NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 99–603 and 99–960

LEGAL SERVICES CORPORATION, PETITIONER
99–603 *v.*
CARMEN VELAZQUEZ ET AL.

UNITED STATES, PETITIONER
99–960 *v.*
CARMEN VELAZQUEZ ET AL.

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

[February 28, 2001]

JUSTICE KENNEDY delivered the opinion of the Court.

In 1974, Congress enacted the Legal Services Corporation Act, 88 Stat. 378, 42 U. S. C. §2996 *et seq*. The Act establishes the Legal Services Corporation (LSC) as a District of Columbia nonprofit corporation. LSC's mission is to distribute funds appropriated by Congress to eligible local grantee organizations "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." §2996b(a).

LSC grantees consist of hundreds of local organizations governed, in the typical case, by local boards of directors. In many instances the grantees are funded by a combination of LSC funds and other public or private sources. The grantee organizations hire and supervise lawyers to provide free legal assistance to indigent clients. Each year

LSC appropriates funds to grantees or recipients that hire and supervise lawyers for various professional activities, including representation of indigent clients seeking welfare benefits.

This suit requires us to decide whether one of the conditions imposed by Congress on the use of LSC funds violates the First Amendment rights of LSC grantees and their clients. For purposes of our decision, the restriction, to be quoted in further detail, prohibits legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law. As interpreted by the LSC and by the Government, the restriction prevents an attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution.

Lawyers employed by New York City LSC grantees, together with private LSC contributors, LSC indigent clients, and various state and local public officials whose governments contribute to LSC grantees, brought suit in the United States District Court for the Southern District of New York to declare the restriction, among other provisions of the Act, invalid. The United States Court of Appeals for the Second Circuit approved an injunction against enforcement of the provision as an impermissible viewpoint-based discrimination in violation of the First Amendment, 164 F. 3d 757 (1999). We granted certiorari, and the parties who commenced the suit in the District Court are here as respondents. The LSC as petitioner is joined by the Government of the United States, which had intervened in the District Court. We agree that the restriction violates the First Amendment, and we affirm the judgment of the Court of Appeals.

I

From the inception of the LSC, Congress has placed restrictions on its use of funds. For instance, the LSC Act prohibits recipients from making available LSC funds, program personnel, or equipment to any political party, to any political campaign, or for use in "advocating or opposing any ballot measures." 42 U. S. C. §2996e(d)(4). See §2996e(d)(3). The Act further proscribes use of funds in most criminal proceedings and in litigation involving nontherapeutic abortions, secondary school desegregation, military desertion, or violations of the Selective Service statute. §§2996f(b)(8)–(10) (1994 ed. and Supp. III). Fund recipients are barred from bringing class-action suits unless express approval is obtained from LSC. §2996e(d)(5).

The restrictions at issue were part of a compromise set of restrictions enacted in the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (1996 Act), §504, 110 Stat. 1321–53, and continued in each subsequent annual appropriations Act. The relevant portion of §504(a)(16) prohibits funding of any organization

> "that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation."

The prohibitions apply to all of the activities of an LSC grantee, including those paid for by non-LSC funds. §§504(d)(1) and (2). We are concerned with the statutory provision which excludes LSC representation in cases

which "involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation."

In 1997, LSC adopted final regulations clarifying §504(a)(16). 45 CFR pt. 1639 (1999). LSC interpreted the statutory provision to allow indigent clients to challenge welfare agency determinations of benefit ineligibility under interpretations of existing law. For example, an LSC grantee could represent a welfare claimant who argued that an agency made an erroneous factual determination or that an agency misread or misapplied a term contained in an existing welfare statute. According to LSC, a grantee in that position could argue as well that an agency policy violated existing law. §1639.4. Under LSC's interpretation, however, grantees could not accept representations designed to change welfare laws, much less argue against the constitutionality or statutory validity of those laws. Brief for Petitioner in No. 99–603, p. 7. Even in cases where constitutional or statutory challenges became apparent after representation was well under way, LSC advised that its attorneys must withdraw. *Ibid.*

After the instant suit was filed in the District Court alleging the restrictions on the use of LSC funds violated the First Amendment, see 985 F. Supp. 323 (1997), the court denied a preliminary injunction, finding no probability of success on the merits. *Id.,* at 344.

