

# 05-0340-cv(L)

05-0360-cv(CON), 05-0787-cv(CON),  
05-0792-cv(CON), 05-0925-cv(XAP)

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IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

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BROOKLYN LEGAL SERVICES CORP. B AND LEGAL SERVICES FOR NEW YORK CITY, on their own behalf and on behalf of their clients, FARMWORKERS LEGAL SERVICE OF NEW YORK, INC., on behalf of itself, and on behalf of all similarly situated not-for-profit legal services entities; namely, organizations who wish to be eligible to receive funds from the Legal Services Corporation, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub. L. 104-208,

*Plaintiff-Appellee-Cross-Appellants,*

COMMUNITY SERVICE SOCIETY OF NEW YORK, INC., AND CENTRO INDEPENDIENTE DE TRABAJADORES AGRICOLAS, on behalf of all similarly situated individuals, organizations and their members, namely, individuals and organizations who are,

*(Caption Continued on Inside Front Cover)*

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

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### **BRIEF OF *AMICUS CURIAE* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, ET AL., IN SUPPORT OF PLAINTIFF-APPELLEE- CROSS-APPELLANTS AND PLAINTIFF-CROSS-APPELLANTS**

(A Complete Listing of *Amici Curiae* is Provided Inside the Cover)

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JASON BROWN\*  
GEORGE KENDALL  
RACHEL NASH  
HOLLAND & KNIGHT LLP  
195 Broadway  
New York, New York 10007  
(212) 513-3200

*Counsel to Amici Curiae*

*\*Counsel of Record*

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or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy activity proscribed by Pub. L. 104-208, PEGGY EARISMAN AND LAUREN SHAPIRO, on behalf of each, and on behalf of all similarly situated individuals, namely, attorneys employed or formerly employed by entities receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub. L. 104-208, ANDREW J. CONNICK, on behalf of himself and all similarly situated individuals, namely, individuals who have provided public or private non-federal funding to entities that also receive funds from the Legal Services Corporation, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208, THE NEW YORK FOUNDATION,

*Plaintiff-Cross-Appellants,*

CARMEN VELAZQUEZ, WEP WORKERS TOGETHER, NEW YORK CITY COALITION TO END LEAD POISONING, GREATER N.Y. LABOR-RELIGION COALITION, on behalf of all similarly situated individuals, organizations and their members, namely, individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy by Pub. L. 104-208, LUCY A. BILLINGS, OLIVE KAREN STAMM, JEANETTE ZELHOF, ELISABETH BENJAMIN, JILL ANN BOSKEY, on behalf of each, and on behalf of all similarly situated individuals, namely, attorneys employed or formerly employed entities receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub. L. 104-208, C. VIRGINIA FIELDS, Council Member, GUILLERMO LINARES, Council Member, STANLEY MICHELS, Council Member, ADAM CLAYTON POWELL IV, Council Member, LAWRENCE SEABROOK, Senator, SCOTT M. STRINGER, Assemblyman, on behalf of themselves and all similarly situated individuals, namely, individuals who have provided public or private non-federal funding to entities that also receive funds from the Legal Services Corporation, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208, DAVID F. DOBBINS, LISA E. CLEARY, DAVID W. ICHEL, DAVID G. KEYKO, MFY LEGAL SERVICES, BRONX LEGAL SERVICES, INC., on their own behalf and on behalf of their clients,

*Plaintiffs,*

—against—

LEGAL SERVICES CORPORATION,

*Defendant-Appellant,*

UNITED STATES OF AMERICA,

*Intervenor-Defendant-Cross-Appellant.*

## **COMPLETE LISTING OF *AMICI CURIAE***

The Association of the Bar of the City of New York  
New York County Lawyers' Association  
New York State Bar Association  
New York State Defenders Association  
Lesbian, Gay, Bisexual and Transgender Law Association of Greater New York  
Women's Bar Association of the State of New York  
Gifford Miller, Speaker of the Council of the City of New York  
Connecticut Bar Association  
Connecticut Bar Foundation  
The Florida Bar Foundation  
Philadelphia Bar Association  
Philadelphia Bar Foundation  
Vermont Bar Association  
Virginia State Bar  
Dominican Bar Association  
Hispanic National Bar Association  
National Asian Pacific American Bar Association  
American Association of Jewish Lawyers and Jurists

## TABLE OF CONTENTS

|  |     |
|--|-----|
| TABLE OF AUTHORITIES.....  | ii  |
| INTEREST OF <i>AMICI CURIAE</i> .....  | 1   |
| ARGUMENT .....   | 5   |
| I.    Legal Services Organizations Provide Assistance<br>in Matters of Fundamental Importance to Low-Income<br>Individuals and Families.....   | 5   |
| II.   LSC's Physical Separation Requirement, as Applied<br>by LSC, Widens the Already Enormous Gap Between<br>the Need for Civil Legal Assistance for the Poor and the<br>Availability of These Critical Services..... | 10  |
| III.  Legal Services Organizations Must Be Permitted to Render<br>Necessary Services In Order to Provide Meaningful Access<br>to Justice.....  | 22  |
| IV.  Access to Legal Assistance Protects the Integrity of Our<br>Courts and Justice System .....   | 27  |
| V.   The District Court's Decision Upholds the First Amendment,<br>Honors Congressional Intent, and Permits Legal Services<br>Organizations to Serve More Clients with Critical Legal<br>Needs.....                    | 31  |
| CONCLUSION .....   | 33  |
| APPENDIX .....   | A-1 |

## TABLE OF AUTHORITIES

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|  |        |
|--|--------|
| <i>Bothwell v. Republic Tobacco Co. et al</i> ,<br>912 F. Supp. 1221 (D.Neb. 1995) .....                                     | 27, 28 |
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|  |        |
|--|--------|
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|  |    |
|--|----|
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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* are bar associations, bar foundations, and the Speaker of the City Council for the City of New York who are committed to the principle of equal access to justice in America.<sup>2</sup> We are guided by Justice Lewis Powell Jr.'s charge, when he was President of the ABA, that “[e]qual justice under the law is not only a caption on the façade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.” Justice Powell, [http://www.atjsupport.org/News/Equal\\_Justice\\_Quotes/index\\_hm](http://www.atjsupport.org/News/Equal_Justice_Quotes/index_hm). We have come together to explain how Legal Services Corporation's ("LSC") program integrity regulation, as applied to organizations that seek to use non-federal funds to provide services that are otherwise restricted by Congress, is contrary to this principle.

The District Court's decision held that LSC's program integrity regulation and its attendant requirement of physical separation, as applied by LSC to the plaintiffs, violated the First Amendment by imposing an undue burden on the plaintiffs' privately financed advocacy on behalf of their clients. The District Court found that the government's claimed interests in avoiding subsidization and preventing the appearance of endorsement could be addressed through less onerous means. *Dobbins v. LSC*, 349 F. Supp. 2d 566 (E.D.N.Y. 2004), *modified by* 356 F.

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<sup>1</sup> All parties have consented to the filing of this *amicus curiae* brief.

<sup>2</sup> Descriptions of the *amici curiae* are contained in Appendix A.

Supp. 2d 267 (E.D.N.Y. 2005). Therefore, the District Court enjoined LSC from applying these regulations to the plaintiffs. The decision offers a model that will enable legal services organizations to provide increased service to those who need desperately to secure their most basic rights. The decision achieves this critical goal, while remaining true to Congressional intent. Accordingly, we urge that this aspect of the decision be affirmed.<sup>3</sup>

A central mission of the *amici curiae* is to increase the accessibility of legal services to the most vulnerable and often most needy members of our society. We work closely with the private bar to encourage greater *pro bono* participation and financial contribution to legal services organizations. We work with state and local governments to expand legal resources for the poor. Some of us have developed and financed our own legal services programs, while others provide funding to legal services programs through grants. Some use a combination of these measures to ensure that the legal needs of the poor are addressed. However, all of our efforts are designed to supplement, not replace, the federally funded programs that are the core of the legal safety net.

