

05-0340-cv

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

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BROOKLYN LEGAL SERVICES CORP. B and LEGAL SERVICES FOR
NEW YORK CITY, on their own behalf and on behalf of their
clients,

Plaintiff-Appellee-Cross-Appellants,

(continued)

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

**BRIEF FOR PLAINTIFF-APPELLEE-CROSS-APPELLANTS AND
PLAINTIFF-CROSS-APPELLANTS**

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(continued)

(caption continued)

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 Service 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, 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,

(continued)

(caption continued)

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,

v.

LEGAL SERVICES CORPORATION,

Defendant-Appellant,

UNITED STATES OF AMERICA,

Intervenor-Defendant-Cross-Appellant.

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SUMMARY OF ARGUMENT

The restriction on public interest solicitation bars legal services lawyers receiving any funding from the Legal Services Corporation (“LSC”) from using LSC funds to advise potential clients that their legal rights have been violated, and that they should take legal action to protect those rights. At the same time, it permits the LSC-funded lawyers to advise potential clients that their rights have not been violated, and/or not to pursue a matter in court. The restriction thus constitutes classic one-way viewpoint discrimination. Under the Supreme Court’s ruling in *Velazquez v. Legal Services Corporation*, 531 U.S. 533 (2001) (“*Velazquez III*”), and this Court’s ruling in *Velazquez v. Legal Services Corporation*, 164 F.3d 757 (1999) (“*Velazquez II*”), *aff’d in part*, 531 U.S. 533 (2001), such viewpoint discrimination is unconstitutional.

The restrictions on using LSC funds to seek a court-awarded attorneys’ fee and/or representing clients in class action litigation are likewise unconstitutional because both sets of speech restrictions undermine the judicial forum where the speech occurs. In *Velazquez III*, the Supreme Court held that the Constitution bars Congress from funding lawyers to represent clients, while barring them from using certain essential arguments or tools in the course of that litigation, because such speech restrictions warp the proper functioning of the courts within which the restricted speech takes place. 531 U.S. at 584. When, because of LSC speech

restrictions on the lawyers before it, a court cannot grant a fee award in an appropriate case or decide to utilize the technique of a class action to increase the court's efficiency, the court's ability to carry out the judicial function is severely compromised. Particularly in the context of state court litigation arising under state law, such a Congressional impairment of the judicial function violates the Constitution.

If the District Court's injunction remains in place, plaintiffs are unlikely to find it necessary to resort to "restricted" LSC funds to provide a full spectrum of legal services to their indigent clients. Thus, if the District Court's injunction is upheld, the challenge to the ban on using LSC funds to solicit clients, or to engage in class actions, is not ripe for judicial decision. If, on the other hand, the District Court's injunction is overturned, the challenges to both restrictions are properly before this Court, and should be upheld.

ARGUMENT¹

I. Merits

A. The public interest solicitation restriction is unconstitutional.

Despite defendants' attempts to minimize the scope of the public interest solicitation restriction, it is indisputable that the restriction bars grantees from representing people after reaching out to them – in person, by telephone, or in writing – to advise them that their legal rights have been violated, and that they should take legal action to protect those rights.² In case after case, the Supreme Court has struck down restrictions on lawyer advertising because of the Court's "concern that the aggrieved receive information regarding their legal rights and the means of effectuating them." *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977) (citing cases). The cases vividly describe how difficult it is for laymen – particularly those with limited means – to enforce their legal rights when lawyers

¹ In accordance with the Court's scheduling Order dated April 8, 2005, in this brief plaintiffs address only defendants' arguments regarding the issues raised by plaintiffs' cross-appeal. However, the plaintiffs do not address one set of issues raised by their cross-appeal – the constitutionality of the District Court's duplicate public areas and new attorney requirements, *see* Plaintiffs' Brief on Appeal, Argument § II.C.4 – because defendants do not raise any new arguments regarding these issues in their most recent briefs.

² Although LSC correctly notes that the restriction applies only to "in-person" advice, it fails to mention that its expansive definition of "in-person" explicitly includes telephone calls and letters. 45 C.F.R. § 1638.2(a) (SPA-168).

are unable to reach out to them. *See, e.g., Brotherhood of RR Trainmen v. Va.*, 377 U.S. 1, 3 (1964) (injured railroad workers “often fell prey on the one hand to persuasive claims adjusters eager to gain a quick and cheap settlement for their railroad employers, or on the other to lawyers either not competent to try these lawsuits against the able and experienced railroad counsel or too willing to settle a case for a quick dollar”). These descriptions are corroborated by the experience of plaintiff Farmworker Legal Services of New York, which works with migrant farmworkers who “often lack knowledge of their legal rights,” and who “often live in isolated rural labor camps” far from the public service announcements and outreach tables that the government claims should be adequate to inform them of their rights. Stip. Facts ¶ 57 (JA-906); Schmidt Decl. 11/15/01, ¶ 36 (JA-36). Thus, the restriction prevents plaintiffs from engaging in a vitally important First Amendment activity.

