

05-0340-cv(L)

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, FARMWORKERS LEGAL SERVICE OF NEW YORK, INC., on behalf of itself, and on behalf of all similarly situated not-for-profit legal services entites; 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 thier members, namely, individuals and organizations who are,

(Caption Continued on Inside Front Cover)

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

**PETITION OF *AMICUS CURIAE* FOR REHEARING
AND REHEARING *EN BANC***

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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. 104208, 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-Appellant.

COMPLETE LISTING OF *AMICI CURIAE*

The Association of the Bar of the City of New York

New York County Lawyers' Association

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

The Florida Bar Foundation

Vermont Bar Association

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INTEREST OF AMICI CURIAE¹

Amici curiae are bar associations across the Country who share a commitment to ensuring equal justice for all people, regardless of their ability to pay. Access to legal services is an essential tool in securing justice. As bar associations, we share a collective mission of providing quality legal services to all people involved in our justice system. A critical component of our mission is to increase the access of legal representation to poor people.

¹ Descriptions of *amici curiae* are contained in Appendix A.

SUMMARY OF ARGUMENT

This case is of exceptional importance to our country's commitment to the even-handed administration of justice. Its outcome will have a very significant effect on the availability of essential legal services to the poor. Meaningful access to the courts is of great importance to the fairness of our justice system, and to the perception that that system is administered even-handedly. Unfortunately we fall far short of delivering on this promise, in large part because the majority of poor people do not have access to civil legal services.

Amici curiae work closely with the private bar to encourage *pro bono* services and strive to increase state, local, and private funding of legal services for low-income communities. Our efforts, however, are designed to supplement, not replace the essential federal-funding of legal service programs. Legal services organizations, supported in large part by federal funding, provide the majority of legal services to the poor in our Country. These organizations assist low-income clients in securing their most basic rights.

But, the shortage of civil legal services for low income people threatens our commitment to equal justice. Furthermore, the inadequate funding of legal services organizations is unreasonably exacerbated by the Legal Services Corporation (LSC) program integrity regulation, 45 C.F.R. § 1610.8. The regulation forces legal services organizations to unnecessarily waste money on separate facilities, separate personnel, and separate computer systems, in order to adequately serve the legal

needs of the low income community. The opinion of the panel in *Brooklyn Legal Services Corp. v. LSC*, - F.3d -, 2006 WL 2588005 (Sep. 8, 2006), lifting the preliminary injunction issued against this regulation and purporting to establish a new standard for the regulation's review, allows this state of affairs to continue. It is essential to our system's promise of equal justice to all that the panel's decision be revisited by the full Court so that this unnecessary burden on the limited resources of legal services organizations can be removed.

This brief is filed in support of the plaintiffs' petition for rehearing en banc. In the Second Circuit, en banc review is rare and will not be granted unless (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.² Both factors are present in this case. First, it is our belief that the panel opinion issued on September 8, 2006 is in conflict with the prior panel ruling from this Court that set forth the rule for decision.³ Second, this case is of exceptional importance because our commitment to equal justice under the law depends upon the maintenance and growth of the legal services organizations that ensure low income individuals have access to the justice system. Given the exceptional importance of what is at stake, and the conflicting opinions of the panels of this Court, we support the plaintiffs' request that the Court rehear this matter en banc.

² FED. R. App. P. 35; See *Hilbert v. Dooling*, 476 F.2d 355 356 (2d Cir 1973).

³ *Amici Curiae* rely on Petition for Rehearing and Rehearing En Banc submitted by Petitioners in support of the argument that this Panel has issued an opinion that conflicts with both a previous panel of this Court and binding Supreme Court Precedent

ARGUMENT

I. This case is of exceptional importance because access to legal services for poor people is an integral part of our commitment to equal justice for all.

A. Legal services organizations are the primary source of legal assistance in matters of exceptional importance to poor people.