Despite our country's commitment to the founding principle of equal justice for all and our ongoing efforts to realize those ideals, the majority of poor people

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<sup>3</sup> *Amici* support plaintiffs' request: a) to affirm the District Court order that authorized them to conduct their privately financed work without unnecessary physical separation, and b) to reverse the District Court's additional requirement to maintain separate public areas, and to change attorneys when a restricted component arises in a case. *Amici* take no position on the plaintiffs' challenge to certain specific substantive restrictions imposed by Congress on federal funds.

in our country still do not have adequate, let alone equal, access to the justice system for their civil legal needs. Today, legal services organizations, which work valiantly to meet the civil legal needs of the populations they serve, possess sufficient resources to ably address only a small portion of the pressing legal needs of poor people. While we embrace the view that the organized bar must continue its efforts to improve access to legal representation and to the justice system for the most vulnerable members of our society, the success of our effort depends in large part on the ability of legal services organizations to use all sources of funding efficiently.

This collective mission to improve access to justice was made more difficult by LSC's so-called "physical separation requirement" that was enjoined by the District Court. In 1996, Congress enacted the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504, 110 Stat. 1321, 1321-53; 45 C.F.R. § 1600 *et seq.*, which cut funding for legal services organizations and severely restricted advocacy by federally funded legal services organizations, limiting the tools they use and the categories of clients they serve.<sup>4</sup> To implement these new restrictions, and a congressionally authorized "private money

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<sup>4</sup> These severe restrictions include: 1) a ban on seeking or receiving court-ordered attorneys' fee awards; 2) a ban on notifying prospective clients of their legal rights and then offering to represent them; 3) a ban on communicating with policy-makers or legislators on a client's behalf, except under extremely narrow circumstances; 4) a ban on representing certain categories of aliens, including many lawfully admitted aliens; and 5) a ban on participating in class actions. The activities covered by the LSC restrictions are referred to in this brief as "restricted" legal services.

restriction," LSC enacted a "program integrity regulation," which prevents legal services organizations that receive federal funds from using their state, local, and private funds for the restricted legal services,<sup>5</sup> unless they first create financially and physically independent affiliates. In applying these regulations, LSC has insisted on an onerous physical separation requirement that wastes precious funds and interferes with effective administration and legal representation.

The physical separation requirement, as applied by LSC, exacerbates the problems caused by inadequate funding by forcing legal services organizations to waste money on separate facilities, personnel, and computer systems. The financial, administrative, and programmatic burdens imposed by the regulation add a significant strain on already scarce resources. Under the regulation, fewer clients receive services. In addition, these burdens make it more difficult for the legal services community to provide comprehensive services to clients who are served. Instead, they require in certain instances that the legal needs of the poor be addressed in a piecemeal and incomplete manner, a method that people of greater economic means would reject as entirely unsatisfactory.<sup>6</sup> The consequence of these obstacles is that low-income individuals are forced to struggle without basic

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<sup>5</sup> 45 C.F.R. § 1610.08.

<sup>6</sup> Imagine the dissatisfaction a client of a private law firm would express if told that the law authorized him to seek attorneys' fees in an action, but that the firm was prohibited from using this critical bargaining tool. Or, imagine a client victimized by a pattern of consumer fraud, whose attorney was prohibited from seeking to certify a class even though doing so would afford the client broader discovery.

goods and services to which they are entitled. Finally, the scarcity of legal assistance for the poor undermines the integrity of our courts and system of justice. The imposition of the program integrity regulation only compounds this problem. Therefore, we support the District Court's decision to enjoin LSC from demanding that the plaintiffs maintain excessive physical separation between their LSC funded activities and their non-LSC funded activities.

## **ARGUMENT**

### **I. Legal Services Organizations Provide Assistance in Matters of Fundamental Importance to Low-Income Individuals and Families**

We begin with an important and undisputed truth – legal services organizations perform an indispensable function in seeing that indigent individuals have access to our courts. Our commitment to equal justice under the law depends upon the maintenance and growth of existing legal services structures as these organizations increasingly are the sole option for many persons who must go to court to obtain justice. We know that the legal services needs of the poor, unlike those of the more affluent, often concern urgent legal matters in the areas of family safety, economic security, food, shelter, education, governmental benefits, health care, and other basic needs.<sup>7</sup> For the poor, the ability to access legal representation

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<sup>7</sup> Studies have consistently found that the most frequent and vital legal needs poor people face are in the categories of food, health care, shelter, public benefits, family and domestic issues, and education. They also frequently struggle with consumer problems, such as predatory lending, discrimination, municipal issues, and difficulties transitioning from welfare to work. *See, e.g.,* American Bar Association, *Legal Needs and Civil Justice: Major Findings from the*

and the justice system is preservative of other fundamental rights that are often "theoretically in existence but not often honored." Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 Fordham Urb. L. J. 1213, 1223 (Feb. 2002). Thus, the issues legal services lawyers tackle for their clients are not matters of secondary importance in their lives, but rather, are essential to their ability to function in society.

Legal services lawyers help clients obtain food, health care, shelter, and the public benefits to which they are entitled. They challenge illegal evictions and help ensure that children have safe and nurturing homes. They promote fairness in the workplace, thwart predatory lending schemes, and ensure that children have access to a good education. These lawyers also protect battered women and their children from their abusers. In providing these services, legal services lawyers preserve and enforce fundamental constitutional and statutory rights and also help alter the conditions that lead to poverty. They often help clients transition from

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*Comprehensive Legal Needs Study* (1994), <http://www.abanet.org/legalservices/downloadas/selaid/legalneedsstudy.pdf>; New York State Bar Association, Committee on Legal Aid, *The New York Legal Needs Study* 20 (June 1990, revised and reprinted Dec. 1993); District of Columbia Bar Foundation, *Civil Legal Services Delivery in the District of Columbia* 6 (Sept. 2003), <http://www.dcbfoundation.org/CivilLegalServicesDeliveryInTheDistrictOfColumbia9-23-03.pdf>; Washington State Supreme Court, Task Force on Civil Equal Justice Funding, *The Washington State Civil Legal Needs Study* 8 (Sept. 2003), [http://www.lri.lsc.gov/pdf/03/030185\\_/g/ndstudy093003.pdf](http://www.lri.lsc.gov/pdf/03/030185_/g/ndstudy093003.pdf); *Massachusetts Legal Needs Survey: Findings From a Survey of Legal Need of Low-Income Households in Massachusetts* 9-10 (May 2003), [http://www.Masslegalservices.org/page/134140;cat\\_id=2351;h=LEGAL;h=NEEDS;h=SURVEY](http://www.Masslegalservices.org/page/134140;cat_id=2351;h=LEGAL;h=NEEDS;h=SURVEY); D. Michael Dale, *The State of Access to Justice in Oregon, Part I: Assessment of Legal Needs* 7 (March 31, 2000), [http://www.osbar.org/\\_docs/resources/LegalNeedsreport.pdf](http://www.osbar.org/_docs/resources/LegalNeedsreport.pdf).

welfare to work. Because of their work, more children receive the education necessary to prepare them to be productive members of society. These legal services ensure that the goals of the various legislative initiatives enacted to help the poor are fulfilled. *Civil Legal Services Delivery in the District of Columbia* at 6. Without legal services, many of the rights that other Americans take for granted would be unavailable because there would be no means to enforce them. See Henry Rose, *Retrospective on Justice and the Poor in the United States in the Twentieth Century*, 36 Loy. U. Chi. L.J. 591, 600 (winter 2005); Paul R. Tremblay, *Crisis in the Legal Profession: Rationing Legal Services for the Poor, Panel One: Tied Hands Confronting Challenges in Civil Legal Services*, 1997 Ann. Surv. Am. L. 767, 768 (1997); Victor Marrero, Chairman, Committee to Improve the Availability of Legal Services, *Final Report to the Chief Judge of the State of New York* (April 1990), reprinted in 19 Hofstra L. Rev. 755, 771-772 (1990-1991) ("*Marrero Committee Report*").

The successes that legal services attorneys have helped their clients achieve are a powerful testament to the promise that equal access to justice holds.

Adequate schooling for children is but one example. In the Bronx, New York, legal services helped a mother place her son in a school where his special learning and emotional needs would be addressed. This early intervention was crucial, because children with minor learning disabilities can develop major problems



when their disabilities go unaddressed. *Bearing Witness: Legal Services Clients Tell Their Stories* 7-8, Access to Justice Series (Brennan Center 2000), <http://www.brennancenter.org/resources/atj/atj5.pdf>.

