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Velazquez v. Legal Services Corporation: Unconstitutional Conditions and First Amendment Rights of Nonprofit Organizations and Their Donors

Edward Chaney*

INTRODUCTION

Nonprofit corporation Language for Life\(^1\) is a hypothetical English as a Second Language program funded by a mixture of foundation grants, individual donations, and state and federal contracts.\(^2\) Believing that English proficiency is an important skill for all, Language for Life has adopted a policy of non-discrimination against undocumented persons in the provision of its services. In fact, it does not even ascertain the citizenship status of

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1. This is a hypothetical scenario created to illustrate the topic of this Note. Language for Life and the federal grant it receives are both fictitious; however, these are real issues being faced by nonprofit organizations across the country.

2. A report by the Panel on the Nonprofit Sector, an independent group, states:

Though funding for individual organizations varies substantially, the majority of support for the [nonprofit] sector as a whole comes from consumers of services and voluntary contributions: 38% from dues, fees, and other charges for goods and services, 17% from individual contributions, and an additional 3% from private foundations and corporate giving programs. Government grants and contracts provide 31% of the sector's revenues, and other sources, such as income from assets, supply the remaining 11%.

its students. Census projections show that the population of immigrants with limited or no English proficiency could grow by as much as 25% in the next five years; and, in response, the federal government has increased the funds available to Language for Life and similar programs through its primary grants program. However, the grant now requires a new restriction that none of its funds may be used to provide services to undocumented persons. Furthermore, the federal government requires that if a grantee does serve such a population, even with non-federal funds received from individual donors, then it must do so as a completely separate legal entity, in separate facilities with no shared equipment, and may only share some of its staff. Language for Life calculates that this condition will require an additional $100,000 a year to create and maintain this separate organization at its current scale. Funding dollars are scarce as it is; in the past, the organization has never been able to increase its income from private sources by more than 10% from year to year. Refusing the federal grant would decrease the current budget by approximately 30%, eliminating one-quarter of current program activity. Such a move would impact all students, not just undocumented immigrants, as well as foreclose any growth to meet the impending spike in demand.

Language for Life decides to contact its major donors to assess the viability of creating the separate organization. As a reliable donor, you receive a letter from Language for Life. You have been supporting the organization for four years through gifts from your personal funds. You are a strong believer in the organization’s undocumented persons policy and are furious at the repercussions of the new restrictions. You believe that the organization’s First Amendment free speech protections are being trampled. Upon further reflection, you believe that your First Amendment rights are being trampled too.

Are you right?

The answer is unclear due to the unsettled and somewhat confusing body of law of unconstitutional conditions. However, the Second Circuit Court of Appeals must grapple with this essential question when it decides the appeal to Velazquez v. Legal

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3. See infra notes 32-33, 56-59 and accompanying text.
Nonprofit Organizations (Velazquez IV). In Velazquez IV, the district
court enjoined Legal Services Corporation ("LSC") from strictly
enforcing its program integrity requirements as a condition to the
grants made to several New York legal services organizations. These
program integrity requirements are similar to the restrictions
in the above hypothetical. In the court's analysis, the requirements
placed an undue burden on the protected First Amendment right to
speech of the grantee organizations. On appeal, the defendant-
appellant, Legal Services Corporation, and the intervener-
appellant, the U.S. Government, asserted in essence that the plaintiffs "can avoid the restrictions by simply refusing the subsidy" and that the federal government may contract as it sees fit provided

Supp. 2d 267 (E.D.N.Y. 2005). There are four, soon to be five, decisions
containing both of the names "Velazquez" and "Legal Services Corporation," all stemming from the same set of facts. One issue in the case worked its way to the Supreme Court. A different set of issues, including the subject of this note, is now the subject of appeal. Oral arguments were heard in November 2005. As of yet, the Court has not issued a decision. See infra Part I.

5. LSC is the organization that distributes federal grant dollars to
nonprofit legal services agencies. See infra notes 15-23 and accompanying
text.

6. The plaintiffs submitted a "Clarified Proposal" to the court proposing
a structure of separation that they argued "would not impose an undue
burden." Velazquez IV, 349 F. Supp. 2d at 574. However, LSC rejected this
proposal, arguing that it did not satisfy the program integrity requirements.
Id. at 577-78. The court sided with the plaintiffs. Id. at 613.

7. Similarities include the separation requirements. For more detail on
the program integrity requirements, see infra text accompanying notes 19-27.

8. Velazquez IV, 349 F. Supp. 2d at 610-13. In balancing the
government's interests against the rights of the plaintiffs, the court sided with
the plaintiffs and their Clarified Proposal, noting, inter alia, that "[t]here is
simply no legitimate justification for requiring duplication of costs." Id. at 612.
First Amendment claims in the context of nonprofit corporations have
appeared several times in the United States Supreme Court. See infra notes
33, 118-123 and accompanying text.