We write briefly to underline for the Court the exceptional importance of this case. The LSC, created in 1974, is a private, non-profit organization responsible for distributing federal funding and administering access to legal services for low-income people across the Nation. Among its fundamental purposes are to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances" and "to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel..."⁴

Legal services attorneys often aid their clients with the most urgent of legal matters. They seek to ensure that families, women, and children can enforce their rights to secure their basic needs in the areas of shelter, food, family safety, health care, governmental benefits, and education. Legal services attorneys work to prevent illegal evictions and to ensure that children have safe and nurturing homes. They protect women and their children from abusers. They ensure that children

⁴ 42 U.S.C. 2996 (2000).

have access to a quality education and health care.⁵ For low-income families, one adverse legal outcome, such as termination of public benefits or eviction, can be devastating.

Today, funding constraints force legal services attorneys to turn away half the clients who seek their assistance.⁶ As explained below in further detail, the panel's opinion in this case leaves in existence an unduly harsh regulation that forces legal services programs to divert some of their scarce resources to pay for redundant facilities and personnel, instead of maximizing those resources to provide vitally needed services to clients.

B. The majority of people who cannot afford to pay for civil legal services, simply do not get access to those services.

The public record clearly shows that there is an overwhelming need for more civil legal services. Existing resources for legal services organizations are insufficient to address the legitimate needs of all low income people. The LSC itself has identified "a major gap between the civil legal needs of low-income people and the legal help they received."⁷ Nationwide, approximately four-fifths of the civil legal needs of the poor are unmet.⁸ In fact, "nationally for every applicant who receives service, one eligible applicant was turned away by an LSC program

⁵Victor 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 (1990-1991) ("Marrero Committee Report").

⁶ Legal Services Corporation, Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-income Americans at 4 (September 2005)."

⁷ Legal Services Corporation, Documenting the Justice Gap in America at 2.

⁸ Deborah Rhode, Access to Justice, 69 Fordham L. Rev. 1785, 1785 (2001).

because of lack of resources."⁹

Additionally, legal services organizations often cannot meet all of the legal needs of the individuals they do assist, in part because of restrictions on their limited resources. While forty-three million Americans currently qualify for LSC-funded civil legal assistance, the vast majority of those millions go without any legal assistance at all. In fact, legal service lawyers can provide assistance to fewer than one in five poor Americans.¹⁰

The unmet need is particularly acute in this Circuit. In 2003, the New York State's Unified Court System Office conducted a survey of self-represented litigants in New York City's Family and Housing Courts. *Most* of the litigants in these courts appear *without* a lawyer for critical types of cases: evictions, domestic violence, child custody, guardianship, visitation, support, and paternity.¹¹ The survey reveals that the majority of the self-represented litigants have low incomes, feel they cannot afford a lawyer, do not consult with a lawyer, and have relatively low levels of education. Legal services attorneys help clients such as these obtain the basic necessities that are essential to their ability to survive. Without the assistance of a legal service attorney, most poor people are forced to proceed in urgent legal matters without representation, and often fail to stave off eviction, or secure a protective order to restrain an abusive partner.

⁹ New Mexico Commission on Access to Justice, Report to the Supreme Court of New Mexico, 1 (April 2006).

¹⁰ American Bar Association, Resolution 121B: Pro Bono Disclosure Requirements for Law School Recruiters, 3 (August 2006).

¹¹ New York State Unified Court System, Office of the Deputy Chief Administrative Judge for Justice Initiatives, Self-Represented Litigants: Characteristics, Needs, Services, at i (2005).

In New York State, 86% of civil legal needs of poor households go unmet.¹² A study of cases in New York City's Housing Court highlights the exceptional importance of legal representation to low-income clients. The study found that while 51% of unrepresented, low-income tenants had final judgments entered against them, only 22% of represented tenants had the same.¹³ A 2003 study by the New York State Unified Court System of unrepresented litigants in New York courts concludes that "attorney representation appears to be the most urgent need."¹⁴

There is a similar lack of legal representation in Vermont and Connecticut. LSC reports a large gap between the level of legal needs reported by low-income households and the percentage of those needs for which legal help was received or sought.¹⁵ Specifically, in Vermont low income people receive legal services for a mere 9% of their legal problems.¹⁶ Similarly, in Connecticut there is a huge unmet need for legal services.¹⁷ In fact, many low-income people do not even realize that legal services are available. In a survey of low-income households in Connecticut, 90% of the legal problems identified did not receive attention from a lawyer. Legal help was sought for only 10% of legal problems and 30% of low-income people

¹² NYS Unified Court System, The Future of Pro Bono in New York v 2, 1 (Jan 2004).