Legal services attorneys also help individuals obtain government benefits and become economically self-sufficient. In Pennsylvania, a legal services attorney enabled a woman to complete her degree in nursing so that she could end her dependence on welfare. The government had threatened to cut off her welfare benefits, which would have forced her to leave school shortly before graduation. Because of the legal representation she received, she was able to keep her welfare benefits until she finished school and obtained a steady job in a hospital. Her hard work, along with the legal representation she obtained, enabled her to become self-sufficient and to care for herself and her child without welfare payments. *Left Out in the Cold: How Clients Are Affected By Restrictions on Their Legal Services Lawyers* 18-19, The Access to Justice Series (Brennan Center for Justice 2000), <http://www.brennancenter.org/resources/atj/atj6.pdf>. In pursuing benefits payments for their clients, legal services attorneys ensure that Congressional statutes are applied properly. In New York City, South Brooklyn Legal Services ("SBLS") ensured that its client received the appropriate reimbursement for her child care costs. Unfortunately, the restrictions on class action suits prevented SBLS from pursuing relief for the hundreds of women who were adversely

affected by the improper reimbursement formula that New York adopted.

Appendix at A-416, Decl. of John C. Gray, Nov. 29, 2001 ¶ 16; Appendix at A-905, Parties' Stipulated Facts ¶ 50.

Still other clients turn to legal services attorneys to escape physical abuse. An immigrant woman whose husband's abuse caused her to live in fear describes how her legal services attorney helped her to escape from this abusive relationship while obtaining permission to remain in the United States. *Legal Services Clients Tell Their Stories* at 2-4. Another woman living in Washington explained the invaluable effects of the legal advice, information, and access to self-help resources she received after leaving her abusive spouse. She found employment, no longer requires government assistance, and lives with her children free of the abuse she had previously endured. *Washington State Civil Legal Needs Study* at 55.

Many additional inspiring stories exist that demonstrate the positive impact that legal services advocacy has on the lives of the poor. However, for every legal services success story, there are several more individuals and families who could not be served because of limited resources. The District Court's order authorizes the plaintiffs to use their own funds more efficiently, enabling them to increase the number of these successes and to reduce the number of people forced to suffer

without basic necessities because they cannot effectively access the justice system that is supposed to secure them.

## **II. LSC's Physical Separation Requirement, as Applied by LSC, Widens the Already Enormous Gap Between the Need for Civil Legal Assistance for the Poor and the Availability of These Critical Services**

Despite the established principle that the poor deserve equal access to justice, and despite recognition that such access promotes the proper functioning of our adversarial system, there is overwhelming evidence that availability of legal services for the poor is insufficient to meet the need. The lack of resources is exacerbated by the restrictions imposed on the private and local funds that LSC-funded organizations possess, as well as by LSC's unduly burdensome program integrity regulation. Thus, legal services organizations face a "dual dilemma of inadequate funding and restrictions on access to justice." *See Self Evaluation Report for Texas Access to Justice Community in Response to LSC Program Letter 2000-7* (Feb. 19, 2003), [http://www.lri.lsc.gov/sitepages/stpl/stpl\\_seflevalrpts.htm](http://www.lri.lsc.gov/sitepages/stpl/stpl_seflevalrpts.htm). First, because most organizations find the burdensome effect of the regulations too great to allow them to create separate affiliates, many of the clients who require federally restricted forms of advocacy cannot be served at all. Second, in order to comply with LSC's physical separation requirement and its attendant burdens, organizations must cut the number of clients they serve. The rule also makes it difficult for organizations to supervise staff, promote staff development, coordinate

fundraising, and maintain a focused mission, all factors central to successful representation of low-income clients.

Legal services programs that seek to provide necessary services to low-income clients face a nearly impossible choice. They can accommodate the program integrity regulation by establishing legally distinct organizations affiliated at the board level, or they can create two legally separate organizations. Under either approach, they will divert funds into an inefficient structure at significant financial cost, while introducing substantial administrative and programmatic burdens. A third alternative is to accept federal restrictions on all sources of funding, which precludes the delivery of critical services to clients who have legal needs that can only be addressed by the restricted services. The District Court recognized that none of these options is acceptable, as all require that larger numbers of poor people forego legal assistance necessary to securing basic goods and services. Because any option the organizations choose to pursue leaves more people without access to critical legal services, LSC's regulation leaves no adequate alternative channel for the provision of restricted legal services.

The level of unmet legal need that exists in the low-income population is disturbingly high and is growing. In a comprehensive study conducted in 1993, the American Bar Association found that 80% of America's poor do not have an attorney when faced with a serious situation in which a lawyer's advice and

assistance would have made a difference. ABA, *Legal Needs and Civil Justice* at 40; Scott Bales and Joseph Kanefield, *Promoting Access to Justice in Arizona, An Urgent Need*, 40 APR Ariz. Att'y 20, 21 (April 2004)(summarizing the ABA's study). The legal assistance gap in New York and other states across the country reflects this national trend. *The New York Legal Needs Study* at 159 (finding that no more than 14% of the civil legal needs of the poor were met in New York state); *Marrero Committee Report*, reprinted in 19 Hofstra L. Rev. at 773 (finding that legal services providers are able to represent a smaller and smaller percentage of the growing number of poor people who need legal assistance); Legal Services Corporation, *Serving the Civil Legal Needs of Low-Income Americans, A Special Report to Congress* 12 (April 20, 2000) ("LSC Special Report"), <http://www.lsc.gov/foia/other/exsum.pdf> (citing studies in New York, Florida, Georgia, Hawaii, Illinois, Kentucky, Maryland, Massachusetts, Missouri, Nevada, and Virginia).

Studies conducted in various states since the ABA's study consistently find that the legal needs of the poor are not met.<sup>8</sup> Indeed, the picture has become

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<sup>8</sup> In the District of Columbia, less than ten percent of the need for civil legal assistance is met, and in Washington state, 85% of low-income households with civil legal problems face them alone. *Civil Legal Services Delivery in the District of Columbia* at 1-2; *The Washington State Civil Legal Needs Study* at 8. Studies in other states too show that less than 20% of the legal needs of low-income families and individuals are met. North Carolina Legal Services Planning Council, *State Wide Legal Needs Assessment* 42 (2003) (demonstrating the high percentage of unmet need in crucial categories of legal problems), [http://www.lri.lsc.gov/pdf/03/030129\\_nclglndsassmnt.pdf](http://www.lri.lsc.gov/pdf/03/030129_nclglndsassmnt.pdf); *The Legal Aid Safety Net: A Report*

bleaker in some states since the ABA's report was published. *See* Michael S. Greco, President Elect, American Bar Association, Remarks to the Fellows of the Alabama Law Foundation Annual Dinner, *in* 66 Ala. Law 183 (May 2005); *Massachusetts Legal Needs Survey* at 3 & 6 (finding that legal needs have increased over the last ten years and that a higher percentage of households eligible for legal services experienced legal needs in 2002 than in 1993). Justice Sandra Day O'Connor recently reiterated a view she had expressed in 1992, observing in 2004 that "there has never been a wider gulf between the need for legal services and its availability." Scott Bales and Joseph Kanefield at 22 (quoting Justice O'Connor's speech before the Volunteer Lawyer Program); Sandra Day O'Connor, *Meeting the Demand for Pro Bono Services*, 2 B.U. Pub. Int. Law Journal, at 1, 2 (1992)(noting "the gap between the demand and the supply of legal services for the poor has probably never been wider.")<sup>9</sup>

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*on the Legal Needs of Low Income Illinoisans* (Feb. 2005) (finding that low-income households received assistance for only one out of every six legal problems), [http://www.ltf.org/docs\\_lns/legal\\_needs.pdf](http://www.ltf.org/docs_lns/legal_needs.pdf); Poverty Research Institute of Legal Services of New Jersey, *Legal Problems, Legal Needs: The Legal Assistance Gap Facing Lower Income People in New Jersey* (Oct. 2002) (finding that only one fifth on those low-income individuals projected to need legal assistance will receive it), <http://www.lsnj.org/PDFs/LegalNeedsReport.pdf>; *The State of Access to Justice in Oregon* at ii (finding that lower income people obtain legal assistance less than 20% of the time). Moreover, organizations turn away a significant percentage of those who seek help. Scott Bales and Joseph Kanefield at, 22-23 (noting that LSC funded Community Legal Services in Arizona turns away three eligible clients for every one that it assists).

<sup>9</sup> *Amici curiae* agree with Justice O'Connor's view, expressed in her speech and her article, that this gap should encourage more lawyers to engage in *pro bono* representation, but *amici curiae* also recognize that *pro bono* representation supplements, but cannot replace, a robust legal services delivery system.