No. 05-0340 (2d Cir. May 27, 2005).
that in so doing recipients are left with "adequate alternative channels of protected expression."\textsuperscript{10}

The impact that this case may have on the nonprofit sector is profound and is not going unnoticed. Many of the sector's leading institutions have filed a joint amicus brief.\textsuperscript{11} The Independent Sector, a "leadership forum for charities, foundations, and corporate giving programs committed to advancing the common good in America and around the world,"\textsuperscript{12} has sounded the alarm, stating that Velazquez will have far-reaching implications that go well beyond the funding of legal services, to the core principles and rights of private giving, private action by charitable nonprofit organizations, and the right to advocate by 501(c)(3) organizations with their private funds, regardless of whether they receive government funding. Given the prevalence of government funding for 501(c)(3) organizations in the arts, human services, education, health care, research, international assistance and virtually every type of nonprofit charitable activity, the implications of outcomes of these cases cannot be understated.\textsuperscript{13}

\textsuperscript{10} \textit{Id.} at 41 (quoting Velazquez v. Legal Servs. Corp. (\textit{Velazquez II}), 164 F.3d 757, 766 (2d Cir. 1999)).


\textsuperscript{13} Independent Sector, Legal Services Challenges: An Important Advocacy Issue for the Nonprofit Community, http://www.independent
Recent congressional action lends credence to such claims. The House of Representatives attached conditions to a recent housing funding initiative that would extend the current ban on the use of federal funds for lobbying and certain electioneering activities to private funds as well. The proposed restrictions are so broad that any charitable organization that has within the previous 12 months engaged in nonpartisan election activities - including voter registration and education, assisting voters to apply for absentee ballots, or providing voters transportation to the polls - would be ineligible for grants from the new Affordable Housing Fund. The proposal would also prohibit non-profit grantees from engaging in any of these activities in the future, even with private funding. In addition, even nonprofits that do not engage in such activities would be disqualified for grants simply if they are affiliated with an organization that engages in such activities.1

Until the law is settled, there will likely be more litigation, inspired by both Velazquez IV and efforts of Congress to tie what it sees as desirable restrictions to federal grants and subsidies to various nonprofits. This Note uses the current Velazquez appeal (hereinafter Velazquez V) as a lens through which to examine questions on the law of unconstitutional conditions that will sector.org/programs/gr/velazquez.html (last visited Jan. 27, 2006); see also Madeline Lee, Why I'm Suing the Federal Government, FOUND. NEWS & COMMENT., (May-June 2002), available at http://www.foundationnews.org/CME/article.cfm?ID=1953 (describing New York Foundation’s interest in Velazquez and why other philanthropic organizations should care about its outcome).

confront the courts in such cases. Part I presents the procedural
history of Velazquez V and explores the issues and facts in greater
detail. Additionally, Part I sets out the First Amendment argument
by nonprofit organizations challenging the program integrity
requirements. Part II examines the debate over the standard of
review for unconstitutional conditions cases and its origin by
focusing on two cases where the Supreme Court has found
“permissible non-subsidies.” Part III critically analyzes the
differences between unconstitutional conditions and permissible
non-subsidies. Part IV proposes a clarified standard of review,
whereby the court balances the government’s interest against the
First Amendment rights of the donor and the nonprofit
organization, and its impact on the organization’s ability to serve as
a traditional sphere of free expression. Finally, this Note concludes
by applying the proposed standard to Velazquez V and finds that
the program integrity requirements excessively burden the First
Amendment rights of the donor and the nonprofit organization.

I. VE LA ZQUEZ V. LEG AL SERVICES CORPORATION:
PROCEDURAL HISTORY

Congress chartered Legal Services Corporation as a
“private nonmembership nonprofit”\(^\text{15}\) to provide “financial support
for legal assistance in noncriminal proceedings or matters to
persons financially unable to afford legal assistance.”\(^\text{16}\) LSC acts as
a grantmaking entity distributing federal dollars on an annual basis
to qualified agencies.\(^\text{17}\) In fiscal year 2003-2004, LSC’s budget was
$335.3 million, supporting nearly 3,700 attorneys and staffing 143
programs that handle approximately one million cases and four
million ‘matters,’ such as community education training and legal
self-help seminars.”\(^\text{18}\) In 1996, responding to political pressure to

\(^{16}\) Id.
\(^{17}\) See 42 U.S.C. § 2996f (detailing, inter alia, the requisites for receiving
funding and limitations on its use).
\(^{18}\) LEGAL SERVICES CORPORATION, ANNUAL REPORT 2003-2004, 6
pdf.
rein in if not terminate LSC, Congress tacked on additional restrictions as to how agencies could use LSC grant dollars. Congress took these restrictions a step further by applying them to activities funded from any other non-federal source. Thus, a legal aid agency that received any amount of LSC funding was banned from using any private or non-federal governmental dollars to engage in any activities prohibited by Congress. After some struggle with the constitutional implications of such a condition, LSC codified these new restrictions into its present program integrity requirements.

