable interpretation of the relevant statutes and are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). See 99-960 Pet. App. 12a-14a, 17a-23a. LSC is vested with the duty to administer the statutory scheme and to fill any gaps left by Congress through such regulations. See 42 U.S.C. 2996e(a)(1)(A) and (B), 2996g; *Texas Rural Legal Aid, Inc.* v. *Legal Servs. Corp.*, 940 F.2d 685, 689 (D.C. Cir. 1991). Accordingly, the "basic principles of *Chevron* apply to the statutory scheme" created by the LSC Act "and the role contemplated for LSC under it." *Ibid.* It follows that LSC's interpretation of Section 504(a)(16) must be upheld unless Congress has directly spoken to the question and resolved it differently, or the regulations are based on an impermissible construction of the statute. *Chevron*, 467 U.S. at 842-844.

Contrary to respondents' contention (Br. 34-37), there is nothing in the text of the 1996 Appropriations Act that precludes an LSC fund recipient from engaging in otherwise restricted activities through an affiliated organization. Section 504(a) of the 1996 Act provides that "[n]one of the funds appropriated" in that Act to LSC "may be used to provide financial assistance to any person or entity" that is described in subsections (1) through (19), 110 Stat. 1321-53; U.S. Br.

App. 1a-2a. Section 504(d)(2)(B) further provides that funds received by a recipient from a source other than LSC "may not be expended by recipients for any purpose prohibited by" the 1996 Act or the LSC Act. 110 Stat. 1321-56; U.S. Br. App. 10a. An LSC fund recipient does not act inconsistently with either of those provisions if it creates an affiliate organization to spend non-federal funds and abides by the program-integrity requirements of the LSC regulations. The affiliate does not "use[]" federal funds to engage in activities prohibited by Section 504(a)(16), and the LSC fund recipient does not "expend[]" any funds it receives for any of those purposes. Moreover, respondents' argument was properly rejected by the court of appeals in light of "the rule favoring an interpretation of a statute that preserves its constitutionality." 99-960 Pet. App. 14a. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Respondents quote a passage in a Senate Report stating that "[t]he legislation prohibits the use of alternative corporations to avoid or evade the provisions of the law." Resp. Br. 35 (quoting S. Rep. No. 392, 104th Cong., 2d Sess. 13 (1996)). The bill that was the subject of that Report would have amended Section 1013 of the LSC Act expressly to provide that "[a]ny attempt, such as the creation or use of 'alternative corporations,' to avoid or otherwise evade the provisions of this title or the Legal Services Reform Act of 1995 is prohibited." See S. Rep. No. 392, *supra*, at 40. The fact that Congress did not include that provision in the 1996 Act and subsequent appropriations acts (see U.S. Br. 2; U.S. Br. App. 1a-25a) supports LSC's interpretation of Section 504(a) not to preclude establishment of an affiliate organization as provided in the LSC regulations.

2. LSC's regulations do not place unconstitutionally burdensome restrictions on a recipient's use of non-federal funds to exercise First Amendment rights. See Resp. Br. 38-44. Congress has broad power to specify the purposes for which

funds appropriated out of the Federal Treasury may be spent. See U.S. Const. Art. I, § 9, Cl. 7. It is well settled that Congress, in exercising that power, may, "in order to ensure the integrity of the federally funded program," *Rust*, 500 U.S. at 198, provide that federal funds are not to be used to facilitate particular activities that also are supported by non-federal funds—even if the activities involved are of a sort that are fully protected by the First Amendment when engaged in without federal support so long as the fund recipient is allowed to form an affiliate organization to receive and spend non-federal funds to engage in those activities. See, *e.g.*, *League of Women Voters*, 468 U.S. at 400. Congress may require that such an affiliate organization be kept "physically and financially separate" from the organization that receives federal funds. *Rust*, 500 U.S. at 180, 187-190.

As we explain at greater length in our brief in opposition (at 12-18) in No. 99-604, this Court has, on several occasions, rejected contrary arguments akin to those pressed by respondents. *See Regan*, 461 U.S. at 544-545; *League of Women Voters*, 468 U.S. at 400; *Rust*, 500 U.S. at 180-181, 198. The LSC restrictions, as implemented by LSC in its final regulations, are fully consistent with the Court's explanation in those cases of the separation requirements the Constitution permits the government to impose in order to eliminate the risk of direct or indirect subsidization of activities that Congress has chosen not to fund. LSC fund recipients are allowed to create affiliates that use non-LSC funds to provide legal services that are foreclosed to the LSC fund recipients themselves. As noted by the courts below, the challenged regulations are substantially the same as those upheld in *Rust*. See 99-960 Pet. App. 10a, 76a.[7] As

[7] Like the *Rust* regulations, the LSC regulations require "physical and financial separation" as part of a requirement that the LSC fund recipient and its affiliate maintain "objective integrity and independence." Compare 45 C.F.R. 1610.8 with 42 C.F.R. 59.9. Sufficient physical and

in *Rust*, "Congress has merely refused to fund [certain] activities out of the public fisc, and the [agency] has simply required a certain degree of separation from the [federally funded] project in order to ensure the integrity of the federally funded program." 500 U.S. at 198.

Moreover, the LSC restrictions are more permissive in some respects than those at issue in *Rust*, because the latter contained a rule that prevented physicians from discussing abortion as a method of family planning or referring a patient to an abortion provider. See 500 U.S. at 180. The LSC regulations contain no comparable restrictions As a result, LSC fund recipients may discuss with their clients what other options they might have (including activities in which the LSC fund recipient may not engage) and may refer clients to organizations that provide restricted services (including any affiliate organization the LSC fund recipient may create under the program-integrity regulations).[8]

3. Respondents attempt to distinguish *Rust* by contending (Br. 41-43) that there is no justification for requiring that an affiliate of an LSC fund recipient be physically separate because longstanding LSC bookkeeping requirements are sufficient to prevent government subsidization of restricted activities in which the affiliate engages.

