

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DAVID F. DOBBINS, *et al.*, :
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 Plaintiffs, :
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 : 01 Civ. 8371 (FB)
 -against- :
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 LEGAL SERVICES CORPORATION, :
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 Defendant. :
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MEMORANDUM OF LAW OF THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, CALIFORNIA RURAL LEGAL ASSISTANCE, INC., COMMUNITY LEGAL SERVICES, INC. (PHILADELPHIA), THE GREATER UPSTATE LAW PROJECT, INC., HARLEM LEGAL SERVICES, THE LEGAL AID FOUNDATION OF LOS ANGELES, LEGAL AID OF NORTH CAROLINA INC., LEGAL AID SOCIETY OF ALBUQUERQUE, INC., THE LEGAL ASSISTANCE FOUNDATION OF METROPOLITAN CHICAGO, LEGAL SERVICES OF GREATER MIAMI, INC., LEGAL SERVICES OF NEW JERSEY, LEGAL SERVICES OF NORTHERN CALIFORNIA, INC., LONE STAR LEGAL AID, NASSAU SUFFOLK LEGAL SERVICES COMMITTEE, NATIVE HAWAIIAN LEGAL CORPORATION, NEIGHBORHOOD LEGAL SERVICES OF LOS ANGELES COUNTY, AND NORTHWEST JUSTICE PROJECT AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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June 19, 2002

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Amici curiae are legal services organizations (“LSO Amici”) from across the United States that support the claims that are being asserted in this case by Dobbins plaintiffs MFY Legal Services, Inc. (“MFY”), Legal Services for New York City (“LSNY”), Bronx Legal Services, Inc. (“BLS”), and Brooklyn Legal Services Corp. B

(“SBLs”) (collectively the “LSO Plaintiffs”). Like the LSO Plaintiffs, many of the LSO Amici operate under the regulations that are the subject of this lawsuit, in particular the so-called “program integrity” regulation, 45 C.F.R. § 1610.8, that make it unduly burdensome for grantees of the Legal Services Corporation (“LSC”) to engage in certain constitutionally protected activities that the federal government disfavors but cannot directly prohibit. The LSO Amici broadly agree with the positions asserted by the LSO Plaintiffs, but submit this memorandum for the limited purpose of arguing that the claims of the LSO Plaintiffs are properly before Court, are ripe for adjudication and should be decided on the merits.

BACKGROUND

There are well over one hundred and fifty local organizations throughout the United States that, like the LSO Plaintiffs, receive funding from LSC to provide legal services to the poor. In addition to the funds they receive from LSC, many of these local legal services organizations also depend upon funding from private donors and state and local governments. Together, these non-federal sources provide roughly half of the approximately \$600 million in funding received by LSC grantees each year. See Declaration of Laura K. Abel, dated Dec. 14, 2001, ¶¶ 5, 50 (“Abel Decl.”).¹ LSC is the largest single source of financing for these legal services organizations, however, and as a result its regulations have significant ramifications for legal services providers throughout the country. See Statement of LSC Before the House Comm. on the Judiciary, Subcom.

¹ “___ Decl.” refers herein to declarations already submitted to the Court by plaintiffs in support of their motion for preliminary injunction.

on Commercial and Administrative Law, 107th Cong. (Feb. 28, 2002) (statement of John Erlenborn, President, LSC) ([available at http://www.lsc.gov/pressr/pr_t_3102.htm](http://www.lsc.gov/pressr/pr_t_3102.htm)).

The regulations at issue in this lawsuit prohibit the LSO Plaintiffs and many other legal services organizations, including many of the LSO Amici, from engaging in certain constitutionally protected activities as a condition for the receipt of LSC funds. These regulations do not merely preclude LSC grantees (including sub-grantees) from using LSC funding for these restricted activities; they categorically prohibit LSC grantees from engaging in the restricted activities, regardless of the source of the funds used for those activities.² Further, the LSC’s so-called “program integrity” regulation requires that LSC grantees have “objective integrity and independence from any organization that engages in restricted activities.” See 45 C.F.R. § 1610.8(a). The concept of “objective integrity and independence” entails stringent legal, physical and financial separation requirements. An LSC grantee must have separate personnel and separate accounting and timekeeping records from any entity that engages in restricted activities and, in addition, must have an unspecified degree of physical separation from any facility in which restricted activities occur. Physical and financial separation depends, in part, on the extent to which signs and directions distinguish the grantee from the organization that engages in restricted activities and the extent to which that organization engages in those restricted activities. See § 1610.8(a)(3); Abel Decl. Ex. 31 at 1-2.³

² Non-LSC funds can be used for restricted activities by an LSC sub-grantee that is a bar association, pro bono program, private attorney, or law firm receiving LSC funds for certain permissible “private attorney involvement activities.” See 45 C.F.R. § 1610.7(c), § 1614.