Current LSC regulations provide that a “recipient may not use non-LSC funds for any purpose prohibited by the LSC Act . . . unless such use is authorized by [additional regulations].” The program integrity requirements enforce this rule by requiring that the grant recipient have “objective integrity and independence from any organization that engages in restricted activities.” This requirement entails a three part test requiring the organization engaging in restricted activity to: (1) be a separate legal entity; (2) receive no transfer of LSC funds or subsidy from the grantee; and, (3) be physically and financially separate. Whether the organization is physically and financially separate is determined on a case-by-case basis, but nonexclusive factors may include separate personnel, separate accounting and time keeping records, the

24. 45 C.F.R. § 1610.3.
25. 45 C.F.R. § 1610.8(a).
26. Id.
degree in separation of facilities, and distinguishing signage and other forms of identification.\(^{27}\)

A group of legal aid providers\(^{28}\) attacked the constitutionality of the program integrity requirements on their face,\(^{29}\) alleging that they violated the First Amendment right to free expression both by denying “a meaningful opportunity for LSC recipients to engage in restricted activities using non-LSC funds,”\(^{30}\) and by being so broad as to inhibit constitutionally protected speech.\(^{31}\) The unconstitutional conditions doctrine holds that the “government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.”\(^{32}\) Prior to this challenge, the United States Supreme Court had applied this doctrine in the context of a federal grant to a nonprofit corporation.\(^{33}\) However, the plaintiffs lost in district court\(^{34}\) as the program integrity requirements were

\(\text{\textsuperscript{27}}\) Id.

\(\text{\textsuperscript{28}}\) Plaintiffs in the original suit included Farmworker Legal Services of New York, Inc., and individual legal aid attorneys. Velazquez v. Legal Servs. Corp. (Velazquez I), 985 F. Supp. 323, 323 (E.D.N.Y. 1997). Carmen Velazquez, for whom the case is named, was a legal aid client who wished to be represented in a class action suit, one of the activities restricted by LSC funding. Id.

\(\text{\textsuperscript{29}}\) In a facial challenge, a plaintiff “must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some circumstances is insufficient to render [them] wholly invalid.” Rust v. Sullivan, 500 U.S. 173, 183 (1991) (alteration in original) (citation omitted).

\(\text{\textsuperscript{30}}\) Velazquez I, 985 F. Supp. at 338 (quoting Plaintiffs’ Reply Memorandum at 2). The Velazquez case actually began before the final codification of the program integrity requirements. See Velazquez v. Legal Servs. Corp. (Velazquez II), 164 F.3d 757, 759-61 (2d Cir. 1999). But even after the revision, the plaintiffs maintained their attack. Id.

\(\text{\textsuperscript{31}}\) Velazquez I, 985 F. Supp. at 340-41.

\(\text{\textsuperscript{32}}\) Perry v. Sindermann, 408 U.S. 593, 597 (1972); see also Regan v. Taxation With Representation of Wash., 461 U.S. 540, 545 (1983) (holding that IRS code restricting lobbying activity does not create such a denial of benefit).

\(\text{\textsuperscript{33}}\) FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) (holding that a grant condition restricting editorializing was unconstitutional). See infra text accompanying notes 71-77.

\(\text{\textsuperscript{34}}\) Id. at 344.
similar to ones that survived a prior facial challenge in Rust v. Sullivan upholding restrictions on abortion related services attached to federal funding. The district court found that the program integrity requirements were a permissible construction of Congress' intentions to insure separation between a grantee and an organization conducting restricted activities, and could not "plausibly be perceived as having such a preclusive effect upon the exercise of the plaintiffs' or third parties' First Amendment rights." On appeal, the plaintiffs continued their facial attack, arguing that the burdens placed on their protected rights of speech by the regulations "amount[ed] to an unconstitutional condition on the receipt of LSC subsidies." In Velazquez v. Legal Services Corp. (Velazquez II), the Second Circuit dismissed this claim, stating that "Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." But, the court's result all but invited an as-applied challenge to the restrictions on the use of non-federal funds as an unconstitutional condition to the receipt of federal funds. This as-applied challenge

35. 500 U.S. 173 (1991); see infra text accompanying notes 82-95.
37. Id. at 342.
39. Id. at 757.
40. Id. at 765-67.
42. As opposed to the broad attack of a facial challenge, see supra note 27, the as-applied attack is narrowed to the facts at hand: "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21 (1960) (citations omitted). Likewise, a holding in a successful as-applied challenge will "never . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Id. Thus, a successful facial challenge will wholly invalidate a regulation; an as-applied challenge will only strike its fact-specific application.
would likely be successful provided that a grantee could show that the "restrictions unduly burden[ed] its capacity to engage in protected First Amendment activity." The Supreme Court granted certiorari on a different question in Legal Services Corp. v. Velazquez (Velazquez III), ignoring the Second Circuit's specific holding and dictum concerning the restrictions on non-federal funds, leaving open the lower court's invitation.

In Velazquez v. Legal Services Corp. (Velazquez IV), the original plaintiffs and a group of private donors accepted the invitation to challenge the program integrity requirements as-applied. At first blush, it is easy to see how the program integrity requirements survived a facial First Amendment challenge. Nonprofit organizations often have affiliated 501(c)(4) organizations that fulfill most, if not all, of these criteria on their face without compromising the organization's protected rights to speech. However, since physical and financial separation is determined on a vague case-by-case basis, the requirements arguably invite a spectrum of government regulation that, once applied, could span from the reasonable to the unconstitutional. Legal Services Corporation insisted that the plaintiff-grantees in Velazquez keep completely separate equipment and physical premises, and while it would allow grantees to share some staff, it