On appeal, the Court of Appeals for the Second Circuit affirmed in part and reversed in part. 164 F. 3d 757 (1999). As relevant for our purposes, the court addressed respondents' challenges to the restrictions in §504(a)(16). It concluded the section specified four categories of prohibited activities, of which "three appear[ed] to prohibit the type of activity named regardless of viewpoint, while one might be read to prohibit the activity only when it seeks reform." *Id.,* at 768. The court upheld the restrictions on litigation, lobbying, and rulemaking "involving an

effort to reform a Federal or State welfare system," since all three prohibited grantees' involvement in these activities regardless of the side of the issue. *Id.,* at 768–769.

The court next considered the exception to §504(a)(16) that allows representation of "'an individual eligible client who is seeking specific relief from a welfare agency.'" The court invalidated, as impermissible viewpoint discrimination, the qualification that representation could "not involve an effort to amend or otherwise challenge existing law," because it "clearly seeks to discourage challenges to the status quo." *Id.,* at 769–770.

Left to decide what part of the 1996 Act to strike as invalid, the court concluded that congressional intent regarding severability was unclear. It decided to "invalidate the smallest possible portion of the statute, excising only the viewpoint-based proviso rather than the entire exception of which it is a part." *Id.,* at 773.

Dissenting in part, Judge Jacobs agreed with the majority except for its holding that the proviso banning challenges to existing welfare laws effected impermissible viewpoint-based discrimination. The provision, in his view, was permissible because it merely defined the scope of services to be funded. *Id.,* at 773–778 (opinion concurring in part and dissenting in part).

LSC filed a petition for certiorari challenging the Court of Appeals' conclusion that the §504(a)(16) suits-for-benefits proviso was unconstitutional. We granted certiorari, 529 U. S. 1052 (2000).

II

The United States and LSC rely on *Rust* v. *Sullivan,* 500 U. S. 173 (1991), as support for the LSC program restrictions. In *Rust*, Congress established program clinics to provide subsidies for doctors to advise patients on a variety of family planning topics. Congress did not consider abortion to be within its family planning objectives, how-

ever, and it forbade doctors employed by the program from discussing abortion with their patients. *Id.,* at 179–180. Recipients of funds under Title X of the Public Health Service Act, §§1002, 1008, as added, 84 Stat. 1506, 42 U. S. C. §§1508, 300a, 300a–6, challenged the Act's restriction that provided that none of the Title X funds appropriated for family planning services could "be used in programs where abortion is a method of family planning." §300a–6. The recipients argued that the regulations constituted impermissible viewpoint discrimination favoring an antiabortion position over a proabortion approach in the sphere of family planning. 500 U. S., at 192. They asserted as well that Congress had imposed an unconstitutional condition on recipients of federal funds by requiring them to relinquish their right to engage in abortion advocacy and counseling in exchange for the subsidy. *Id.,* at 196.

We upheld the law, reasoning that Congress had not discriminated against viewpoints on abortion, but had "merely chosen to fund one activity to the exclusion of the other." *Id.,* at 193. The restrictions were considered necessary "to ensure that the limits of the federal program [were] observed." *Ibid.* Title X did not single out a particular idea for suppression because it was dangerous or disfavored; rather, Congress prohibited Title X doctors from counseling that was outside the scope of the project. *Id.,* at 194–195.

The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding. We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, see *Board of Regents of Univ. of Wis. System* v. *Southworth,* 529 U. S. 217, 229, 235 (2000), or instances, like *Rust,* in

which the government "used private speakers to transmit information pertaining to its own program." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U. S. 819, 833 (1995). As we said in *Rosenberger*, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Ibid.* The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Board of Regents of Univ. of Wis. System* v. *Southworth, supra,* at 235.

Neither the latitude for government speech nor its rationale applies to subsidies for private speech in every instance, however. As we have pointed out, "[i]t does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Rosenberger, supra*, at 834.