³ LSC’s program integrity regulation states, in relevant part:

(continued...)

The program integrity regulation identifies these separation requirements as “factors” to be weighed in each case. See § 1610.8(a)(3) (“Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative.”). Notwithstanding the supposed relevance of individual circumstances, it is apparent in light of the record developed by the LSO Plaintiffs that, as applied by LSC in practice, the program integrity regulation imposes costly and unduly burdensome measures on the LSO Plaintiffs entirely out of proportion to its supposed governmental objectives, and in violation of the LSO Plaintiffs’ rights to engage in constitutionally protected conduct.

The stringent program integrity regulation has forced many LSC grantees, including the LSO Plaintiffs and many of the LSO Amici, to make an untenable choice:

³ (...continued)

(a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

- (1) The other organization is a legally separate entity;
- (2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and
- (3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:
 - (i) The existence of separate personnel;
 - (ii) The existence of separate accounting and timekeeping records;
 - (iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
 - (iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

45 C.F.R. § 1610.8(a).

they can forego LSC funding or, in order to remain eligible for LSC funds, either abandon many important and constitutionally protected activities on behalf of the poor or submit to the unconstitutional burden of engaging in those activities only through entities that are held separate to the extent required by LSC. Many LSOs that accept LSC funding often have no practical means of engaging in the restricted activities, despite their constitutionally protected nature, and thus forego constitutional liberties in order to remain eligible for LSC funds. Other LSOs have gone through costly and unduly burdensome efforts to engage in these constitutionally protected activities through affiliates that meet the stringent separation requirements of the LSC program integrity regulation.

The record developed in this case demonstrates that the program integrity regulation, as applied by LSC, would impose costly and unduly burdensome requirements on the LSO Plaintiffs. See Scherer Decl. ¶ 14 (LSO Plaintiffs have been “unable to come up with a feasible way to create a useful separate entity in compliance with LSC’s program integrity regulation”); Gray Decl. ¶ 12; Thompson Decl. ¶ 4. Particularly burdensome are LSC’s prohibition on the sharing of executive directors by an LSC grantee and any affiliate that engages in restricted activities, see Abel Decl. Ex. 34 (“Guidance in Applying the Program Integrity Standards”), and the strict limits on the sharing of other attorneys and staff, 45 C.F.R. § 1610.8(a)(1)(i), see Kelly Decl. ¶ 23(b)-(c) (“The salary and other expenses incident to the establishment of separate supervisors and Executive Directors would constitute a significant, unwarranted expense.”); Scherer Decl. ¶ 19; see also Schmidt Decl. ¶¶ 14-15 (discussing costs to FLSNY of duplicate

salaries and coordination problems resulting from inability to share an executive director). The considerable costs associated with setting up the wholly separate programs required by the program integrity regulation are potentially prohibitive in light of the limited resources of the LSO Plaintiffs. See Kelly Decl. ¶¶ 8, 16-17, 23 (MFY had previously maintained separate offices and determined that doing so again would impose prohibitive financial and administrative costs); Gray Decl. ¶ 11; see also Schmidt Decl. ¶ 14 (estimated cost of compliance for FLSNY would be approximately \$130,000 in first year and \$80,000 per year thereafter).

Apart from financial and administrative burdens, the degree of separation required by the LSC's program integrity regulation tends to impair the effectiveness of the legal services that the LSO Plaintiffs provide to the poor. Because the LSC Plaintiffs are prohibited from providing certain legal services, their clients who need those services must be referred to different institutions, which by regulation cannot even be closely affiliated with the LSO Plaintiffs. This is a further source of problems. See Gray Decl. ¶ 14 ("Even when a referral is possible, not all clients are able to use a referral effectively."); see also Schmidt Decl. ¶¶ 19-20. Indeed, it is difficult even to establish and maintain such affiliate relationships, because the degree of separation required by the program integrity requirement vastly complicates the ability of referring entities to monitor and oversee the activities of the affiliate to whom clients have been referred. See Gray Decl. ¶¶ 14, 16 (stating that "non-LSC-funded organizations have not met all the needs of clients of [South Brooklyn Legal Services] for restricted services" and that SBLS has been unable to find a non-LSC organization to replace it as counsel in a class action

on behalf of day care providers); Scherer Decl. ¶¶ 21-22 (“The programs to which clients may be referred are themselves underfunded and understaffed, are committed to their own substantive agendas, and cannot guarantee that they will accept referred clients. . . .

Moreover, in many instances, the LSNY program is the only program to possess particular expertise.”).