43. Velazquez II, 164 F.3d at 767.
44. 531 U.S. 533 (2001) (declaring unconstitutional a restriction prohibiting a legal aid attorney representing a client in a welfare case from challenging the validity of the law).
46. Most 501(c)(4) organizations operate "exclusively for the promotion of social welfare." I.R.C. § 501(c)(4) (2005). As such, they may engage in certain activities, such as lobbying, from which a 501(c)(3) organization is generally restricted. 501(c)(4) organizations do not enjoy the same level of tax exemption that 501(c)(3) organizations do. See generally JOHN FRANCIS REILLY, CARTER C. HULL, AND BARBARA A. BRAIG ALLEN, IRC 501(c)(4) ORGANIZATIONS (2002), available at http://www.irs.gov/pub/irs-tege/eotopic03.pdf (general article on 501(c)(4) organizations published by the IRS for training purposes only).
47. Cf. Regan v. Taxation With Representation of Wash., 461 U.S. 540, 544 n.6 (1983) (explaining how IRS requirements for separation between 501(c)(3) and 501(c)(4) affiliates are not unduly burdensome).
would not permit 100% overlap. In Velazquez IV, the plaintiffs, and more importantly the district court, felt that applying the regulations in this manner crossed the line into the realm of the impermissible; that is, this case by case application of the requirements did not “ensure that the rules adopted by LSC will give birth to viable alternative channels [for protected speech], and not place unjustifiable obstacles in the path of their creation.”

LSC appealed, and in Velazquez V, the Second Circuit must decide whether the LSC’s current program integrity requirements, as-applied, violate the First Amendment rights of both the grantees and the non-federal donors of those grantees by imposing unjustified “onerous fiscal, administrative and programmatic costs . . . on protected speech?”

II. LINES IN THE SAND: SEEKING A STANDARD OF REVIEW

In Velazquez II, the Second Circuit indicated two possible standards of review to determine the constitutionality of the LSC program integrity requirements. First, the court stated that “in appropriate circumstances, Congress may burden the First Amendment rights of recipients of governmental benefits if the recipients are left with adequate alternative channels for protected expression.” Second, the court also said that any grantee demonstrating that the 1996 restrictions unduly burdened its capacity to engage in protected First Amendment activity is free to bring an as-applied challenge. Not surprisingly, LSC latched on to

49. Id. at 610-13.
50. Id. at 611.
52. Velazquez v. Legal Servs. Corp. (Velazquez II), 164 F.3d 757, 766 (2d Cir. 1999).
53. Id. at 767.
the former adequate alternative standard,\textsuperscript{54} and the plaintiffs, the undue burden standard.\textsuperscript{55}

The Second Circuit's mixed signals do not come from thin air. Indeed, a survey of Supreme Court decisions show both confusing language and a divergence of facts that make gleaning a consistent test more akin to auguring tea leaves.\textsuperscript{56} The elusive doctrine of permissible non-subsidies further complicates the matter.

Professor Kathleen Sullivan, in her seminal essay, \textit{Unconstitutional Conditions},\textsuperscript{57} states that the unconstitutional conditions doctrine "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."\textsuperscript{58} The doctrine is built on the foundation that "government may not do indirectly what it may not do directly."\textsuperscript{59} But, there is a tension in modern jurisprudence between what the United States Supreme Court perceives to be a "permissible refusal[] to subsidize"\textsuperscript{60} (hereinafter "permissible non-subsidy")\textsuperscript{61} which is not subject to an unconstitutional conditions inquiry, and "impermissible penalties," which are subject to such inquiry.\textsuperscript{62}

Good examples of permissible non-subsidies can be found in \textit{Regan v. Taxation With Representation of Washington}\textsuperscript{63} and \textit{Rust v. Sullivan}.\textsuperscript{64} In \textit{Taxation With Representation}, a 501(c)(3) organization challenged federal limits on lobbying placed upon tax-

\textsuperscript{54} Brief for Defendant-Appellant, \textit{supra} note 9, at 41.
\textsuperscript{55} Brief for Plaintiff-Appellee-Cross-Appellants and Plaintiff-Cross-Appellants, \textit{supra} note 51, at 39.
\textsuperscript{56} \textit{See infra} text accompanying notes 60-80.
\textsuperscript{58} \textit{Id}.
\textsuperscript{59} \textit{Id}.
\textsuperscript{60} \textit{Id.} at 1464.
\textsuperscript{61} This term is also derived from Professor Sullivan. \textit{Id.} at 1499.
\textsuperscript{62} \textit{Id.} For more on distinguishing unconstitutional conditions from permissible non-subsidies, see \textit{infra} Part III.
exempt organizations. The challenge failed as the Court determined that: "Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that non profit organizations undertake to promote the public welfare." In Rust, the Court held that regulations promulgated by the Department of Health and Human Services prohibiting abortion related activity by family planning grantees withstood a facial First Amendment challenge as they also reflected permissible non-subsidies. The Court stated that "Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation . . . in order to ensure the integrity of the federally funded program." Thus, a permissible non-subsidy is a line drawn in the sand to ensure that federal funds do not subsidize, directly or indirectly, activities that Congress does not wish to support. Since Congress is not obligated to fund an activity, First Amendment rights such as lobbying or the free expression associated with a family planning clinic are not implicated.