Although the LSC program differs from the program at issue in *Rosenberger* in that its purpose is not to "encourage a diversity of views," the salient point is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message. Congress funded LSC grantees to provide attorneys to represent the interests of indigent clients. In the specific context of §504(a)(16) suits for benefits, an LSC-funded attorney speaks on the behalf of the client in a claim against the government for welfare benefits. The lawyer is not the government's speaker. The attorney

defending the decision to deny benefits will deliver the government's message in the litigation. The LSC lawyer, however, speaks on the behalf of his or her private, indigent client. Cf. *Polk County* v. *Dodson*, 454 U. S. 312, 321–322 (1981) (holding that a public defender does not act "under color of state law" because he "works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client" and because there is an "assumption that counsel will be free of state control").

The Government has designed this program to use the legal profession and the established Judiciary of the States and the Federal Government to accomplish its end of assisting welfare claimants in determination or receipt of their benefits. The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*.

The private nature of the speech involved here, and the extent of LSC's regulation of private expression, are indicated further by the circumstance that the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning. Where the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations. In *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364 (1984), the Court was instructed by its understanding of the dynamics of the broadcast industry in holding that prohibitions against editorializing by public radio networks were an impermissible restriction, even though the Government enacted the restriction to control the use of public funds. The First Amendment forbade the Government from using the

forum in an unconventional way to suppress speech inherent in the nature of the medium. See *id.,* at 396–397. In *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666, 676 (1998), the dynamics of the broadcasting system gave station programmers the right to use editorial judgment to exclude certain speech so that the broadcast message could be more effective. And in *Rosenberger*, the fact that student newspapers expressed many different points of view was an important foundation for the Court's decision to invalidate viewpoint-based restrictions. 515 U. S., at 836.

When the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program. *Perry Ed. Assn.* v. *Perry Local Educator's Assn.*, 460 U. S. 37 (1983); see also *Lamb's Chapel* v. *Center Moriches Union Free School Dist.,* 508 U. S. 384 (1993). The same is true when the government establishes a subsidy for specified ends. *Rust* v. *Sullivan,* 500 U. S. 173 (1991). As this suit involves a subsidy, limited forum cases such as *Perry*, *Lamb's Chapel* and *Rosenberger* may not be controlling in a strict sense, yet they do provide some instruction. Here the program presumes that private, nongovernmental speech is necessary, and a substantial restriction is placed upon that speech. At oral argument and in its briefs the LSC advised us that lawyers funded in the Government program 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. It extends further, it must be noted, so that state statutes inconsistent with federal law under the Supremacy Clause may be neither challenged nor questioned.

By providing subsidies to LSC, the Government seeks to

facilitate suits for benefits by using the State and Federal courts and the independent bar on which those courts depend for the proper performance of their duties and responsibilities. Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys in much the same way broadcast systems or student publication networks were changed in the limited forum cases we have cited. Just as government in those cases could not elect to use a broadcasting network or a college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems, see *Arkansas Ed. Television Comm'n, supra,* and *Rosenberger, supra,* it may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.

LSC has advised us, furthermore, that upon determining a question of statutory validity is present in any anticipated or pending case or controversy, the LSC-funded attorney must cease the representation at once. This is true whether the validity issue becomes apparent during initial attorney-client consultations or in the midst of litigation proceedings. A disturbing example of the restriction was discussed during oral argument before the Court. It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue. *Gomez* v. *United States,* 490 U. S. 858, 864 (1989); *Ashwander* v. *TVA,* 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring). Yet, as the LSC advised the Court, if, during litigation, a judge were to ask an LSC attorney whether there was a constitutional concern, the LSC attorney simply could not answer. Tr. of Oral Arg. 8–9.

Interpretation of the law and the Constitution is the

primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is"). An informed, independent judiciary presumes an informed, independent bar. Under §504(a)(16), however, cases would be presented by LSC attorneys who could not advise the courts of serious questions of statutory validity. The disability is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case. By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source. "Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law." *Id.*, at 178.