In addition to the declarations of hardship submitted by the LSO Plaintiffs, the record also contains concrete historical examples of the strictness with which the program integrity regulation is applied by LSC in practice – which indicate how LSC would apply the regulation to applications by the LSO Plaintiffs themselves. In 1997, LSC rejected a proposal submitted by Plaintiff LSNY on behalf of the Queens Legal Services Corporation (“QLSC”), an entity that receives LSC funding through LSNY. QLSC sought to establish a separate affiliate that would engage in the restricted activities that were foreclosed to QLSC itself as an LSC sub-grantee. See Abel Decl. ¶¶ 46-49, Ex. 28 (Letter from H. Richard Schumacher, LSNY, to John A. Tull, LSC, dated August 12, 1997). LSC rejected the proposal, on the ground that QLSC would not have “objective integrity and independence” from the new entity, see Abel Decl. ¶ 48, Ex. 27 (Letter from John A. Tull, LSC, to H. Richard Schumacher, LSNY, dated September 10, 1997), even though, as contemplated by the proposal, the two entities would be legally separate, would employ careful accounting procedures to ensure that funds received by QLSC would not subsidize any restricted activities, and would distinguish themselves through use of signs in a shared reception area and statements to clients and court personnel so as to ensure against any misperception that QLSC was engaging in restricted activities. See

Abel Decl. ¶¶ 46-49, Ex. 28. Despite its costs, the plan was practicable for QLSC because it allowed for the two entities to share office space, library facilities, office equipment and supplies, and office support services and personnel, including project directors, attorneys, and paralegals. See id. LSC objected to even those limited connections between the two entities. As a result of LSC’s rejection of its proposal, QLSC has been denied the practical alternative means of engaging in constitutionally protected activities through a proposed affiliate on terms that would not unduly burden its exercise of its rights.

LSC similarly rejected a proposal made by Velazquez plaintiff Farmworker Legal Services of New York (“FLSNY”) in 1998, which had examined the possibility of establishing a separate affiliate that would comply with the program integrity regulation.⁴ FLSNY concluded that, as a practical matter, it could not undertake to do more than adopt certain practices, such as maintaining separate financial records, to ensure that LSC funds would not be used for restricted purposes. See Schmidt Decl. ¶¶ 14-16. Those practices were rejected by LSC as insufficient to ensure FLSNY’s “program integrity.” See id. ¶ 16. Since it was unable to take on additional burdens, FLSNY instead elected to forego LSC funding altogether rather than accept the condition that it desist from constitutionally protected activities.

⁴ LSO Amici rely on the record with respect to FLSNY only to demonstrate LSC’s position and that the claims of LSO Plaintiffs in Dobbins are properly before the Court.

ARGUMENT

The challenge of the LSO Plaintiffs to LSC’s program integrity regulation is properly before the Court. These plaintiffs have standing to assert their claims because the LSC regulations restrict them from engaging in constitutionally protected activities on behalf of their clients as a condition for receiving federal funds, an actionable injury in fact. Their claims are ripe, because the regulations are applicable to them now, and require no further action by LSC in order to deprive the LSO Plaintiffs of their constitutional rights. Nor are the LSO Plaintiffs required, as a condition to asserting their claims, to first apply to LSC for permission to engage in constitutionally protected activities through separate affiliated entities, because there are no formal administrative procedures for such LSC approval and because, in any event, the LSO Plaintiffs have demonstrated that any such application on their part would be futile.

A. The LSO Plaintiffs Have Standing To Assert their Challenge to the LSC Regulations

LSC’s program integrity regulation substantially limits and burdens the LSO Plaintiffs’ ability to engage in constitutionally protected conduct. That limitation and burden is a present harm to the LSO Plaintiffs and confers standing upon them to challenge LSC’s regulations.

To establish standing, a plaintiff must allege that it has suffered an “injury in fact,” which must be concrete and particularized, and either actual or imminent. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The injury that has been

suffered by the LSO Plaintiffs is undoubtedly concrete, particularized and actual.⁵ An undue burden has been placed on their ability to engage in certain constitutionally protected activities – a burden that is no less objectionable because it is conditioned on the receipt of federal funds. This is exactly the type of Hobson’s choice that the unconstitutional conditions doctrine condemns. See Perry v. Sindermann, 408 U.S. 593, 597 (1972) (“[E]ven though the government may deny [a] benefit for any number of reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.”); New Hampshire Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996) (“[A]n actual injury can exist when the plaintiff . . . foregoes expression in order to avoid enforcement consequences.”).⁶

LSC and the government argue that the LSO Plaintiffs lack standing because they have not sought to establish affiliated entities through which they could engage in restricted activities. That position is directly contrary to the case law that controls here. It is well-settled that “for purposes of standing, plaintiffs need not actually apply for funding and be denied in order to challenge a restrictive funding policy; instead, they need only demonstrate that but for the . . . restrictions, they would qualify to receive . . .

⁵ The other requirements for standing set forth in Lujan are that a causal connection exists between the injury and the conduct complained of, and that a favorable decision would likely redress the injury. See 504 U.S. at 560-61. LSC and the government do not claim that the challenged regulation is not the cause of the LSO Plaintiffs’ complaint or that the complaint would be not redressed by a favorable decision.