Moreover, defendants do not and cannot dispute that while grantees are permitted to represent individuals after advising them not to pursue a matter in the courts, grantees are barred from representing them after advising them to protect their rights. In *Velazquez II*, this Court made clear that when the government funds legal services lawyers, but permits them to advocate on only one side of a particular debate, then that restriction is classic, unconstitutional viewpoint discrimination. 164 F.3d at 769-70.

The United States relies on the District Court’s unsupported contention that “[w]hether a lawyer has advised a client of his or her rights is different from targeting a particular ideology, opinion or perspective.” Br. of United States at 46 (quoting Op. at 59 (JA-1027)). This contention is insupportable both as a matter of logic and in light of the Supreme Court’s ruling in *Velazquez III*. There, the Court ruled that a ban on challenging welfare reform laws in the course of representing clients in welfare litigation was unconstitutional viewpoint discrimination. 531 U.S. at 549. Under the ban, the Court noted, “lawyers . . . may not undertake representation in suits for benefits if they must advise clients respecting the questionable validity of a statute which defines benefit eligibility and the payment structure. The limitation forecloses advice or legal assistance to question the validity of statutes under the Constitution of the United States.” *Id.* at 544. As the District Court noted, advising a potential client of his rights is exactly the activity barred by the solicitation restriction. Just as the welfare reform challenge restriction at issue in *Velazquez II* and *Velazquez III* was unconstitutional, the solicitation restriction is too.³

³ The cases the United States cites are not to the contrary. See *RAV v. City of St. Paul*, 505 U.S. 377 (1992) (statute was viewpoint discriminatory when it permitted people to use fighting words in arguing for tolerance but not in arguing for intolerance); *Boy Scouts of America v. Wyman*, 335 F.3d 80, 94 (2d Cir. 2003) (Connecticut’s Gay Rights Law, which regulated discriminatory membership and

B. The attorneys’ fee and class action restrictions are unconstitutional.

1. Under *Velazquez III*, speech restrictions that warp the functioning of the courts are unconstitutional.

If the attorneys’ fee and class action restrictions are scrutinized under the definition of viewpoint discrimination that this Circuit applied in *Velazquez II*, the plaintiffs’ challenges to those restrictions must fail. In *Velazquez II*, this Circuit rejected a challenge to a restriction that barred legal services lawyers from lobbying on behalf of their clients. The Circuit’s ruling was based on its observation that the restriction “burdens no particular viewpoint and favors neither speech in support of legislative action nor speech opposed.” 164 F.3d at 768. Viewed under the same standard, the attorneys’ fee and class action restrictions would also be constitutional.

Velazquez III has since taught, however, that whether a restriction on use of a particular advocacy tool by legal services lawyers is constitutionally permissible depends on the restriction’s impact on the performance of the judicial function. 531 U.S. at 548. Tellingly, LSC does not even attempt to argue that a restriction that warps the functioning of the courts would be constitutional. *See* LSC Reply Br. at 37-40 (attempting to distinguish attorneys’ fee and class action restrictions

employment policies as conduct, not speech, was not viewpoint discriminatory), *cert. denied*, 541 U.S. 903 (2004).

from the welfare reform challenge restriction at issue in *Velazquez III*, but not contending that the restrictions would be constitutional if they warped the functioning of the courts). Although the United States does attempt to distinguish *Velazquez III*, its argument rests on the Court’s uncontroversial statement that Congress is not “required to fund the whole range of legal representations or relationships.”⁴ 531 U.S. at 548. *See also* United States Reply Br. at 37-38, 41. However, as the United States acknowledges, the Court also warned that when Congress does fund a legal representation or relationship it may not “define the scope of the litigation it funds to exclude certain vital theories and ideas.” 531 U.S. at 548.⁵

In plaintiffs’ initial brief, they demonstrated that the District Court was right in holding that, just like the vital theories and ideas that were excluded by the

⁴ Congress has, in fact, limited its funding in this way. For example, it has determined that LSC-funded lawyers may not represent prisoners and certain categories of immigrants. 45 C.F.R. pts. 1626, 1637 (2001) (SPA-142 to 147, 167 to 168). In contrast to the attorneys’ fee and class action restrictions, these restrictions do not affect the operation of a particular case. Instead, they remove entire categories of cases from representation by legal services lawyers.