Unfortunately, the basic notion of a permissible non-subsidy has complicating effects on the standard of review in unconstitutional condition cases. In the as-applied challenge rejected in Taxation With Representation, the Court held that Congress was not imposing an unconstitutional condition in limiting the lobbying of 501(c)(3) organizations; rather, it was exercising a permissible non-subsidy. As a key component of its analysis, the Court noted that the plaintiff nonprofit organization could lobby through an affiliated 501(c)(4) organization. The Court, in a footnote, also acknowledged that the requirements thereof (separate incorporation and separate records) were not "unduly burdensome." Thus, the Court implied, but did not hold, that an

65. Taxation With Representation, 461 U.S. at 542.
66. Id. at 544.
67. Rust, 500 U.S. at 192-200.
68. Id. at 198.
69. Taxation With Representation, 461 U.S. at 544.
70. Id. at 544 n.6. The Court did not provide examples of what would be unduly burdensome.
undue burden may bring a permissible non-subsidy case into the realm of unconstitutional conditions.

The following year, in *FCC v. League of Women Voters of California*, the Court held that federal broadcast regulations amounted to an unconstitutional condition as-applied. In a case that involved federal regulations that prohibited governmentally subsidized public television stations from using private dollars to editorialize, the Court stated that to be constitutional under the First Amendment, the regulations must be "narrowly tailored to further a substantial government interest." In finding the considered regulations overbroad, the Court held that the "ban on all editorializing . . . far exceeds what is necessary to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of the government." However, the Court also considered whether the regulations amounted to a permissible non-subsidy similar to those found in *Taxation With Representation*. The Court rejected this argument, but suggested that if Congress authorized an affiliate organization similar to the 501(c)(4) in *Taxation With Representation*, "such a statutory mechanism would plainly be valid . . . ."

The language in these decisions is murky, circular, and subject to at least two possible interpretations. The first interpretation is that there is a strict dichotomy between unconstitutional conditions and permissible non-subsidies. That is, if a restriction is not a permissible non-subsidy, it is an unconstitutional condition. There is simply no further standard of

71. 468 U.S. 364 (1984). The plaintiffs challenged a section of the Public Broadcasting Act of 1967 which forbade any "'noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] to 'engage in editorializing.'" *Id.* at 366 (citation omitted).
72. *Id.* at 380-99.
73. The Court found that the restriction in question was "specifically directed at a form of speech—namely, the expression of editorial opinion—that lies at the heart of First Amendment protection." *Id.* at 381.
74. *Id.* at 380.
75. *Id.* at 395.
76. *Id.* at 400.
77. *Id.*
review beyond whatever standard was employed to distinguish one from the other. Thus, if the Second Circuit, in its as-applied analysis, distinguishes the LSC program integrity requirements from permissible non-subsidies, the plaintiffs win.

The second interpretation is that challenges based on unconstitutional conditions require a two-part inquiry. The first question is whether the challenged regulation or act is a permissible non-subsidy or instead, a condition whose constitutionality needs to be explored. If the condition needs to be explored, the second question is whether the government's regulation passes constitutional muster by being narrowly tailored to further a substantial government interest. Through this lens, the Second Circuit's signals in Velazquez II were not mixed at all. The court applied the appropriate test to the question of whether the program integrity requirements were actually permissible non-subsidies.79 Finding that the requirements were non-subsidies, the court left open the possibility that an as-applied challenge might bring forward distinguishing facts to pull the requirements into the realm of unconstitutional conditions. If so, the court indicated a second standard of review: an undue burden test.80

In either case, whether a challenged condition is a permissible non-subsidy is a decisive factor in determining its constitutionality. A further exploration of permissible non-subsidies is warranted before arguing for one standard or the other.

III. A Rusty Reliance: Permissible Non-subsidies Analyzed

As mentioned above, Regan v. Taxation With Representation of Washington81 and Rust v. Sullivan82 provide the touchstone examples of permissible non-subsidies. Not

78. Id. at 380.
80. Id. at 767.
surprisingly, both *Taxation With Representation* and *Rust* are important components in LSC's defense of its program integrity requirements for two reasons: (1) the LSC regulations were based on those that withstood the facial challenge in *Rust* and are "virtually identical,"\(^{83}\) and (2) in *Velazquez II*, the Second Circuit leaned heavily on *Taxation With Representation* in holding the program integrity requirements facially constitutional.\(^{84}\) Given these two factors, it would seem that the cards are stacked in favor of LSC. However, when it opened the door for an as-applied challenge, the Second Circuit indicated its willingness to consider ways in which the facts of *Velazquez* could be distinguished from other permissible non-subsidies.\(^{85}\) Thus, the Second Circuit has suggested that any court considering an as-applied unconstitutional conditions challenge must ask whether the facts are sufficiently distinguishable from *Rust* and *Taxation With Representation*. If so, it appears that an actual application of a regulation can create an unconstitutional condition not found in the analysis of facial challenges.