The restriction imposed by the statute here threatens severe impairment of the judicial function. Section 504(a)(16) sifts out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry. If the restriction on speech and legal advice were to stand, the result would be two tiers of cases. In cases where LSC counsel were attorneys of record, there would be lingering doubt whether the truncated representation had resulted in complete analysis of the case, full advice to the client, and proper presentation to the court. The courts and the public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the repre-

sentation despite the statute, avoided all reference to questions of statutory validity and constitutional authority. A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech.

It is no answer to say the restriction on speech is harmless because, under LSC's interpretation of the Act, its attorneys can withdraw. This misses the point. The statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider.

The restriction on speech is even more problematic because in cases where the attorney withdraws from a representation, the client is unlikely to find other counsel. The explicit premise for providing LSC attorneys is the necessity to make available representation "to persons financially unable to afford legal assistance." 42 U. S. C. §2996(a)(3). There often will be no alternative source for the client to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits. Thus, with respect to the litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict. This is in stark contrast to *Rust*. There, a patient could receive the approved Title X family planning counseling funded by the Government and later could consult an affiliate or independent organization to receive abortion counseling. Unlike indigent clients who seek LSC representation, the patient in *Rust* was not required to forfeit the Government-funded advice when she also received abortion counseling through alternative channels. Because LSC attorneys must withdraw whenever a question of a welfare statute's validity arises, an individual could not obtain joint representation so that the constitutional challenge would be presented by a non-LSC attorney, and other,

permitted, arguments advanced by LSC counsel.

Finally, LSC and the Government maintain that §504(a)(16) is necessary to define the scope and contours of the federal program, a condition that ensures funds can be spent for those cases most immediate to congressional concern. In support of this contention, they suggest the challenged limitation takes into account the nature of the grantees' activities and provides limited congressional funds for the provision of simple suits for benefits. In petitioners' view, the restriction operates neither to maintain the current welfare system nor insulate it from attack; rather, it helps the current welfare system function in a more efficient and fair manner by removing from the program complex challenges to existing welfare laws.

The effect of the restriction, however, is to prohibit advice or argumentation that existing welfare laws are unconstitutional or unlawful. Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise. Here, notwithstanding Congress' purpose to confine and limit its program, the restriction operates to insulate current welfare laws from constitutional scrutiny and certain other legal challenges, a condition implicating central First Amendment concerns. In no lawsuit funded by the Government can the LSC attorney, speaking on behalf of a private client, challenge existing welfare laws. As a result, arguments by indigent clients that a welfare statute is unlawful or unconstitutional cannot be expressed in this Government-funded program for petitioning the courts, even though the program was created for litigation involving welfare benefits, and even though the ordinary course of litigation involves the expression of theories and postulates on both, or multiple, sides of an issue.

It is fundamental that the First Amendment "was fashioned to assure unfettered interchange of ideas for the

bringing about of political and social changes desired by the people." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 269 (1964) (quoting *Roth* v. *United States,* 354 U. S. 476, 484 (1957)). There can be little doubt that the LSC Act funds constitutionally protected expression; and in the context of this statute there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives. This serves to distinguish §504(a)(16) from any of the Title X program restrictions upheld in *Rust*, and to place it beyond any congressional funding condition approved in the past by this Court.

Congress was not required to fund an LSC attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal representations or relationships. The LSC and the United States, however, in effect ask us to permit Congress to define the scope of the litigation it funds to exclude certain vital theories and ideas. The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest. *Regan* v. *Taxation With Representation of Wash.,* 461 U. S. 540, 548 (1983); *Speiser* v. *Randall*, 357 U. S. 513, 519 (1958).

For the reasons we have set forth, the funding condition is invalid. The Court of Appeals considered whether the language restricting LSC attorneys could be severed from the statute so that the remaining portions would remain operative. It reached the reasoned conclusion to invali-

date the fragment of §504(a)(16) found contrary to the First Amendment, leaving the balance of the statute operative and in place. That determination was not discussed in the briefs of either party or otherwise contested here, and in the exercise of our discretion and prudential judgment we decline to address it.

The judgment of the Court of Appeals is

Affirmed.