⁶ LSC argues that the LSO Plaintiffs’ injury is not concrete, relying upon Bordell v. General Electric Company, 922 F.2d 1057 (2d Cir. 1991). But in Bordell, the court held that the appellant’s subjective belief that his speech rights were being chilled was belied by the evidence. Id. at 1060-61. Here, by contrast, the record clearly demonstrates that the LSC’s regulation burdens the LSO Plaintiffs’ exercise of their right to free speech. See supra, pp. 5-7 (discussing declarations of LSO Plaintiffs).

funding.” Gay Men’s Health Crisis v. Sullivan, 733 F. Supp. 619, 629 (S.D.N.Y. 1989).
See also DKT Memorial Fund, Ltd. v. Agency for Int’l Dev., 810 F.2d 1236, 1238 (D.C. Cir. 1987) (holding that “otherwise qualified non-applicants may have standing to challenge a disqualifying statute or regulation” if they can show that, absent the challenged policy, they would be qualified).

The standing of the LSO Plaintiffs to press their claims is demonstrated by the holding in Gay Men’s Health Crisis. The plaintiffs in that case sought to challenge certain restrictions on the use of federal funds distributed for purposes of AIDS education. Id. at 623. Defendants opposed on the ground that plaintiffs lacked standing because none of them had actually been denied funding or instructed to alter their educational materials. Id. at 627. The court properly rejected that argument for the reason that plaintiffs, to establish standing, did not need to show that they had applied for and been denied funding – only that they would be eligible for funding *but for* the challenged restrictions. See id. The court rejected the defendants’ argument that the plaintiffs would not have standing until they exhausted numerous steps, including submitting proposed materials. See id. at 629-30 (“[P]laintiffs only need to show that they would otherwise be eligible for funding, and that they need not actually apply for funding and be denied before they can attain standing to challenge the regulations. The number of steps involved in the process of reviewing proposals is of no consequence”) (discussing ruling in DKT).⁷ Here, there is no doubt that the LSO

⁷ The court observed that a rule to the contrary would give rise to a “perverse incentive” for Congress and agencies “to create layers of bureaucracy for the approval of federally-funded projects, in order to discourage challenges to funding restrictions.” Id. at 630 n.10. The court also rejected the
(continued...)

Plaintiffs – who, like the plaintiffs in Gay Men’s Health Crisis, are receiving government funding and are subject to the government restriction – desire to provide restricted services and would be qualified to do so but for the challenged regulation.

The LSO Plaintiffs are not challenging a statute or regulation that would only become applicable to them upon the happening of a specific event, such as their application for a permit. The LSO Plaintiffs are *currently* subject to the program integrity regulation as a condition of their continued access to LSC funds.⁸ Indeed, the LSO Plaintiffs’ claim – an unconstitutional conditions challenge – is similar to the claims of the plaintiffs in Rust v. Sullivan, 500 U.S. 173 (1991), and FCC v. League of Women Voters, 468 U.S. 364 (1984). Like the plaintiffs in those cases, the LSO Plaintiffs have been injured by the law’s requirement that they comply with a condition that burdens the exercise of constitutional rights in order to receive federal funds. The fact that the Supreme Court did not question the standing of the plaintiffs in Rust and League of Women Voters – all of whom stood in essentially the same position as the LSO Plaintiffs – supports the conclusion that the LSO Plaintiffs have standing here. See Gay Men’s

⁷ (...continued)

government’s argument, similar to the one made in this case, that “no plaintiff would suffer any adverse consequences merely by presenting non-complying material” for review. Id. at 627.

⁸ The distinction between “benefit-conferring” rules and “duty-creating” rules was recognized by Justice O’Connor in Reno v. Catholic Social Services. See 509 U.S. 43, 68 (1993) (O’Connor, J., concurring) (comparing “benefit-conferring” rules and “duty-creating” rules for purposes of ripeness). Unlike a situation involving a “benefit-conferring” rule, in which “[e]ven if he succeeds in his anticipatory action, the would-be beneficiary will not receive the benefit until he actually applies for it,” this case involves a “duty-creating” rule (i.e., the duty not to engage in restricted activities, except through a separate affiliate), in which “a successful suit . . . will relieve the plaintiff immediately of a burden that he otherwise would bear.” Id. Further, a challenge to a benefit-conferring rule is ripe if “it is ‘inevitable’ that the challenged rule will ‘operate’ to the plaintiff’s disadvantage.” See Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1436 (9th Cir. 1996) (adopting approach of Justice O’Connor in Catholic Social Services).

Health Crisis, 733 F. Supp. at 629 (noting that adjudication of prior cases brought by entities in similar positions to plaintiffs supported the conclusion that plaintiffs had standing).