Given the similarities between the regulations at issue in *Velazquez* and *Rust*,\(^{86}\) *Rust* is the best place to begin such analysis. *Rust* involved a facial challenge to newly implemented regulations limiting the ability of Department of Health and Human Services Title X grantees "to engage in abortion-related activities."\(^{87}\) Among the regulations at issue were requirements for projects to "be organized so that they are 'physically and financially separate' from prohibited abortion activities."\(^{88}\) The Secretary could make a

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83. *Velazquez II*, 164 F.3d at 767.
84. Id. at 766-67. This court also found certain suggestions made by the United States Supreme Court in *FCC v. League of Women Voters of California*, 648 U.S. 364 (1984) to be persuasive. Id. at 767. See discussion infra note 104 and accompanying text.
85. *Velazquez II*, 164 F.3d at 767. "It may be . . . that the program integrity rules will, in the case of some recipients, prove unduly burdensome and inadequately justified . . . . And it may be . . . that the program integrity requirements may prove especially burdensome in the context of legal services." Id.
86. See *supra* note 83.
88. Id. at 180 (citations omitted).
"case-by-case determination of objective integrity and independence" aided by "a list of non-exclusive factors." Plaintiffs argued that these regulations amounted to an unconstitutional condition of a receipt of funds. The United States Supreme Court dismissed this argument, stating:

[T]he Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary’s regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.

The Court also noted that the grantee still possessed avenues for its protected, and now separated, speech: "[t]he Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." Furthermore, "employees remain free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X project." Essentially, the Court argued that "Title X subsidies are just that, subsidies. The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulation, it can simply decline the subsidy." Furthermore, it notes, "[t]he regulations are limited to Title X funds; the recipient remains free to use private, non-Title X funds to finance abortion-related activities."

89. Id. at 181.
90. Id. at 196.
91. Id.
92. Id. (emphasis in original).
93. Id. at 198.
94. Id. at 199 n.5.
95. Id.
A. Distinguishing Permissible Non-subsidies from Unconstitutional Conditions

There are at least four somewhat interrelated ways in which Velazquez V and other similar cases can be distinguished from the archetypical permissible non-subsidy presented by Rust. First, an as-applied challenge is more nuanced and complicated than the all or nothing analysis of the facial challenge in Rust. Second, Rust makes an important differentiation between restrictions on programs and restrictions on a grant recipient. Third, donors have directly joined the litigation. Fourth, Velazquez V calls into consideration the broader purposes and functions of the nonprofit sector as a whole.

1. The As-Applied Context

First, the language in Rust must be analyzed in the context of the issue in front of the Court – a facial First Amendment challenge. The Court notes at the outset the heavy burden placed upon plaintiffs who facially challenge the constitutionality of a legislative act: "[T]he challenger must establish that no set of circumstances exist under which the Act would be valid."96 This stark all-or-nothing test allows the Court to view the case through a lens of simplicity97 that is inappropriate for the question at hand in Velazquez V. The question in Velazquez V is not whether the program integrity requirements unconstitutionally restrict speech in all possible scenarios but whether they do so in practice. The simplicity of the facial test is eroded by the practical realities that speech is not turned on and off like a switch; rather, at some point the burdens placed on speech effectively quash it. For example, in practice, there are real costs to regulations requiring the creation of a separate corporation, maintenance of separate offices and files, separate equipment and separate staff. At some point, those costs

96. Id. at 183 (citation omitted).
97. The word "simply" appears seven times in the Court's analysis of the unconstitutional condition claim, twice in tandem with "merely." Id. at 196-201; see, e.g., supra notes 68, 91-92, 94 and accompanying text.
may weigh heavily on an organization if not exceed its capacity altogether. A more nuanced as-applied analysis inquires at what point this occurs. In Velazquez IV, the court found that the costs of creating a separate corporation in a separate location without sharing equipment and staff would cost Queens Legal Services $200,000, South Brooklyn Legal Services ("SBLS") at least $380,000 and Farmworker Legal Services $130,000 for the first year and $80,000 thereafter. When balancing these costs against the government interests protected by the regulations, the court found the costs to be too weighty.

2. The Recipient/Program Distinction

Second, Rust explicitly distinguishes between unconstitutional conditions and permissible non-subsidies. After placing Title X restrictions outside of the unconstitutional conditions box, the Court clarified an important defining factor for the cases that remain, or wish to remain, inside the box. "In contrast, our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." Furthermore, the plaintiffs in Rust were in "no way 'barred from using even wholly private funds to finance' its pro-abortion activities outside the Title X program. The regulations are limited to Title X funds; the recipient remains free to use private, non-Title X funds to finance abortion-related activities." Thus, the Court is drawing a clear distinction between restrictions that attach to the implementation of a grant or subsidy and those that extend beyond the specified grant related activity.

99. Id. at 610-13.
100. Rust, 500 U.S. at 197 (emphasis in original).
101. Id. at 199 n.5 (citation omitted).
But that line is not so clear. In the simplistic analysis of a facial challenge, "never the twain shall meet."\textsuperscript{102} In practical application, however, it is often difficult to distinguish between a restriction that attaches to a program and one that attaches to a recipient as a whole.\textsuperscript{103} For example, if an organization exists to provide one service, does a restriction on a federal subsidy for that service also attach to the organization de facto?\textsuperscript{104} More importantly, just as grant dollars subsidize an organization, grant restrictions may have costs that an organization must somehow bear. In \textit{Rust}, the Court held that the government was "simply insisting that public funds be spent for the purposes for which they were authorized."\textsuperscript{105} Theoretically, such insistence is attached to the program grant, but its costs may require the expenditure of already