⁵ *Southern Christian Leadership Conference v. Supreme Court of the State of Louisiana*, upon which the United States also relies, is similarly helpful. There, the Fifth Circuit emphasized that the restriction at issue “imposes no restrictions on the kind of representations the clinics can engage in or on the arguments that can be made on behalf of a clinic client,” and that “[n]othing in [the restriction] implicates the proper functioning of the judicial system.” 252 F.3d 781, 791 (5th Cir. 2001). The contrast with the instant case is clear.

welfare reform challenge restriction struck down in *Velazquez III*, attorneys’ fee awards and class actions are essential to the functioning of the courts. For example, attorneys’ fee awards enable judges both to deter both inefficient conduct by parties and counsel and to punish contempt of court. *See* Pls.’ Br. on Appeal at 80-82. Similarly, by deciding to proceed as a class action, a court can make the most efficient use of scarce judicial resources, prevent mootness, learn essential facts about a case, and order relief that transcends the named parties before the court. *Id.* at 79-80. Funding lawyers to bring cases before the courts, while simultaneously barring them from urging the court to utilize those essential tools, inevitably warps the courts’ proper functioning, just as the welfare reform challenge restriction did.⁶ In both settings, judges are deprived of the argument and advice crucial to the rendering of an informed judicial determination on both procedural and substantive issues.

The United States’ warning that applying *Velazquez III* to invalidate the attorneys’ fee and class action restrictions would inevitably result in the invalidation of Congressional enactments ignores the fact that the crux of

⁶ Although the defendants contend that no constitutional rights are implicated here, their argument is contradicted by the Supreme Court’s instruction in *Velazquez III* that “the LSC Act funds constitutionally protected expression.” 531 U.S. at 548. That ruling postdates, and overrules, the *Legal Aid Society of Hawaii v. LSC* opinions on which the District Court and defendants rely. *See* United States Reply Br. at 37; LSC Reply Br. at 36-37 n.18.

plaintiffs' case is that Congress has limited power to intrude in the functioning of *state* courts in cases involving solely *state* law. *See* DOJ Reply Br. at 36-37, 42-43. Were LSC to apply the restrictions solely to litigation in the federal courts, this would be a different case. In fact, however, LSC applies the restrictions even to cases pending in state courts and involving solely issues of state law – an area in which Congress has, wisely, abstained from intruding.⁷

2. The attorneys' fee and class action restrictions are far more devastating to the power of the courts than defendants admit.

The attorneys' fee and class action restrictions have a far greater effect on the courts than the defendants acknowledge. For example, although LSC is correct that the attorneys' fee award restriction permits judges to award fees to a grantee pursuant to a Rule 11-type rule, the restriction bars judges from awarding fees to a grantee based on the violation of a court order or on the court's inherent contempt powers. *See* LSC External Op. 2001-1007 (March 20, 2001) (JA-524); 45 C.F.R. § 1642.2(a) (SPA-179). When a judge is unable to award fees for contempt, the court is often left without any tool to enforce its orders. *See Gordon v. Marrone*, 590 N.Y.S.2d 649, 653 (Sup. Ct. 1992) (inherent power of courts to issue sanctions

⁷ There is no conceivable theory under which *Velazquez III* could be construed as requiring the invalidation of the court rules to which the United States points. *See* DOJ Reply Br. at 37, 42-43. The separation of powers protects courts from Congress' intrusion; it does not protect litigants from the courts' own actions.

“reaches a court’s inherent power to police itself”), *aff’d*, 616 N.Y.S.2d 98 (App. Div. 1994).

The defendants also try to minimize the effect on courts by arguing that legal services lawyers know at the beginning of a case whether they will need to seek a fee award or move to certify a class and so they can simply turn away all such cases. *See* LSC Reply Br. at 38. Notably, in *Velazquez III* the Supreme Court rejected the defendants’ similar contention that attorneys would always know at the beginning of a case whether they would need to challenge a welfare reform law. *Compare Velazquez III*, Br. of Pet’r U.S., 2000 WL 797469, *24 (U.S. filed June 13, 2000) (arguing that legal services grantees would simply reject such cases), *with Velazquez III*, 531 U.S. at 544-45 (noting that the issue sometimes “becomes apparent . . . in the midst of litigation proceedings”). The need to seek a contempt sanction is not foreseeable. Nor is it always clear at the inception of a case whether other types of fee awards are appropriate. Stip. Facts ¶ 45 (JA-905). Likewise, it is sometimes unclear before the attorney has had a chance to investigate the facts, including by conducting discovery, whether class relief would be available or necessary. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 687-89, 698-701 (1979) (approving certification of class action in case that began when recipients of government benefits objected in individual administrative

proceedings to government's recoupment of public benefits; only after individuals lost administrative appeals did they file a class action).