¹³ Carroll Seron, et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City Housing Court: Results from a Randomized Experiment, 35 LAW & SOC'Y REV. 419,419 (2001).

¹⁴ New York State Unified Court System Office of the Deputy Chief Administrative Judge for Justice Initiatives, Self-Represented Litigants: Characteristics, Needs, Services, at 30.

¹⁵ Legal Services Corporation, Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-income Americans, at 12.

¹⁶ Id at 14.

¹⁷ Center for Survey Research & Analysis at the University of Connecticut, Civil Legal Needs Among Low-income Households in Connecticut (April 2003).

were unaware that legal aid services were even available.¹⁸

The limited resources of legal service organizations are often the sole option for low-income persons who must go to court to obtain justice. The lack of such resources is intensified by the restrictions imposed on private and local funds that LSC-funded organizations receive, as well as by the unduly burdensome program integrity rules promulgated by the LSC. Since legal services organizations are essential in securing the most basic rights for low income communities, it is critical that they not be subjected to unnecessary or overbroad constraints on such important and necessary advocacy.

C. Access to legal services for low income people protects the integrity of our judicial system

Justice Powell charged us with the guiding principal that “[e]qual justice under the law is not only a caption on the facade 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.”¹⁹ The availability of legal services, regardless of one's ability to pay, is fundamental to the fair and efficient functioning of our justice system. The courts have recognized the importance of legal representation in ensuring the proper and just functioning of the system. In this very case, the U.S. Supreme Court confirmed

¹⁸ Legal Services Corporation, Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-income Americans at 12, Cl.

¹⁹ Justice Powell, Address to the ABA Legal Services Program, ABA annual meeting, August 10, 1976.

this sentiment when it explained that prohibiting legal services attorneys from advancing a client's legal argument in support of claims for welfare benefits impaired the judicial function and distorted the legal system.²⁰ Other courts have also acknowledged the importance of legal representation of low income parties in ensuring the proper functioning of the court.²¹

In 2000, New York Deputy Chief Administrative Judge Juanita Bing Newton reported that a lack of funding was resulting in a shortage in the number of attorneys to represent low income people thereby "causing a crisis in the courts."²² As a result of this lack of representation, "sensitive Family Court proceedings face lengthy delays -- to the great detriment of the parties involved and the public."²³ The report added that "self-represented litigants generally are unknowledgeable about the legal system, the law and court procedures, and thus face serious barriers at each step of the litigation process."²⁴

Not only is having to proceed without an attorney extremely detrimental to the unrepresented litigant, it also causes serious obstacles to the efficiency and fairness of the judicial system. The American Bar Association has reported that "[b]y helping to ensure access to counsel, judges can also help reduce the backlogs

²⁰ LSC v. Velazquez, 531 U.S. 533, 544-546, 121 S.Ct. 1043, 1050-1051 (2001).

²¹ 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.")

²² Honorable Juanita Bing Newton, Deputy Chief Administrative Judge for Justice Initiatives, First Annual Report, 9 (2000).

²³ Id.

²⁴ Id. at 11.

and delays created by a large number of *pro se* litigants, enhancing both the reputation and the effectiveness of the courts."²⁵ The lack of legal representation for the poor has an extremely detrimental effect on both low-income communities and the proper functioning of the entire legal system.

II. The legal standard imposed by the panel threatens to allow LSC to apply the physical separation requirement to limit significantly the legal services available to low income people.

The "physical separation requirement" contained in LSC's program integrity regulation creates unnecessary obstacles to the provision of legal services to low income communities. In 1996, Congress cut funding and implemented severe restrictions on the type of advocacy that LSC-funded programs can use in representing their clients. These restrictions prevent legal services organizations from providing certain legal services such as participating in class actions, engaging in outreach to represent clients, and collecting statutory attorney's fee awards.²⁶ More fundamentally, Congress imposed a private money restriction on the LSC, pursuant to which LSC promulgated the program integrity regulation that prevents legal services organizations from using their state, local, or private funds for the federally restricted legal services, unless they first create a separate entity, with separate physical facilities and personnel, through which to do so.