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\textsuperscript{102} 6 \textsc{Rudyard Kipling}, \textit{The Ballad of East and West}, Compact Edition of Rudyard Kipling 61 (Charles Scribner's Sons 1925) (1896).
\textsuperscript{103} The Court has complicated things with its own imprecise language. The Court interchangeably uses the words "grant" and "subsidy." \textit{Rust}, 500 U.S. 173 passim. But the two words have very different connotations. The subsidy an organization receives from tax exemption, for example, has a very different operational effect than a programmatic grant.
\textsuperscript{104} This question may be in part answered by \textit{FCC v. League of Women Voters of California}, 468 U.S. 364 (1984). The issue in that case was whether the federal government could attach a condition to federal funding of public broadcasting stations forbidding them from "'engag[ing] in editorializing.'" \textit{Id.} at 366 (quoting 47 U.S.C. § 399). In holding that such was an unconstitutional condition, the Court stated, "[t]he station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity." \textit{Id.} at 400. However, the Court did suggest that Congress could require separation through an affiliate. \textit{Id.} at 399-400 (discussing \textit{Regan v. Taxation With Representation of Washington}, 461 U.S. 540, 544-45 (1983)); \textit{see also} Sullivan, \textit{supra} note 57, at 1465. On the other hand, it is possible to parse broad program activity into smaller parts thereby undermining any claim that a restriction on a smaller subset of activity applies to the broader activity as a whole. For instance, taking the hypothetical of Language for Life and the government restriction, see \textit{supra} note 1, one can make the valid argument that while the organization exists to provide English as a Second Language, the federal government would not be restricting the teaching of ESL to populations other than undocumented immigrants.
\textsuperscript{105} \textit{Rust}, 500 U.S. at 196.
\end{flushright}
scarce resources from other services and sources.\textsuperscript{106} At some point, these will extend well beyond a program budget into the coffers of the recipient, thereby burdening its protected right to expression. For example, in *Velazquez IV*, the court found that it would cost at least $380,000 a year for SBLS to adhere to the program integrity requirements.\textsuperscript{107} This figure represented 8\% of the organization's budget and the diverted resources would result in the organization serving 500 fewer clients, and with fewer staff.\textsuperscript{108} Thus, it can be argued that the LSC program integrity requirements do not solely restrict the federally funded activity; they have "placed a condition on the recipient of the subsidy rather than on a particular program or service . . . ."\textsuperscript{109} Therefore, in *Velazquez V*, the court must answer whether, in applying the program integrity requirements, the government "effectively prohibit[ed] the recipient from engaging in the protected conduct outside the scope of the federally funded program."\textsuperscript{110} When, as in this case, the costs to plaintiffs may be measured not only in hundreds of thousands of dollars, but also in hundreds of clients, the answer to this inquiry should be affirmative.

However, *Taxation With Representation* adds another layer to this analysis. Since the subsidy involved in *Taxation* was the organization's tax exempt status, it follows that the restrictions on lobbying attached to the recipient of the subsidy as a whole rather than a particular program of the recipient. Yet, the Court ruled that the lobbying restriction was not an unconstitutional condition because the organization had outlets for its protected speech through a 501(c)(4) organization.\textsuperscript{111} Thus, a restriction that is

\begin{footnotes}
\item 106. For discussion on First Amendment rights of donors, see infra Part III.A.3.
\item 108. *Id*.
\item 109. *Rust*, 500 U.S. at 197 (emphasis in original).
\item 110. *Id*.
\item 111. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544-45 (1983). The Court also suggested as much in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), albeit from a different posture. In that case, the Court held that certain restrictions attached to federal public broadcasting funding were unconstitutional conditions but noted that they
attached to the recipient of a subsidy as a whole may also be found to be constitutional if it does not "condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."

But the Court also suggested that the existence of alternate outlets for protected speech is not the sole determining factor of the constitutionality of a condition attached to an organizational subsidy. In a footnote, the Court dismissed arguments that creating a 501(c)(4) could become overbearing, but not because such was an illegitimate argument. Rather, the Court dismissed those arguments because "[t]he IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying. This is not unduly burdensome."

Thus, plaintiffs, like those in Velazquez V, can distinguish a set of restrictions from permissible non-subsidies in two ways. First, plaintiffs can prove that the restrictions go beyond limited program activity and attach to the organization as a whole. If so, plaintiffs can then prove that either (a) there is no alternate outlet for the protected speech, or (b) the alternate outlet is unduly burdensome.

3. The First Amendment Rights of Donors

The third factor that distinguishes Velazquez V from the archetypical permissible non-subsidy found in Rust is the presence of donors. The Rust opinion did in fact address interests of donors, but in that case donors were providing matching dollars to a federal program. It was easy there for the Court to dismiss any of their claims within the framework of permissible non-subsidies by stating would be valid if "Congress were to . . . permit[] . . . stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds . . . ." Id. at 400.