The fact that legal services organizations fall far short of meeting the legitimate needs of their communities is consistently supported by other studies as well. In 2000, LSC reported that legal services programs are forced to turn away tens of thousands of people with critical legal needs. LSC, *Special Report* at 13. This is true in states like New York, Massachusetts, New Jersey, and the District of Columbia, as well as in regions where funding is even more scarce.<sup>10</sup> One legal services attorney in Louisiana poignantly expressed the pain, as well as the danger, in turning away a substantial number of clients. Because of limited resources, her

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<sup>10</sup> The study conducted by the New York State Bar Association revealed that organizations were forced to close intake during the survey year (1988), limiting new clients to those with emergencies, and that the organizations were unable even to meet the needs in all emergency cases. *The New York Legal Needs Study* at 152, 163-164. Ten years later, the lack of access to legal services in New York led New York's IOLA fund to issue a report describing the societal costs that result from the decreased access poor people have to protection of the laws. 1998 Planning Process Steering Committee of the Grantees of the IOLA Fund of the State of New York, *Planning for Enhanced Outcomes -1998: Strengthening Civil Legal Services in New York* 5, [http://www.lri.lsc.gov/state\\_planning/stateplans/NY233207.pdf](http://www.lri.lsc.gov/state_planning/stateplans/NY233207.pdf). See also, *Marrero Committee Report*, 19 Hofstra L. Rev. at 771-772 (finding that the lack of legal services for the poor in New York had reached a crisis level in 1990). Poor people are similarly underserved in New Jersey. *The Legal Assistance Gap Facing Lower Income People in New Jersey* at 12 (finding that of 415,000 low-income individuals projected to need legal assistance in New Jersey, less than one-fifth would actually receive it). In the District of Columbia, providers are contacted by more than 50,000 people per year, but can provide assistance to less than half of those who call, and even those who receive assistance often are provided only with advice or information and not with full representation. *Civil Legal Services Delivery in the District of Columbia* at 10. Similarly, in Oregon, only 21% of eligible clients with serious legal problems are fully served, a number which includes those who are sent to *pro se* classes and do not receive actual representation. *The State of Access to Justice in Oregon* at 16. In Massachusetts, where only 20% of low-income households experiencing civil legal needs have all of their needs met, South Middlesex Legal Services turns away at least one out of every two people who call seeking help. *Policy Implications of the Massachusetts Legal Needs Survey* 3 (May 2003), [http://www.masslegalservices.org/page/134123;cat\\_id=235;h=LEGAL;h=NEEDS;h=SURVEY](http://www.masslegalservices.org/page/134123;cat_id=235;h=LEGAL;h=NEEDS;h=SURVEY)); Rhonda Stewart, *Survey Says Need for Legal Aid Vastly Increased in Last Decade*, Boston Globe, Aug. 14, 2003, available at 2003 WLNR 3428490.

organization can represent only a limited number of women facing domestic abuse, and therefore must make difficult judgments about the severity of danger a woman faces. This attorney fears that an abused woman will be killed because the legal services organization, forced to ration its services, turns away a client who faced greater danger than the organization was able to predict. *Struggling to Meet the Need: Communities Confront Gaps in Federal Legal Aid* 15, The Access to Justice Series (Brennan Center for Justice 2000), <http://www.brennancenter.org/resources/atj/atj8.pdf>. Moreover, the statistics showing the number of people that legal services organizations turn away *understates* the level of unmet need as a majority of those who face legal problems and who are eligible for assistance do not seek it. *See infra* at 24.

While the need for legal services is pervasive among the poor generally, the particularly vulnerable members of that group experience a disproportionate level of unmet need. Children,<sup>11</sup> immigrants, and farm workers<sup>12</sup> are among the most

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<sup>11</sup> North Carolina's study decried the number of children who go without necessary legal services. "This report, and every other of the many done nationwide, make it clear that an intolerable number of children are not getting their essential needs met. Moreover, these children do not have legal representation to get these needs met even when federal and state law promises the services." *North Carolina State Wide Legal Needs Assessment* at 46. *See also, Policy Implications of the Massachusetts Legal Needs Survey* at 23 (noting that 41% of low income Massachusetts households have children under 18, and that 87% of these households experience a legal need); *The New York Legal Needs Study* at 81-89.

<sup>12</sup> In *The Erlenborn Commission Report*, released by the LSC, lawyers and clients describe the difficulties that immigrant workers have in accessing legal services, due in part to the federal restrictions. They explain how this lack of access leaves them open to abuse and exploitation in the work place. 15 Geo. Immigr. L.J. 99 (2000). Similarly, *The New York Legal Needs Study* emphasizes the drastic repercussions that the lack of legal services has for poor immigrants.



underserved. Unmet legal needs are also particularly high among Native Americans, the disabled, individuals with AIDS, the elderly, the homeless, prisoners and the institutionalized, and victims of domestic violence. *See, e.g., The New York Legal Needs Study* at 162; *Washington State Civil Legal Needs Study* at 27-29; *State of Access to Justice in Oregon* at 16, 24-26.

Some states have tried to address these critical shortfalls by establishing access to justice commissions or similar types of bodies. American Bar Association and National Legal Aid and Defender Assoc., Access to Justice Support Project, *Access to Justice Partnerships State by State*, <http://www.atjsupport.org/DMS/Documents/1113666733.35/NLADA-AccessToJustice%239.pdf>. States recognize that the federal program meets only

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That study found that political asylum applicants go without representation despite fear of retaliation if forced to return to their native lands and that immigrant children eligible for Medicaid and public education are denied these rights due to a lack of legal representation. *The New York Legal Needs Study* at 75-80. Other studies reveal the lack of access to legal services that persists among the immigrant community. For example, in Massachusetts, 79% of low income households with immigrants had at least one unmet civil legal need in the year preceding the study. *Policy Implications of the Massachusetts Legal Needs Survey* at 19. *See also, Washington State Civil Legal Needs Study* at 27-29; *State of Access to Justice in Oregon* at 16, 24-26 (both noting relatively high levels of unmet needs of farm workers). Studies also find that this problem is exacerbated by the LSC restrictions. *North Carolina State Wide Legal Needs Assessment* at 49 (noting that the LSC restrictions on many classes of non-citizens has a substantial negative impact on the ability to serve the migrant workers in the state); National Asian Pacific American Legal Consortium, *The Search for Equal Justice: Asian American Access to Justice Project Report* (May 2000) (asserting LSC restrictions prevent certain immigrants from obtaining legal assistance); CASA of Maryland & Public Justice Center, *Unequal Justice: Barriers to Justice for Latinos in Maryland, A Preliminary Assessment of the Legal Needs of Low-Income Latinos in Maryland* 26 (Dec. 1999) (reporting that many undocumented workers exploited by their employers cannot obtain legal assistance because the restrictions preclude Maryland's largest legal aid providers from representing them).

some of the needs of the poor population and that state-based delivery of legal services is an increasingly important part of an overall system. Massachusetts State Planning Board for Civil Legal Services, *Proposal for a Massachusetts Access to Justice Commission, Discussion Draft 3* (April 13, 2004), [http://www.lri.lsc.gov/pdf/04/040055\\_MAAccesstoJustice.pdf](http://www.lri.lsc.gov/pdf/04/040055_MAAccesstoJustice.pdf). However, these non-federal funding initiatives are frustrated and limited because LSC's program integrity regulation, and its physical separation requirement, prevents the states from allocating their resources where the greatest needs exist.<sup>13</sup>

The inevitable result of LSC's program integrity regulation is that the degree of unmet need of the most vulnerable groups in our society will grow. This result occurs whether organizations create separate affiliates, split completely, or submit all funds to the federal restrictions.<sup>14</sup> Organizations that comply with the program integrity regulation inevitably must reduce service because of the financial burdens

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<sup>13</sup> The following reports all refer to the negative impact that the LSC restrictions have on the ability to serve those most in need. Preliminary Report from the Legal Services Planning and Reengineering Process-Phase II, *Justice For All 2000: A Master Plan for Legal Services In New Jersey 1999-2001* (Discussion Draft) 7, [http://www.lri.lsc.gov/state\\_planning/stateplans/NJ331016.pdf](http://www.lri.lsc.gov/state_planning/stateplans/NJ331016.pdf); *North Carolina State Wide Legal Needs Assessment* at 42; *Self-Evaluation Report for Texas* at 10, 11, 19; *Center for Arkansas Legal Services, Forging New Standards of Excellence II: A Re-Examination of the Arkansas State Plan for the Delivery of Legal Services to the Poor* 27-28 (1998), [http://www.lri.lsc.gov/sitepages/stpl/stpl\\_stplrpts.htm](http://www.lri.lsc.gov/sitepages/stpl/stpl_stplrpts.htm); Pennsylvania Legal Services, *Pennsylvania Agenda for Legal Services 1998-2001: The Action Plan for a Statewide Integrated Legal Services Delivery System* 41-41 (Oct. 1, 1998), [http://www.lri.lsc.gov/sitepages/stpl/stpl\\_stplrpts.htm](http://www.lri.lsc.gov/sitepages/stpl/stpl_stplrpts.htm); Legal Services Corporation of Virginia, *Virginia Civil Legal Services Delivery System Planning Report 1998* 19, 31, 34 (Dec. 1, 1998), [http://www.lri.lsc.gov/sitepages/stpl/stpl\\_stplrpts.htm](http://www.lri.lsc.gov/sitepages/stpl/stpl_stplrpts.htm).