²⁵ American Bar Association, Commission on the Renaissance of Idealism in the Legal Profession, Resolution 121C (August 2006).

²⁶ Omnibus Consolidated Rescissions and Appropriations Act of 1996 Pub L No 104-134, § 504, 110 Stat. 1321 (1996).

In applying this rule, LSC has insisted on extreme physical and employee separation. This forces legal services programs desiring to spend their non-LSC funds on activities otherwise barred by the restrictions to waste precious resources and suffer interference with their effective administration and legal representation. Unfortunately, these requirements are so burdensome that virtually no legal services organizations have been able to overcome the financial and administrative hurdles to create separate physical entities. As a result, LSC grantees are effectively prevented from using their non-LSC funding to engage in the restricted, yet constitutionally protected activities. Legal services organizations are left with untenable choices: i) forgo LSC funding altogether, ii) significantly strain resources by creating separate entities, or iii) abandon many constitutionally protected activities on behalf of low-income communities. These options all result *in fewer* legal services to low-income communities that are urgently in need of *more* legal services.

The plaintiff legal services programs sought to comply with the program integrity regulations without sacrificing the needs of their low income clients. They submitted a proposal to LSC that offered to establish a legally distinct affiliate, with a separate name and rigorous accounting principles that make it impossible to use federal funds for restricted activities, and to provide notice to the public, courts, and clients of the distinct functions of each entity. LSC rejected the proposal because it lacked separate personnel and facilities. The district court

below found that LSC's physical separation requirement imposed significant burdens on the plaintiffs without sufficient justification.

The panel's recent decision, however, rejected that analysis, opining that it is irrelevant whether the burdens imposed are adequately justified, and that the regulation is constitutional unless the burdens associated with compliance "in effect preclude" the establishment of an affiliate to provide a full spectrum of privately-funded legal services. Slip op. at 29. This stringent standard, which departs significantly from the prior caselaw of this Court and the Supreme Court, will allow LSC to impose severe and unjustified burdens on legal services programs, with the result that fewer low income people will get access to legal services.

III. The panel decisions of this Court are in conflict and consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

Because of the exceptional importance of this matter, it is imperative that the Court clarify the controlling First Amendment standard that governs review of the LSC regulations. In this case, two panels of this Court have disagreed about the proper standard.²⁷ The first panel ruled that the government's claimed interests in imposing a physical separation requirement must be sufficient to justify the burden

²⁷ *Amici* agree with Plaintiffs' argument as set forth in the Petition for Rehearing that this Panel's decision also conflicts with binding Supreme Court precedent.

imposed on legal services programs by the requirement. That panel made clear that an undue burden on First Amendment freedoms will not be tolerated under the First Amendment. Now, a second panel has ruled that the government's claimed interests are actually irrelevant to the analysis, and urges instead that the standard is exclusively whether the burden imposed on the legal services programs actually precludes them from engaging in First Amendment-protected activities.

We urge this Court to grant the petition for rehearing en banc in order to resolve this disagreement. It cannot be that consideration of the government's claimed interests is irrelevant to the analysis of whether the burden imposed on free expression is constitutional. We submit that the decision of the original panel correctly identified the standard, honors Congressional intent, permits private and local funding for legal services to be used where it is most needed, and allows legal services to use their limited resources most efficiently.

CONCLUSION

Our Nation's commitment to equal access to justice is being tested in this case. Millions of poor people depend on federally-funded legal service organizations to secure their most basic rights and needs. The ultimate decision in this case will determine whether legal services organizations throughout the Circuit can use their very limited resources to best serve the poor. At stake in this matter is the promise of justice to all people. *Amici curiae* urge this Court to hear this case en banc and to clarify the inconsistent rulings made by earlier panels in this exceptionally important case.

Respectfully Submitted,

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Dated: October 13, 2006

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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.

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.

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.

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.

ANTI-VIRUS CERTIFICATION

Case Name: Brooklyn Legal v. Legal Services

Docket Number: 05-0340-cv(L)

I, Natasha R. Monell, hereby certify that the Petition submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 10/16/2006) and found to be VIRUS FREE.

/s/ Natasha R. Monell

Natasha R. Monell, Esq.

Staff Counsel

Record Press, Inc.

Dated: October 16, 2006