None of the cases cited by LSC or the government involved a challenge to a regulation that, like the LSC “separation requirement,” conditions a government benefit on the acceptance of a burden on constitutional rights. In Prayze FM v. FCC, 214 F.3d 245 (2d Cir. 2000), the Second Circuit held that the plaintiff did not have standing to raise an as-applied challenge to FCC regulations that banned microbroadcasting and had failed to demonstrate futility. Id. at 251. The plaintiff in Prayze FM had simply challenged the FCC’s microbroadcasting ban; it did not maintain that the exercise of its rights was unlawfully conditioned upon the acceptance of an undue burden, only that the requirement that it obtain a license itself was invalid. See id. The court concluded that the plaintiff lacked standing to challenge the licensing requirement because it had not applied for a waiver or demonstrated that such an application would be futile – and thus had not demonstrated that it was injured by the licensing requirement. The LSO Plaintiffs in this case, by contrast, are injured because they cannot exercise their rights except by establishing unduly burdensome affiliate relationships.

Similarly, in Jackson-Bey v. Hanslmaier, 115 F.3d 1091 (2d Cir. 1997), the Second Circuit held that a prisoner who made no attempt to comply with a prison religion-registration procedure “that entailed only a modest act of commitment by the inmate” did not have standing to challenge the prison’s failure to accommodate his

religious needs. Id. at 1095-96.⁹ The plaintiff did not claim that compliance with the registration procedure would unduly burden the exercise of his constitutional rights, only that the prison failed to accommodate his religious beliefs – a failure that the court ascribed to the plaintiff’s own failure to register. Here, by contrast, the LSO Plaintiffs are injured by the burdens that the program integrity regulation imposes on the exercise of their constitutional rights.

Madsen v. Boise State University, 976 F.2d 1219 (9th Cir. 1992), also cited extensively by LSC and the government, involved a much different factual scenario than is presented by the LSO Plaintiffs’ claim. There, the Ninth Circuit held that the plaintiff lacked standing to claim that he had been denied a free handicap parking permit. See id. at 1222. The plaintiff had never applied for a permit or sought a waiver of the fee, and thus he had not “submitted [to the challenged policy] by actually applying for the desired benefit.” Id. at 1220. As a result, the court was unable to discern the precise nature of the plaintiff’s claimed injury and the relief he sought – *i.e.*, whether he wanted the university to give him a free permit to park in any handicap space or to set aside certain handicap spaces for no-fee permits. See id. at 1221 (finding that “the precise nature of Madsen’s asserted injury – and the appropriate relief – are unclear to us”). In the present case, by contrast, the nature of the injury to LSO Plaintiffs, and the relief they seek, is clear – the

⁹ It was crucial to the court’s decision in Jackson-Bey that prison inmates “retain only those [constitutional] rights consistent with legitimate penological objectives.” 115 F.3d at 1096. The LSO Plaintiffs, by contrast, retain their full constitutional rights despite receiving LSC funds.

program integrity regulation unconstitutionally burdens rights that they seek to exercise without undue constraint.¹⁰

B. The Claims of the LSO Plaintiffs Are Ripe for Review by the Court

The LSO Plaintiffs, by virtue of their status as LSC grantees, are injured *now* by the program integrity regulation. They are unable to provide restricted legal services *now* because of the burdens that the regulation imposes on them. No further factual development is necessary to ripen the LSO Plaintiffs' claims, because it is clear from the record that LSC will not accept any affiliate relationship that would not impose an undue burden on the LSO Plaintiffs.¹¹

The ripeness doctrine, which looks at whether the timing of the action is proper, requires a court to balance "the fitness of issues for review and the hardship to the parties of withholding review." Gary D. Peake Excavating, Inc. v. Town Bd. of the Town of Hancock, 93 F.3d 68, 72 (2d Cir. 1996). The simplicity of the LSO Plaintiffs' position underscores the ripeness of their challenge. Grantees who seek to provide restricted

¹⁰ In other cases cited by the government, the plaintiffs lacked standing to challenge benefit programs because, not having applied for the benefit, they failed to demonstrate that they had a real interest in it. See Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 55 (D.C. Cir. 1991) (appellants could not demonstrate that they had been injured by absence of affirmative action preference where they "had not applied for or otherwise sought to fill" jobs in question as a result of hiring policy); Doe v. Blum, 729 F.2d 186, 189-90 (2d Cir. 1984) (plaintiffs had not alleged that they had requested and were denied family planning services). Here, there is no question that each of the LSO Plaintiffs is an LSC grantee that wishes to engage in restricted activities.