<sup>14</sup> A fourth option, forfeiting federal funds entirely, is equally problematic.

associated with the creation of physically separate, non-federally funded entities. These burdens are so significant that very few LSC-funded organizations have been able to create a program affiliate under LSC's program integrity regulation.<sup>15</sup> For example, South Brooklyn Legal Services rejected the creation of an affiliate when it determined that the costs of doing so would require the organization and its unrestricted affiliate to serve 500 fewer clients annually. Appendix at A-904, Parties' Stipulated Facts ¶ 41. For organizations that already turn away a substantial number of people with pressing legal needs, such reductions in service are unacceptable. Therefore, these organizations simply cannot serve individuals whose needs fall under federal restrictions. Each of the options for compliance leaves an unacceptable and growing number of vulnerable members of our society with no legal recourse to enforce basic rights and secure essential services.

This fact is reflected in the experiences of legal services organizations in various states. In New York, major legal services providers, in addition to South Brooklyn Legal Services, have declined to create affiliates when, after careful review, they determined that the required cuts in services would be too overwhelming. *See* Pls' Mem. Of Law in Support of Pls' Mot. For Prelim. Inj. at 12-17. In New Jersey, a state that is relatively well-funded in comparison to other

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<sup>15</sup> The record reflects LSC approval of only seven affiliate relationships, but in only two of these does the non-LSC affiliate engage in restricted forms of advocacy, and in all of these, LSC's physical separation requirement imposes substantial burdens. Appendix at A-900-A-901, Parties' Stipulated Facts ¶¶ 11, 12, Appendix at A-176-177, Decl. of Laura Abel, Dec. 14, 2001 ¶¶ 40-44; Pls.' Mem. In Reply to Govt's Opp. To Prelim. Inj. Mot. at 12-14.

states, the LSC restrictions cause great inefficiencies and result in a denial of fundamental legal assistance to those who need it. *Justice For All 2000: A Master Plan for Legal Services In New Jersey 1999-2001* at 7. Similarly, Community Legal Services in Pennsylvania struggled to overcome daunting financial and administrative burdens as it created two separate organizations, one that accepted federal LSC funds and one that did not. Catherine C. Carr & Alison E. 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)(describing the extensive costs, administrative burdens, and effect on clients).

In 22 other states, there is little if any access to the legal services that fall under federal restrictions because most of the funding available for legal services comes from the LSC. *See* LSC, *Special Report* at 8.<sup>16</sup> Legal services organizations in these states have been unable to raise sufficient non-LSC funds to finance physically separate affiliates to perform advocacy that is restricted by the LSC. Houseman at 1228. In states such as Texas, those who have legal needs that can be addressed only through restricted activities are likely to receive no assistance at all. *Self Evaluation Report for Texas Access to Justice* at 4. Even in

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<sup>16</sup> In Alabama, Mississippi, Arkansas, New Mexico, South Dakota, and Wyoming, LSC funding constitutes over 80% of the funding available for legal services. In 16 other states, LSC funding constitutes over 50% of available funding.

states where the federally funded legal services organization does manage to create an affiliate, the geographic coverage of the affiliate may be quite limited. For example, the legal services organization in Oregon has established an affiliate system, but it does not reach into some of the more rural areas of the state, leaving poor people in communities across Oregon without access to legal services that are prohibited by the federal funding restrictions. *The State of Access to Justice in Oregon* at 42-43; Appendix at A-620-622, Decl. of Angel Lopez and Charles Williamson, June 12, 2002 ¶¶ 13-15; Appendix at A-642, 644, Decl. of David Thornburg, June 12, 2002 ¶ 23, ¶ 28; Appendix at A-627-629, Decl. of Louis D. Savage, June 12, 2002 ¶¶ 5-7. Similar situations exist in states throughout the South, the Southwest, and the Rocky Mountain region. Houseman at 1228.

That some states face an even greater crisis than others in terms of the availability of legal services resources cannot support the government's misguided argument that well-funded organizations have adequate alternative channels for the provision of restricted legal services. In truth, there are no well funded, or even adequately funded, legal services organizations. *Amici* are troubled by statements in the briefs submitted by LSC and the Department of Justice suggesting that organizations like Legal Services for New York City (“LSNY”) are well-funded. *See, e.g.*, Br. For Intervenor-Appellant United States of America at 20, 34, 37; Br. For Legal Services Corporation at 17-18. These statements ignore study after

study that consistently document the severe funding shortfalls for legal services organizations. Legal services organizations in every state face a serious lack of resources. While some are better funded than others, none has adequate resources to meet even a fraction of the need that exists. Moreover, organizations like LSNY that are supposedly better funded,<sup>17</sup> often serve exceedingly larger populations. LSC itself recognized that a substantial unmet need exists in areas like New York. In its *Special Report* to Congress in 2000, LSC cited state studies, including one conducted in New York, to support its finding that the need for legal services is overwhelming. LSC, *Special Report* at 12. *See also, The New York Legal Needs Study* at 147-151 (showing that most legal services organizations in New York were forced to limit their caseloads and the kinds of cases they covered due to a lack of resources).

The government's argument is undercut further by the fact that LSC has so strongly encouraged the merger of smaller legal services organizations to form larger organizations like LSNY that are better able to take advantage of economies of scale. Through its State Planning Process, LSC encouraged, and even required, smaller legal services organizations to combine into larger organizations, because it believed that inefficiencies and decreased effectiveness result when several small

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<sup>17</sup> In contrast to assertions made by the LSC and the Department of Justice, LSNY, and the recipients of its grants, lack sufficient resources to meet the needs of the communities they serve. Br. For Pls.-Appellee-Cross-Appellants and Pl.-Cross-Appellants at 17-19; Appendix at A-452, Decl. of Andrew Scherer, Dec. 7, 2001 ¶ 25.

programs serve the same geographic areas. Organizations in New York followed LSC's call for merger, reducing the number of service areas from 15 to seven between 2003 and 2004. Joint Appendix at A-902, Parties' Stipulated Facts ¶ 16. In discouraging just the kind of physical separation it now requires, LSC described the problems that these divisions cause, such as difficulties with recruiting lawyers, developing expertise, ensuring client access, developing and using technology, and fundraising. Appendix at A-170-172, Decl. of Laura Abel, Dec. 14, 2001 ¶¶ 26-32; Appendix at A-259, John A. Tull, LSC, *Program Letter 98-1* (Feb. 12, 1998), <http://www.lsc.gov/FOIA/pl/98-1.htm>, Decl. of Laura Abel, Dec. 14, 2001, Exhibit 7. LSC's physical separation requirement undercuts any advantages that followed from LSC-mandated mergers and penalizes those organizations that followed LSC's call for consolidation. For the government and LSC to argue now that larger organizations should take on the cost of duplicate programs is contrary to the very principle that LSC has steadfastly propounded, namely, that an unacceptable number of people remain underserved when organizations are broken into smaller units.

### **III. Legal Services Organizations Must Be Permitted to Render Necessary Services In Order to Provide Meaningful Access to Justice**

The program integrity regulation and LSC's interpretation of its physical separation requirement prevent legal services lawyers from engaging in the full range of advocacy necessary to address the problematic practices that affect the

lives of their clients. This significantly lessens the effectiveness of the attorneys and frustrates their mission of providing competent and comprehensive legal services to poor people in need. We have deep concerns about the program integrity regulation because it so severely and unnecessarily constrains important and necessary advocacy. As the District Court found, LSC's goals can be accomplished without imposing so heavily on the ability of legal services organizations to meet clients' needs. Most obviously, by making it difficult, if not impossible, to use non-federal funds to finance advocacy mechanisms like class actions, public interest solicitation, and claims for attorneys' fee awards, the physical separation requirement actually prevents legal services attorneys from using the very legal tools that may best protect their clients' rights.