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

[8] The one requirement in the LSC regulations that was not in the *Rust* regulations—that an LSC fund recipient and its affiliate organization be "legally" separate entities (45 C.F.R. 1610.8(a)(1))—does not alter the analysis, because such a requirement was held by this Court in *Regan* not to constitute an undue burden. 461 U.S. at 544-545 n.6; see *Legal Aid Soc'y of Haw.*, 145 F.3d at 1027-1028.

Respondents are wrong that bookkeeping necessarily ensures that federal funds do not subsidize restricted activities. Respondents' argument (Br. 38) that establishing a physically separate affiliate imposes wasteful and inefficient burdens on recipients (by requiring duplication of resources) confirms that, absent physical separation, the funds of the LSC fund recipients are, to the extent of the burden respondents assert, subsidizing the affiliate's activities by making them more efficient and less costly. It is precisely that sort of indirect subsidy that Congress intended to prohibit and that the LSC regulations are designed to prevent.[9] Put another way, respondents are complaining of the very costs and asserted "burdens" that legal services organizations would have to bear if they received no federal funds at all. The federal restrictions therefore are not properly regarded as the cause of those costs and burdens.[10]

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[9] Congress made clear when it enacted the statutory restrictions that "it is inappropriate for Federal resources to be used to support directly or indirectly these [prohibited] activities," since these activities "only further drain much needed resources from the program's core mission—to provide basic legal aid to poor individuals." H.R. Rep. No. 196, 104th Cong., 2d Sess. 121 (1996); see also S. Rep. No. 392, *supra*, at 7 ("many legal services grantees currently receive funds from both public and private sources. Since the money is basically fungible, it would be difficult if not impossible to place restrictions only on the Federal funds").

[10] We do not doubt that it would be easier for LSC grant recipients to benefit from the economies of scale allowed by shared resources. Yet as respondents themselves acknowledge (Br. 39-40), some recipients have established physically separate affiliates, and therefore the notion that it is impossible to do so is simply incorrect. See also C. Carr & A. Hirschel, *The Transformation of Community Legal Services, Inc., of Philadelphia: One Program's Experience Since the Federal Restrictions*, 17 Yale L. & Pol'y Rev. 319 (1998). If a recipient avails itself of the affiliate structure, its ability to use non-federal contributions is subject to restrictions only if the donor makes a specific choice to give the money to the recipient rather than its non-LSC affiliate, after receiving written notification that that choice would make the contribution subject to the same restrictions as federal funds. That consequence raises no substantial First Amendment issue.

This Court has recognized that the government has a strong interest in maintaining the integrity of the programs it funds and in preventing direct or indirect subsidies to activities that Congress has chosen not to fund. In *Rust*, for instance, the Court held that the regulations requiring physical separation furthered the interest in preventing federal funds from being spent on prohibited activities, see 500 U.S. at 198, and rejected the argument that the program could not extend to private matching funds. *Id.* at 199 n.5. And in *Regan*, the Court noted: "TWR would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize." 461 U.S. at 544.

Respondents suggest that the only other possible objective of the separation requirement is in avoiding the perception that the government endorses the restricted activities, which, they assert, is an insubstantial or even impermissible interest. See Resp. Br. 42-43. This case, however, is unlike *Rosenberger*, in which the fact that the university funded a multiplicity of competing student views reduced the potential that it endorsed any one of them. 515 U.S. at 841-842. Here, Congress could be legitimately concerned that the public would perceive that federal funds were being used to support, and thus endorse, the restricted activities.[11] Cf.

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[11] As one Member of Congress stated, in the eyes of the public, "every time they [legal services lawyers] go out they are wearing the imprimatur of Congress and they are the Federal Government, and the public does not distinguish the difference." 138 Cong. Rec. 10,521 (1992) (statement of Rep. McCollum). In conjunction with a subsequent proposal to limit the activity of LSC grantees, concern was expressed in Congress that "the public cannot differentiate between LSC advocacy subsidized with public versus private funds." S. Rep. No. 392, *supra*, at 7. As a result, Congress enacted the LSC restrictions to "maintain the credibility and effectiveness of the program," 141 Cong. Rec. 27,002 (1995) (statement of Sen. Hollings), and to "protect LSC from the negative perceptions of those who wish to

Cornelius v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 809 (1985) ("avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum"). LSC's regulations also advance an additional government interest: avoiding the public perception that federal funds are being used in a manner not authorized by Congress. That interest is crucial to the integrity of the LSC program and is precisely the governmental interest that the Court recognized in *Rust*. See 500 U.S. at 188.[12]

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For the reasons set forth above and in our opening brief, the judgment of the court of appeals should be reversed insofar as it holds unconstitutional the proviso in Section 504(a)(16).

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

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see its termination." 142 Cong. Rec. 4715 (1996) (remarks of Sen. Domenici).

[12] Respondents' contention (Br. 45-47) that the Section 504(a)(16) proviso violates separation of powers by interfering with the decisional autonomy of the judiciary is without merit. Nothing in Section 504(a) prevents a court from declaring what the law is, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), or directs a decision in a particular case, *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). Nor does Section 504(a) authorize LSC attorneys to represent certain clients and then preclude them from calling certain legal issues to the court's attention. Rather, the proviso prohibits LSC attorneys from representing a client at all in a case in which the client seeks relief that challenges existing welfare reform laws. The proviso does not preclude any welfare claimant, whether proceeding pro se or represented by someone other than an LSC fund recipient, from seeking such relief or making any legal argument in support thereof.