¹¹ Plaintiffs rely on a record far more developed than was before the court in Digital Properties, Inc. v. City of Plantation, 121 F.3d 586 (11th Cir. 1997). In that case, the Eleventh Circuit held that the plaintiff's First Amendment challenge to a zoning ordinance was not ripe because it filed the action immediately after receiving a non-supervisory employee's "initial reaction" to its development proposal and had not followed that employee's advice that it obtain a decision from her supervisor. See id. at 590. The LSO Plaintiffs here have not engaged in a race to the courthouse, but rather base their challenge on an extensive record of LSC's position regarding affiliate separation.

services are required to do so through an affiliate program that satisfies LSC's program integrity regulation. The LSO Plaintiffs are grantees to whom these rules apply, and thus are prohibited from engaging in restricted activities *except* through a strictly separate affiliate. See Jackson v. Okaloosa Cty., 21 F.3d 1531, 1541 n.16 (11th Cir. 1994) ("In order for an as applied claim to be ripe, the plaintiff usually must demonstrate that the regulation has been applied to him."); see also Williams v. Lambert, 46 F.3d 1275, 1280 (2d Cir. 1995) (reconciling Supreme Court holdings and surmising that a pre-bid challenge to a statutory contracting restriction was ripe because plaintiffs established based on their historical actions that, absent the restriction, they would have submitted bids). The LSO Plaintiffs have determined, and the record shows, that the degree of connection to an affiliate program that is necessary for them – whether to ensure adequate provision of legal services or to preserve scarce resources – is more than the degree of connection permitted by LSC. No further elaboration is necessary at the administrative level for the Court to consider this claim.

LSC and the government argue that the challenge cannot be ripe until the LSO Plaintiffs first attempt to comply with the program integrity regulation. But the gravamen of the LSO Plaintiffs' claim is not that they have been denied approval of a proposal (*i.e.*, not that LSC has denied a proposal in contravention of the rules), but that compliance with the LSC's policy regarding separate affiliates is unduly burdensome for them. See Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 149 F.3d 679, 690 (7th Cir. 1998) (review would not be premature where speech plaintiff wishes to publish

would not qualify for exception to challenged act's coverage).¹² Simply put, as a result of the program integrity regulation, the LSO Plaintiffs are forced *now* either to abstain from providing restricted legal services, to cease receiving LSC funds or to submit, if they can bear it, to unconstitutional burdens on their exercise of protected rights. See Employers Assoc., Inc. v. United Steelworkers of America, AFL-CIO-CLC, 32 F.3d 1297, 1299 (8th Cir. 1994) (“Ripeness is demonstrated by a showing that a live controversy exists such that the plaintiffs will sustain immediate injury from the operation of the challenged provisions, and that the injury would be redressed by the relief requested.”).

To delay review would impose real hardship on the LSO Plaintiffs, because it would require them to continue to refrain from engaging in restricted activities, so as not to jeopardize their LSC funding. See Whitney v. Heckler, 780 F.2d 963, 968 n.6 (11th Cir. 1986) (“It is well established that an issue is ripe for judicial review when the challenging party is placed in the dilemma of incurring the disadvantages of complying or risking penalties for noncompliance.”). Where, as here, a regulation has a “direct effect on the day-to-day business” of the plaintiffs, hardship to the parties is established, counseling in favor of ripeness. See Abbott Laboratories v. Gardner, 387 U.S. 136, 152-53 (1967). Applying this principle, the Second Circuit held in Thomas v. City of New York, 143 F.3d 31 (2d Cir. 1998), that the plaintiffs’ challenges to livery car regulations in that case were ripe for review because the plaintiffs, who were subject to the

¹² The government’s reliance on Kittay v. Giuliani, 112 F. Supp. 2d 342 (S.D.N.Y. 2000), aff’d, 252 F.3d 645 (2d Cir. 2001), is misplaced. Kittay involved a challenge to administrative and zoning regulations. See 112 F. Supp. 2d at 348. It is well-settled that the ripeness doctrine is applied with heightened strictness in the context of challenges to property regulations. See Triple G. Landfills, Inc. v. Board of Comm’ners, 977 F.2d 287, 289 (7th Cir. 1992) (“[T]akings cases are fact-intensive, and require a careful examination of the challenged decision’s economic impact and the extent to which it interferes with reasonable investment-backed expectations.”) (internal quotations omitted).

regulations, faced “a present hardship that results directly from the regulations themselves.” *Id.* at 36. See also Commodity Trend Serv., Inc., 149 F.3d at 689 (finding as-applied challenge to registration requirement ripe where plaintiff was forced, *inter alia*, to dilute contents of its publications, limit its advertising, and suspend development of new publications). The claim of the LSO Plaintiffs is similarly ripe for review because the program integrity regulation, by affecting their day-to-day operations, imposes a current hardship on them.¹³

Finally, there is little if any reason to believe that submission to LSC of a proposal to establish an affiliate program would help to focus the issues, as LSC and the government claim. Neither of them points to any established LSC policy of explaining why proposals are rejected. Indeed, the record that exists on this point – in particular, the treatment of the proposal submitted on behalf of QLSC, which was rejected without any meaningful guidance by LSC – demonstrates that even if the LSO Plaintiffs were to submit further proposals for certain rejection, the LSC’s response would not provide either the LSO Plaintiffs or the Court with any better understanding of the degree of separation required by LSC.