The physical separation requirement prevents legal services organizations from addressing effectively the very needs that defendants repeatedly seek to cast as the core of LSC's mission. A large percentage of those eligible for legal services do not seek help because they are not aware of available services or are not aware that any legal remedy exists. *See, e.g., ABA, Legal Needs and Civil Justice; Massachusetts Legal Needs Survey at 30; State of Access to Justice in Oregon at 34; Washington State Civil Legal Needs Study at 9; The Legal Assistance Gap Facing Lower Income People in New Jersey at 12; Legal Needs of Low Income Illinoisans at 1-2.* Yet, organizations that cannot afford to create



physically separate affiliates (or entirely separate organizations) are prohibited by the public interest solicitation restriction from reaching out to advise these individuals of their need to protect their basic rights and their need for legal services. The physical separation requirement, in combination with the public interest solicitation restriction, thus effectively prevents individuals from obtaining assistance in enforcing even their most basic individual legal rights – the rights the defendants insist Congress expects legal services organizations to protect.

Similarly, the inability to seek attorneys' fees prevents attorneys from adequately addressing individuals' basic legal needs. For instance, attorneys' fees are an important tool to combat landlords who engage in repetitive wrongful evictions. Legal services attorneys in Florida represented a woman who had been wrongfully evicted, but because they could not seek attorneys' fees, the landlord evicted her a second time. Again, legal services attorneys demonstrated that the eviction was wrongful. Yet they had no means of deterrence, and the landlord evicted the woman a third time. This time, the legal services organization lacked the resources to pursue her case, and the wrongful eviction had to be left unchallenged. *How Congress Left the Poor with Only Half a Lawyer* 15, The Access to Justice Series (Brennan Center for Justice 2000), <http://www.brennancenter.org/resources/atj/atj2.pdf>. These examples reveal that the government wholly ignores the realities of legal services practice when it

claims that physical separation advances a Congressional interest in funding only “those legal service providers whose sole focus is on the provision of specified legal services to the poor.” Br. for Intervenor-Appellant United States of America at 39. In fact, the physical separation requirement undermines this goal.

The creation of duplicate programs also interferes with efforts to address the full range of important needs that clients experience. Studies reflect that legal services clients are likely to face a variety of interrelated legal problems, but because of the funding shortfalls, legal services attorneys must pick a subset of these needs to address. According to the legal needs study in Massachusetts, of 4,335 legal problems reported, 60% came from those households that experienced five or more legal needs, and 31% came from those households with two to four legal needs. *Massachusetts Legal Needs Survey* at 9. Similarly, the study conducted in Washington found that in one year, most low-income households with legal needs experienced several legal problems or issues. *Washington State Civil Legal Needs Study* at 23. Even if some of these families are lucky enough to receive legal assistance, chances are high that they will not have all of their problems addressed. Organizations that struggle with the financial and administrative strain of creating entirely separate affiliates are even less likely to meet the variety of legal needs faced by each client.

The difficulty with this piecemeal approach to advocacy is particularly apparent in the context of domestic violence. In North Carolina, many legal services organizations restrict representation in family law cases to assistance with protective orders. Yet, victims of domestic violence often face a range of legal issues that require legal representation. *North Carolina State Wide Legal Needs Assessment* at 42. A woman who leaves an abusive husband often needs legal assistance in finding new housing for her family, schooling for her children, and in handling new credit issues that arise from a loss of income following a divorce. The legal needs of domestic abuse victims “are unique in that they require legal help in so many areas simultaneously. Integrated legal services are, thus, particularly important for domestic violence victims.” *The New York Legal Needs Survey* at 75; *see also, Washington State Civil Legal Needs Study* at 23.

We believe that attorneys have a professional obligation to meet the various compelling needs of their clients. The District Court’s preliminary injunction will allow more organizations to use their non-federal funds for critical advocacy and will also permit more clients to have their various basic legal needs properly addressed. In this way, it is more supportive of Congressional intent than the onerous LSC regulations and furthers the goal of equal access to justice for all.

#### **IV. Access to Legal Assistance Protects the Integrity of Our Courts and Justice System**

The District Court recognized that increased availability of legal services is critical to the proper functioning of our justice system. This recognition echoes the sentiment expressed in *LSC v. Velazquez*, in which the U.S. Supreme Court explained that the restriction preventing LSC lawyers from challenging welfare laws in benefits suits distorted the legal system and impaired the judicial function. *LSC v. Velazquez*, 531 U.S. 533, 544-546, 121 S.Ct. 1043, 1050-1051 (2001). Other courts have similarly recognized the importance of legal services in allowing for and facilitating the judicial function. *See In Re Arkansas Bar Association, Petition for the Creation of the Arkansas Access to Justice Commission*, No. 03-979, 2003 WL 22967388, at \* 3 (Ark. Dec. 18, 2003)(endorsing the view that, “not only is justice not served when self-represented litigants are unprepared, but these individuals also affect the functioning of the courts.”) LSC's physical separation requirement undermines our system of justice by blocking access to legal assistance for substantial numbers of poor people. As the District Court correctly held, the First Amendment of our Constitution prevents LSC from applying the regulation in this pernicious way.

Because of the adversarial nature of our justice system, courts rely on adequate representation for both parties in order to make fair and informed decisions. *See Bothwell v. Republic Tobacco Co. et al.*, 912 F. Supp. 1221, 1228

(D.Neb. 1995). Thus, *Bothwell* held that courts have an inherent power to conscript attorneys to represent the indigent. *Id.* at 1235. The court found this inherent power essential in light of the lack of affordable legal assistance for low-income individuals.<sup>18</sup> In reaching this decision, the court explained that LSC budget cuts caused drastic reductions in the number of legal services attorneys and offices. It noted that the current restrictions, which, at the time of the decision were being contemplated by Congress, would only exacerbate the already sizable unmet need for legal services. *Bothwell*, 912 F. Supp. at 1228-1229. It reasoned that justice requires equal representation for the poor in order to satisfy our fundamental principles of fairness and to protect the integrity and proper functioning of the court. *Id.* at 1227. It further recognized that "reduction of government resources to provide legal services to the poor is, for them, a removal of the civil justice system's accessibility (and thus its legitimacy.)" *Id.* at 1230.

The decision in *Woodruff Corp. v. LaCrete*, 154 Misc.2d 301, 585 N.Y.S.2d 956 (N.Y. Civ. Ct. 1992) reveals the injustices that result from a lack of access to legal representation and the resulting burden on the court. The court was faced with an indigent tenant who was goaded by her landlord and his attorney into signing two stipulations that required her to pay a monthly rent that was more than 20% greater than the legal regulated rent for her apartment. Because she was

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<sup>18</sup> The court declined to exercise its inherent power in this case, as the plaintiffs' lack of legal assistance was not due to his indigency. *Bothwell*, 912 F. Supp at 1236.

unrepresented during the summary eviction proceeding, she lacked knowledge of her basic legal rights. *Woodruff*, 154 Misc.2d at 302, 585 N.Y.S.2d at 957.

Recognizing that it would be unjust to enforce these stipulations, the court vacated them.

The court discussed the plight of unrepresented tenants, noting that in 80%-90% of summary eviction proceedings, landlords are represented while tenants are not. *Woodruff*, 154 Misc.2d at 304, 585 N.Y.S. 2d at 958. Quoting from the Marrero Committee Report, the court lamented that "[o]ur society has evolved so that the poor need legal help to obtain basic human requirements and to an appalling degree cannot get it. . . . It is grotesque to have a system in which the law guarantees to the poor that their basic human needs will be met but which provides individuals with no realistic means with which to enforce that right." *Woodruff*, 154 Misc. 2d at 305, 585 N.Y.S.2d at 959 (quoting from the *Marrero Committee Report*, 19 Hofstra L. Rev. at 774-775). While the court lamented the lack of legal assistance for the poor, the court's decision also reflected the burden that this lack of legal assistance imposes on the justice system. The judge calculated that in 5,000 housing cases, most of the stipulations to pay rent arrears were signed by tenants without knowledge of their possible defenses. Because justice requires the court to vacate those stipulations whenever such circumstances are brought to the court's attention, (*Woodruff*, 154 Misc.2d at 308, 585 N.Y.S. at 961), the lack of

legal assistance undermines the efficiency that is intended to accompany a summary proceeding.