Finally, the defendants are simply wrong that there is no evidence in the record that the plaintiffs engage in litigation in which seeking a fee award or seeking class certification would be desirable. *See* LSC Reply Br. at 39. Plaintiff South Brooklyn Legal Services, for example, brought a case on behalf of an individual seeking reimbursement for a child care subsidy from New York City, even though the case would have been more appropriately brought on behalf of the class of parents and child care providers whom the City had failed to properly reimburse. Stip. Facts ¶ 50 (JA-905); Gray Decl. 11/29/01, ¶ 16 (JA-416 to 417). The program has been unable to find an attorney willing to bring the case as a class action. *Id.* Likewise, plaintiff Peggy Earisman continues to litigate housing cases, in which fees are a particularly important tool for the courts to manage their dockets, because there is an overwhelming need for representation in such cases. *See* Pls.' Br. on Appeal, Argument § III.B.2; Earisman Decl., 11/16/01, ¶ 15 (JA-408). In one such case, she was forced to decline a fee award even when the judge – wanting to speed up the proceedings – warned her opponent (who had already conceded the merits of the case) that if he proceeded to trial he would be liable for Ms. Earisman's fees. Earisman Decl., 11/16/01, ¶ 15 (JA-408).

Thus, the attorneys' fee and class action restrictions deprive the courts – including state courts hearing state law claims – of control over the proceedings in a category of cases, warping their functioning in violation of *Velazquez III*.

II. The constitutionality of the restrictions on federal funds is properly before the Court only if the District Court's injunction protecting the use of non-federal funds is reversed.

The parties apparently agree, but for different reasons, that this Court need not reach the merits of plaintiffs' challenges to the attorneys' fee, class action and public interest solicitation restrictions. LSC argues the claims were raised in the plaintiffs' first preliminary injunction motion and so are procedurally barred. LSC Reply Br. at 36. This is wrong both as a matter of fact and as a matter of law. First, the *Dobbins* plaintiffs were not parties in *Velazquez* and so cannot be bound by anything the *Velazquez* plaintiffs did. Second, neither the District Court nor this Circuit believed that challenges to the attorneys' fee award, class action and solicitation restrictions were before them, so those courts did not rule on those challenges. Op. at 35 n.11, 39-40 & n.12 (JA-1003, 1007 to 1008). Finally, even if the courts had ruled on those challenges, it would be appropriate for this Court to revisit them because *Velazquez III* changed the applicable legal landscape, *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 178 (2d Cir. 1967), and because rulings in the context of a preliminary injunction motion are not binding in later stages of the case. *DiLaura v. Power Auth. of State of N.Y.*, 982 F.2d 73, 77 (2d Cir. 1992).

Plaintiffs argue that this Court need not reach the merits of plaintiffs' cross-appeal for a different reason: if this Court upholds the preliminary injunction, the plaintiffs' challenges to the attorneys' fee, class action and solicitation restrictions are no longer ripe. The preliminary injunction permits the plaintiffs to spend their private funds to litigate free of the attorneys' fee award, class action and solicitation restrictions. Accordingly, they now plan to use their private funding to bring any cases requiring them to engage in activities barred by those restrictions. It is unlikely that they will need to use their federal funds on any such cases.⁸

The United States and LSC do not make any real effort to demonstrate that the plaintiffs' claims are ripe. Rather, the United States argues that any lack of ripeness or any mootness is the plaintiffs' fault, and so vacatur would be inappropriate.⁹ However, plaintiffs notified the District Court long before that court issued its opinion that the challenges to the federal funds restrictions might

⁸ Contrary to the defendants' argument, this does not mean that the restrictions are rendered less effective. Rather, they remain wholly effective as applied to federal LSC funds. *See* LSC Reply Br. at 35 n.17; United States Reply Br. at 34.

⁹ The United States mischaracterizes the plaintiffs as seeking to relitigate the constitutionality of these restrictions in the instant litigation. *See* United States Reply Br. at 34. However, plaintiffs understand that were this Court to vacate the District Court's ruling as to these restrictions, while affirming the grant of the preliminary injunction, the Complaint would be dismissed. They merely seek the ability to challenge these restrictions at a later date and in a separate legal proceeding should the dispute ever become ripe.

well be moot if the preliminary injunction as to the restrictions on the use of the plaintiffs' non-federal funds was granted, and they accordingly sought leave to withdraw all pending motions other than their request for a preliminary injunction as to the private money restriction. *See* Ltr. From Burt Neuborne to J. Block, April 25, 2003, at 1-2 (JA-755 to 756). Once the District Court ignored that request and, after issuing a preliminary injunction against the private money restriction, ruled on the merits of the challenges to the attorneys' fee award, class action and solicitation restrictions, the plaintiffs were left with no choice but to cross appeal and seek vacature in this Court.

CONCLUSION

For the reasons stated above, and in the Plaintiffs' initial brief on appeal, this Court should vacate the District Court's ruling as to the attorneys' fee, class action, and solicitation restrictions. In the alternative, this Court should issue a preliminary injunction against operation of those restrictions as applied to the Plaintiffs.

Respectfully submitted,

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August 29, 2005

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Dated: August 29, 2005

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