¹³ Burson v. Freeman, 504 U.S. 191 (1992), on which LSC relies, does not support its argument. The Court in Burson simply stated, in a footnote, that hypothetical concerns about situations in which a 100-foot campaign-free boundary around polling places would present unique problems (e.g., the boundary might encompass a road on which cars with campaign bumper stickers might pass) should not be addressed in a facial challenge to the restriction. *Id.* at 210 n.13. The LSO Plaintiffs are not raising hypothetical concerns, but rather are claiming, based on the record, that compliance with LSC’s separation requirements would impose an undue burden.

C. The LSO Plaintiffs Are Not Required to “Exhaust” Any Administrative Remedies Before Asserting their Claims

The assertion that the LSO Plaintiffs, before pursuing their claims, must first seek LSC approval for “separate” affiliated organizations to engage in restricted activities is meritless. There can be no exhaustion requirement where there are no administrative procedures to exhaust – and there are no real procedures for seeking LSC approval of proposals to enable a legal services organization to engage in restricted activities through separate affiliates. LSC and the government do not point to any statute enacted by Congress or any regulation promulgated by LSC that contemplates LSC review of grantee proposals for affiliate programs. There is only the claimed LSC “policy” of encouraging grantees to submit such proposals before establishing affiliate relationships. A single statement in the preamble to a regulation calling for voluntary submission of pre-implementation proposals, which provides no procedural or timing guidelines, simply cannot be characterized as a mandatory administrative review procedure.¹⁴ Cf. McCarthy v. Madigan, 503 U.S. 140, 157 (1992) (“[W]e have previously refused to require exhaustion of administrative remedies where the administrative process subjects plaintiffs to unreasonable delay or to an indefinite time frame.”).

¹⁴ See Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 62 Fed. Reg. 27,695, 27,698 (1997) (“[I]ndividual recipients are welcome to submit all the relevant ‘program integrity’ information and request a review by the Corporation of any existing or contemplated relationship with an organization that engages in restricted activities.”). In contrast to this vague invitation, in other contexts Congress and LSC have expressly provided for detailed administrative review procedures. See, e.g., 42 U.S.C. §§ 2996e(1)(A) (granting LSC authority to terminate financial support after a hearing); 2996j (instructing LSC to prescribe procedures for suspension and termination of funding); 45 C.F.R. §§ 1606, 1623 (review process for LSC termination, debarment and suspension); § 1627 (procedure for approval of subgrants).

The fact that Congress never established a formal process for LSC review of grantee proposals for affiliate programs weighs heavily against imposing an exhaustion requirement. See McCarthy, 503 U.S. at 144, 149 (stating that “[o]f paramount importance to any exhaustion inquiry is congressional intent” and holding that exhaustion was not required in part based on finding “that Congress has not meaningfully addressed the appropriateness of requiring exhaustion in this context”) (internal quotations omitted). This is especially true where the administrative “procedures” that the plaintiff has declined to pursue are as informal and ad hoc as LSC’s offer to preapprove grantees’ plans to establish separate affiliates. Having failed to establish any real procedure, LSC is in no position to assert that the LSO Plaintiffs must seek “administrative review” as a precondition to suit.

LSC argues that exhaustion is required because LSC is entitled to a meaningful opportunity to “wrestle” with its regulations and to interpret them in a constitutional manner. See LSC Mem. of Law at 23. But the claims being asserted by the LSO Plaintiffs have in one form or another been a matter of controversy since LSC first promulgated the program integrity regulation five years ago. LSC cannot plausibly claim that it needs more time to consider whether the program integrity regulation unduly burdens grantees.¹⁵

¹⁵ The cases that LSC and the government rely upon for this argument are inapposite. In Continental Air Lines, Inc. v. Department of Transportation, 843 F.2d 1444 (D.C. Cir. 1988), for example, the plaintiff raised questions regarding a DOT regulation during agency proceedings but had not presented the agency with its constitutional challenge. See id. at 1455 (“Continental was mum before the agency on the constitutional issue.”). See also Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (rejecting claim that exhaustion was not required because agency was without jurisdiction to hear case); Adelphia Communications Corp. v. Federal Communications Comm’n, 88 F.3d 1250, 1256 (D.C. Cir. 1996) (relying on Continental and finding that agency had not been presented with a fair “shot” to “wrestle” (continued...))

D. The LSO Plaintiffs are Not Required to Submit Affiliate Relationship Proposals to LSC as a Precondition to Suit, Because Such Proposals Would Be Futile

The record clearly demonstrates that any additional affiliation proposal that would not impose an undue burden on the LSO Plaintiffs would be rejected by LSC. The futility of any proposal that would be programmatically, financially and administratively efficient for the LSO Plaintiffs defeats any argument that they must submit such a proposal before they can challenge the LSC's program integrity regulation as unduly burdensome. The futility doctrine applies with equal force to the standing, ripeness and exhaustion objections deployed by LSC and the government in an effort to avoid a decision on the merits. See Jackson-Bey, 115 F.3d at 1096 (standing); Palazzolo v. Rhode Island, 533 U.S. 606, 622 (2001) (ripeness); McCarthy, 503 U.S. at 147 (exhaustion).