Judges faced with unrepresented litigants can either assist them, which undermines the court's appearance of objectivity, or base a decision on what is likely to be incomplete evidence. *The State of Access to Justice in Oregon* at 9; *see also, Marrero Committee Report*, 19 Hofstra L. Rev. at 842 (explaining that increased access to justice will reduce the efforts expended by judges in trying to protect *pro se* litigants). Judges who participated in the legal needs study conducted in Oregon shared the view that this Catch-22 threatens the integrity of the courts. They noted that the need for representation was particularly acute in eviction proceedings and in domestic relations disputes. They indicated that unrepresented tenants need advice in eviction proceedings, in terms of available defenses, how to enter a notice of appearance, and how to present evidence at trial. *State of Access to Justice in Oregon* at 10. Family law judges also expressed frustration over how to handle poorly drafted pleadings and how to deal with litigants who are unaware of their important rights. These judges emphasized the need for more information on which to base custody decisions - information that would normally be brought to the court's attention by an attorney.

The obstacles that self-represented litigants face underscore the essential role of legal representation in our democracy. This role is summarized by three

concurring judges in *Frase v. Barnhart*, 379 Md. 100, 840 A.2d 114 (Md. 2003), who sought a solution to the lack of legal representation in child custody cases. They argued that the court should have decided the question of whether a parent in a custody dispute who risks the loss of custody of a child possesses a right to counsel. They noted that “one of the most important roles of the judiciary is to see that the laws equally protect all people – the poor as well as the wealthy.” *Frase*, 840 A.2d at 132. They understood that “the quality of justice received, even in our system, arguably the best system of justice ever conceived, is impacted by the presence or absence, and the quality of, legal representation of the respective parties.” *Frase*, 840 A.2d at 133. The District Court's decision in this case reflects a similar understanding that the existing lack of access to legal assistance has grave consequences for the administration of justice.

**V. The District Court's Decision Upholds the First Amendment, Honors Congressional Intent, and Permits Legal Services Organizations to Serve More Clients with Critical Legal Needs**

For all of the above reasons, we believe the configuration model proposed by the plaintiffs and approved by the District Court strikes the proper balance between Congressional intent and the plaintiffs' First Amendment right to engage in legal advocacy for the poor. *Amici* support the District Court's conclusion that LSC's application of the program integrity regulation to the plaintiffs is unconstitutional. The Court correctly determined that LSC imposed an unduly



burdensome degree of physical separation between LSC-funded, approved activities and privately financed, restricted activities. This undue burden violates the First Amendment because each option left available to legal services organizations leaves an unacceptable number of poor people without access to legal assistance.

The ruling allows the plaintiffs to use non-LSC funding for the restricted activities as long as they follow guidelines approved by the District Court. The Court was correct to require LSC to permit the plaintiffs to share all employees, back office space, and equipment with a non-LSC affiliate, so long as the two entities adhere to rigorous bookkeeping and timekeeping measures and use adequate signage and disclaimers. This arrangement respects Congress' desire to fund only a subset of critical legal services and to prevent confusion over the source of funding for restricted activities. At the same time, it saves money, makes administration easier, and reduces strain on the programs' legal work. Thus, it makes it feasible for legal services organizations to use non-LSC funds for vitally important legal services work that is crucial for the pursuit of improved access to justice for low-income individuals and families. However, *amici curiae* respectfully submit that the District Court's own logic does not support the Court's dual public areas requirement nor its requirement that a new attorney be appointed when a restricted matter arises in a case. The plaintiffs should not be required to

undertake the burdensome and entirely unnecessary measure of maintaining one set of public areas for their LSC entity and another for their non-LSC affiliate.

## **CONCLUSION**

When the Legal Services Corporation was established, two of its fundamental purposes were to “provide equal access to the system of justice in our Nation for individuals who seek redress of grievances,” and to ensure that “attorneys providing legal assistance. . .have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.” 42 U.S.C. § 2996. The unduly burdensome restrictions on the use of non-federal funds imposed by LSC’s program integrity regulation and its requirement of physical separation undermine these purposes and are far broader than necessary to effect Congress’ intent. The physical separation requirement forces legal services organizations to curtail advocacy that even defendants agree Congress had intended to support.

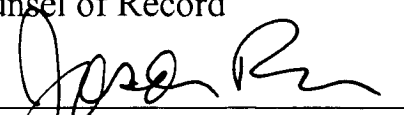
The District Court’s decision to invalidate the LSC program integrity regulation as applied to the plaintiffs protects the First Amendment, honors Congressional intent, permits states and private funding sources to allocate resources where they are needed most, and reduces the financial strain that legal services organizations constantly face. *Amici curiae* urge this Court to uphold this

portion of the District Court's decision and to abide by the principle expressed eloquently by Judge Learned Hand, "If we are to keep our democracy, there must be one commandment: thou shalt not ration justice." Judge Learned Hand, [http://www.atjsupport.org/News/Equal\\_Justice\\_Quotes/index\\_html](http://www.atjsupport.org/News/Equal_Justice_Quotes/index_html).

Respectfully submitted,

Jason Brown\*  
George Kendall  
Rachel Nash  
HOLLAND & KNIGHT LLP  
195 Broadway  
New York, NY 10007  
(212) 513-3200  
Counsel for *Amici Curiae*  
\*Counsel of Record

Dated: July 6, 2005

By:   
Jason Brown (7824)

## APPENDIX

### **The Association of the Bar of the City of New York**

The Association of the Bar of the City of New York, founded in 1870, comprises over 22,000 members. While most practice in the New York area, the Association has members in nearly every state and over 50 countries. The Association has long been committed to promoting reform of the law and providing access to justice for all. A major aspect of that effort is working to ensure that legal services organizations have the resources and ability to effectively address their clients' needs. In New York City, the Association has helped coordinate the efforts of the general legal services community. Its affiliated organization, the City Bar Justice Center, draws upon the *pro bono* efforts of thousands of lawyers to provide free legal services to the needy in a number of program areas and runs a hotline providing legal information to those who cannot afford a lawyer.

### **New York County Lawyers' Association**

The New York County Lawyers' Association, founded in 1908, currently has 8,500 members. It sponsors activities such as *pro bono* programs, continuing legal education programs and public forums, and has consistently supported funding for legal services and the independence of the judiciary.

### **New York State Bar Association**

The New York State Bar Association ("NYSBA") is the official statewide organization of lawyers in New York. With 71,000 members, it is the largest voluntary state bar association in the nation. Founded in 1876, the NYSBA offers programs and activities which have continuously served the public and improved the justice system for nearly 130 years. Expanding access to the civil justice system for low-income persons has been a core mission of the NYSBA for decades and has been continuously advanced through the work of Association leaders and several member committees. In 1996, the Association was honored with the American Bar Association Harrison Tweed award for developing an increased statewide grassroots lobbying effort seeking continued Legal Services Corporation funding. One of the Association's legislative priorities for 2005 states that adequate funding from the federal and state governments is necessary to ensure access to the justice system for people at the lowest economic strata of our society. The Association also encourages its members to render *pro bono* service to the poor and to make financial contributions to legal aid agencies and nonprofit organizations serving the poor.

### **New York State Defenders Association**

Founded in 1967, the New York State Defenders Association ("NYSDA") is the largest criminal defense bar association in New York State. Our members include nearly 1400 lawyers who provide legal representation for people financially unable to hire counsel, individuals from the public defense client community, and others who support the Association's mission of improving the quality and scope of public defense services. With funds provided by New York State, NYSDA operates the Public Defense Backup Center, which offers case assistance, research and training, and technical assistance to all public defense lawyers statewide. NYSDA has a long history of working closely with civil legal service providers in our day-to-day mission and in policy efforts to secure funding for expanded legal services for low-income people. In 1981, NYSDA was the defender representative in the initial standards drafting project which resulted in *Standards for Providers of Civil Legal Services to the Poor*. Our Backup Center, modeled on civil legal services backup centers, has collaborated with legal services providers in litigating the right to counsel and in monitoring abuses of the constitutional rights of our jointly represented clients. NYSDA has brought civil and criminal providers together to deal with the problems of prisoner reentry and has been in the vanguard of the decade long fight to protect Prisoners' Legal Services of New York from executive defunding. Through its Immigrant Defense Project, the Association assists lawyers and non-citizen clients with issues arising from the interplay between criminal and civil immigration law. The Association's Client Advisory Board recently completed a series of fact-finding hearings, which examined the civil and criminal rights of farm workers, the deaf, and other low-income people in New York.

### **Lesbian, Gay, Bisexual and Transgender Law Association of Greater New York**

The Lesbian, Gay, Bisexual and Transgender Law Association of Greater New York ("LeGaL") was founded in 1978 and incorporated in 1981. LeGaL, through its over 400 members, seeks to represent the interests of the lesbian, gay, bisexual and transgender ("LGBT") legal community and the LGBT community at large. Among our community activities is sponsoring three free walk-in legal clinics to help address the unmet legal needs of the LGBT community.

### **Women's Bar Association of the State of New York**

The Women's Bar Association of the State of New York ("WBASNY") is a statewide organization of attorneys comprised of sixteen (16) chapters with more than 3,200 members throughout the State of New York. Members include jurists, academics, and practicing attorneys who work in every area of the law including, but not limited to, constitutional and civil rights, family and matrimonial law, and

children's rights. Since its formation in 1980, WBASNY has been dedicated to the advancement of equal rights of and the eradication of discrimination against women. In this regard, WBASNY seeks to contribute to the improvement and reform of the law in New York and the United States. WBASNY's perspective is derived from the experiences of a membership that spans a broad cross-section of the diverse cultures in New York State.

### **Gifford Miller, Speaker of the Council of the City of New York**

Gifford Miller, joins in his capacity as Speaker of the Council of the City of New York (the "Council"). The Council appropriates funding for numerous organizations that provide legal representation and advice to New Yorkers otherwise unable to afford it, including funding for: anti-eviction legal services, representation of domestic violence survivors, indigent criminal defense representation, assistance to persons trying to access federal benefits, and basic information for families involved in proceedings in Family Court. The imposition of restrictions on the use of these funds is a matter of great importance to the Council.

### **Connecticut Bar Association**

The Connecticut Bar Association, Inc., ("CBA") is the preeminent organization for lawyers and the legal profession in Connecticut. The CBA is a non-profit organization pursuant to section 501(c)(6) of the Internal Revenue Code. Through its eleven thousand members, the CBA is dedicated to promoting public service and advancing the principles of law and justice.

### **Connecticut Bar Foundation**

The Connecticut Bar Foundation, established in 1952, is a non-profit organization which develops and administers programs to enhance understanding and improvement of the law and legal institutions, provides grants for legal research, and sponsors educational symposia. The Foundation administers the Interest on Lawyers' Trust Accounts (IOLTA) program which provides funds for the delivery of legal services for the poor and for law school scholarships based on financial need for Connecticut students attending schools in the state.

### **The Florida Bar Foundation**

The Florida Bar Foundation, a 501(c)(3) public charity, was established in 1956. The Foundation administers the Florida Supreme Court's Interest on Trust Accounts Program and raises funds from lawyers, law firms, the business community, and from members of the general public. The primary mission of the

Foundation is to provide financial support for legal aid and to promote improvements in addressing the civil legal needs of the poor.

### **Philadelphia Bar Association**

Founded in 1802, the 13,000-member Philadelphia Bar Association is America's oldest chartered metropolitan bar association. Its mission is to serve the profession and the public by promoting justice, professional excellence and respect for the rule of law. In so doing, the Association strives to foster understanding of, involvement in, and access to the justice system.

### **Philadelphia Bar Foundation**

The Philadelphia Bar Foundation is the single organization that works with all legal service provider organizations in the greater metropolitan region. The Bar Foundation works side by side with Philadelphia lawyers, their firms, and their clients to guarantee access to justice for all Philadelphians. Each year the Bar Foundation raises funds through special events and direct contributions from individuals, law firms, and other corporations. The Foundation distributes these funds as monetary grants to local organizations that provide no-cost or low-cost legal services to the poor, the elderly, the disabled, and children who are victims of abuse and neglect.

### **Vermont Bar Association**

The Vermont Bar Association ("VBA") is the only statewide association open to all Vermont lawyers, judges, and law students. It is a voluntary association and has approximately 2100 members which is close to 80% of licensees. The VBA's mission statement includes promoting reform in the law and facilitating the administration of justice. The Board of Managers of the VBA has partnered with Vermont Legal Aid and Legal Services Law Line of Vermont for many years, and the Board has consistently supported the work of each.

### **Virginia State Bar**

The Virginia State Bar is an administrative agency of the Supreme Court of Virginia, charged with improving the availability of legal services for all Virginians.

### **Dominican Bar Association**

The Dominican Bar Association ("DBA") is an incorporated, non-profit, national association representing the interests of Dominican-American, native Dominican, and Latino attorneys, judges, law professors, and law students in the US and the Dominican Republic. Founded in New York City in 1990 as The American Society

of Dominican Attorneys, DBA has grown to represent thousands of Latino attorneys and law students across the country. Through its members and programs DBA is committed to the principles of justice, professionalism, and public service. The Dominican Bar Association mission also includes partnering with other bar associations, governmental agencies, and community groups to foster greater participation in the U.S. legal system by the Dominican and Latino communities.

### **Hispanic National Bar Association**

The Hispanic National Bar Association ("HNBA") is a non-profit, national association representing the interests of Hispanic American attorneys, judges, law professors, law graduates, law students, legal administrators, and legal assistants or paralegals in the United States and Puerto Rico. Its continuing mission: To improve the study, practice, and administration of justice for all Americans by ensuring the meaningful participation of Hispanic Americans in the legal profession. Founded in California in 1972 as La Raza National Lawyers Association, the HNBA has grown to represent thousands of Hispanic Americans in the legal profession across the country. The HNBA collaborates with State and local Hispanic Bar Associations in over 100 cities in the United States. The HNBA, as a national organization of Hispanic attorneys, has a particular interest in issues regarding the role and effectiveness of Hispanic lawyers and the delivery of legal services to Hispanic communities. Ultimately, the HNBA works diligently to bring about a better understanding and confidence in our legal system for the benefit of everyone.

### **National Asian Pacific American Bar Association**

The National Asian Pacific American Bar Association ("NAPABA") is the national association of Asian Pacific American attorneys, judges, law professors, and law students. NAPABA represents over 40,000 attorneys and 47 local Asian Pacific American bar associations. Its members represent solo practitioners, large firm lawyers, corporate counsel, legal service and non-profit attorneys, and lawyers serving at all levels of government. NAPABA continues to be a leader in addressing civil rights issues confronting Asian Pacific American communities. Through its national network of committees and affiliates, NAPABA provides a strong voice for increased diversity of federal and state judiciaries, advocates for equal opportunity in the workplace, works to eliminate hate crimes and anti-immigrant sentiment, and promotes professional development of minorities in the legal profession.

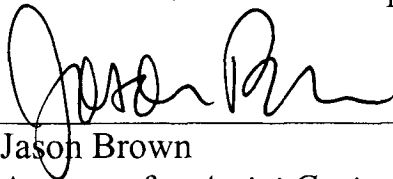


**American Association of Jewish Lawyers and Jurists**

The American Association of Jewish Lawyers and Jurists (“AAJLJ”) is a membership association of lawyers and jurists open to all members of the professions regardless of religion. It is an affiliate of the International Association of Jewish Lawyers and Jurists, which is based in Israel and was founded by the late Justice Arthur Goldberg of the United States Supreme Court and the late Justice Haim Cohen of the Supreme Court of Israel. The mission of the AAJLJ is to promote an understanding of the principles of traditional Jewish law among the bar, the judiciary, and the public, including an understanding of the relevance and applicability of Jewish law to current legal issues and controversies. The AAJLJ strongly believes that the principle of equal access to justice is an indispensable feature of a democratic society, and that unwise and unnecessary restrictions on the ability of legal service organizations to engage in activities that foster and support such access for all persons, regardless of economic circumstance, is inconsistent with that principle. In Jewish law the principle is expressed in the Torah: “Justice, justice shall you pursue,” Deuteronomy 16:20.

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1. This brief contains 6,970 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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A handwritten signature in black ink, appearing to read "Jason Brown", is written over a horizontal line.

Jason Brown  
Attorney for *Amici Curiae*

Dated: July 6, 2005

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