LSC's rejection of the QLSC and FLSNY proposals, combined with its clear pronouncement that affiliates may not share an executive director, see Abel Decl. Ex. 34, demonstrate that any plan that would not unduly burden the constitutional rights of the LSO Plaintiffs would also not pass muster with LSC. Under these circumstances, the LSO Plaintiffs are not required to invoke a process that would amount to an empty formalism. See Triple G Landfills, Inc. v. Board of Comm'ners, 977 F.2d 287, 291 (7th Cir. 1992) (stating that ripeness doctrine "does not require [appellant] to jump through a series of hoops, the last of which it is certain to find obstructed by a brick wall").

¹⁵ (...continued)
with regulation at issue); Sierra Club v. FEC, 593 F. Supp. 166, 169 (D.D.C. 1984) (plaintiffs, who alleged that agency had "misconstrued" their original request for an advisory opinion, failed to exhaust administrative remedies where regulation required them to submit a request for reconsideration to agency).

The Second Circuit’s treatment of futility claims in other contexts does not defeat the LSO Plaintiffs’ claim of futility here. In Prayze FM v. FCC, 214 F.3d 245 (2d Cir. 2000), the court rejected the plaintiff’s claim that an application for a waiver to the FCC microbroadcasting restriction would have been futile, because the FCC was required to “give a hard look to waiver applications that raise First Amendment concerns,” had “just drastically changed its policy” in a manner more favorable to appellant (and thus its past rejections of waiver requests had little predictive value), and had never applied a new rule that the plaintiff claimed would require rejection of his application. Id. at 251. In this case, by contrast, none of these considerations is present. Indeed, here there is every reason to believe, based on LSC’s consistent policy regarding affiliate relationships, that LSC will disapprove any proposed affiliate relationship that would not impose an undue burden on the LSO Plaintiffs.

This case is similarly distinguishable from Jackson-Bey, 115 F.3d 1091 (2d Cir. 1997). In that case, there was no reason to believe that it would have been futile for the plaintiff, a prisoner, to attempt to register his religion with the prison authorities. The prison had not recognized his religion, but there was no evidence that the prison would have refused to do so if he had attempted to register. See id. at 1097. Indeed, the prison subsequently did recognize the plaintiff’s religion. Id.

Finally, in an effort to rebut the LSO Plaintiffs’ futility argument, LSC and the government emphasize the “flexibility” of the program integrity regulation. In essence, they claim that the LSO Plaintiffs cannot know that LSC would insist on unduly burdensome conditions until the LSO Plaintiffs actually submit a proposal. But even in

the absence of specific proposals, it is clear from the evidence in the record – including the rejections of the QLSC and FLSNY proposals and the prohibition on shared executive directors – that the level of separation that is acceptable to LSC would impose an undue burden on the LSO Plaintiffs’ exercise of their constitutional rights. See supra, pp. 5-7 (discussing declarations by LSO Plaintiffs).

Moreover, the “uncertainty” that LSC and the government invoke in an effort to defeat the LSO Plaintiffs’ futility claim only underscores the absence of any clear guidelines from LSC as to what is required – and the necessity of judicial consideration of the LSO Plaintiff’s claims. It is well-settled that restrictions on First Amendment expression must be specific, and that the discretion of government officials to limit free expression must be carefully bounded. See Niemotko v. Maryland, 340 U.S. 268, 271 (1951) (license requirements must contain “narrowly drawn, reasonable and definite standards for the officials to follow”); Million Youth March, Inc. v. Safir, 63 F. Supp. 2d 381, 390 (S.D.N.Y. 1999); see generally Thomas v. Chicago Park Dist., 122 S. Ct. 775, 780 (2002) (“Where the licensing official enjoys unduly broad discretion . . . there is a risk that he will favor or disfavor speech based on its content.”).¹⁶ LSC and the government cannot seek to avoid the LSO Plaintiffs’ showing of futility by maintaining that, for all practical purposes, the program integrity regulation is standardless.

¹⁶ The Supreme Court in Thomas upheld a park permitting scheme on the grounds that the scheme provided detailed grounds for denying a permit, a time limit for processing applications, and a requirement that park officials “clearly explain” their reasons for any denials. See 122 S. Ct. at 780. None of these facets of the permissible permitting regime is a part of the LSC program integrity regulation.

CONCLUSION

For the reasons set forth above, amici curiae respectfully submit that the claims of the LSO Plaintiffs are properly before the Court, are ripe for adjudication and should be decided on the merits.

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Respectfully submitted,

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