112. Sullivan, supra note 57, at 1415.
113. Taxation With Representation, 461 U.S. at 544 n.6.
114. Id. Compare these requirements, and their consequent costs, to the LSC program integrity requirements mandating physical and financial separation, including separation of personnel and facilities. See supra notes 22-25 and accompanying text.
115. Rust, 500 U.S. at 199 n.5.
that grantees "voluntarily consent[ed] to any restrictions placed on any matching funds or grant-related income."\textsuperscript{116} In \textit{Velazquez V}, there is no evidence that donations are simply matching dollars to a federal program; rather, it appears that donations were made to organizations as a whole to support broader program activities.\textsuperscript{117}

But in order for that to matter, donors must have a valid First Amendment interest in the activity of the nonprofit organizations they support – and they do as evidenced by the law of charitable solicitation. In \textit{Village of Schaumburg v. Citizens for a Better Env’r},\textsuperscript{118} the Court held that the act of charitable solicitation "involve[s] a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment."\textsuperscript{119} It follows that if a donor responds to such a solicitation, the same interests are invoked. Indeed the court implied as much in \textit{Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.},\textsuperscript{120} stating that a "contribution in response to a request for funds functions as a general expression of support for the recipient and its views."\textsuperscript{121} Furthermore, it follows that the protections of the First Amendment extend beyond the mere act of giving into the expectations of the gift itself. As Justice Breyer stated in his concurrence to a case concerning a challenge to campaign finance law, "a decision to contribute money to a campaign is a matter of First Amendment concern – not because

\begin{itemize}
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} \textit{See, e.g., Lee, supra note 13 (asserting the intentions of the New York Foundation when providing a grant to South Brooklyn Legal Services).}
\item \textsuperscript{118} 444 U.S. 620 (1980). This case involved a challenge to an ordinance enacted by the Village of Schaumburg prohibiting charitable solicitation by "organizations that do not use at least 75 percent of their receipts for 'charitable purposes.'" \textit{Id.} at 622 (quoting \textit{SCHAUMBURG VILLAGE, ILL., CODE § 22-20(g) (1975))}.
\item \textsuperscript{119} \textit{Id.} at 632; \textit{see also Riley v. Nat’l Fed’n of the Blind, 487 U.S. 781 (1988) (finding that the North Carolina Charitable Solicitation violated the First Amendment rights of charities).}
\item \textsuperscript{120} 473 U.S. 788 (1985). In this case, various legal defense funds challenged their exclusion from the Combined Federal Campaign, a federal workplace giving program. \textit{Id.} at 790.
\item \textsuperscript{121} \textit{Id.} at 799.
\end{itemize}
money is speech (it is not); but because it enables speech."\(^{122}\) It is no great leap of faith or logic to analogize political campaign donations to nonprofit donations, especially since many nonprofits advocate political ideas. Thus, when the government interferes with the protected speech of a nonprofit, it is implicating the First Amendment rights of the donors who enable that speech through their donations.\(^{123}\)

For instance, the New York Foundation, a plaintiff in *Velazquez V*, made a grant to SBLS to support that organization’s efforts in working with family daycare provider networks.\(^{124}\) Soon, SBLS discovered that the city was significantly underpaying daycare providers, but a full remedy of the situation required a class action suit, which the organization was prevented from filing because of LSC regulations in spite of the New York Foundation’s support.\(^{125}\) In order to be able to engage in this activity, SBLS would have to create a separate affiliate organization at an additional cost of at least $380,000.\(^{126}\) By burdening the protected speech of the nonprofit, the government also burdened the protected speech of the donor whose contribution was intended to enable the speech.\(^{127}\)


\(^{123}\) On a corollary note, donors have high expectations of their gifts. In a recent Zogby poll, 72.4% of those polled “said that when a nonprofit organization uses money ‘for a purpose other than the one for which it was given,’ the managers of the recipient organization ‘should be held legally or criminally liable for acting in a fraudulent manner.’” Zogby International, *Donor Intent Key to Healthy Charitable Giving Climate, New Poll Finds*, Dec. 19, 2005, http://www.zogby.com/soundbites/ReadClips.dbm?ID=12445.

\(^{124}\) Lee, *supra* note 13.

\(^{125}\) Id.


\(^{127}\) There are two counterarguments to this assertion. The first is that another organization can pick up the lawsuit, fulfilling the expectation of the donor. But it would seem that if two political candidates shared identical platforms and parties, and if one candidate won a primary nomination due to restriction on the speech of the other, no court would hold that it was in essence a harmless error. The same reasoning applies to the donor/charity context. The second counterargument is that if other donors came up with the
Thus, if the donors are engaged in protected activity by contributing to the organization's program activity as a whole, rather than simply matching funds to a federally defined program, any court should take their interests into account. A court will have a difficult time reconciling a heavy burden on the First Amendment interests of donors with a finding of a permissible non-subsidy. This will be an especially difficult reconciliation if the court first finds that the costs of the restriction extend beyond the federally funded program and attach to the organization, as discussed above.

4. The Broader Purpose and Function of the Nonprofit Sector

Finally, the language in Rust also suggests another way in which Velazquez V can be distinguished by consideration of the broader purposes and functions of the nonprofit sector as a whole. In further describing traits of cases in the unconstitutional conditions box, the Court writes:

Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the

$380,000 to create the affiliate organization, then the original donor's First Amendment interests would not be burdened at all. While in theory this seems to be true, I will defer to development officers and major donors to argue the possibility of theory being realized.

128. An interesting question is what action by a donor constitutes protected speech? Logically, it would seem that simply responding to a solicitation would be enough. It would also follow that if a donor gives proactively, a concomitant verbal or written statement of support might also be required. In the case of the New Foundation's grant to SBLS, such would be the grant agreement and/or grant application.

129. Although it is difficult to imagine a scenario where this was not the case.
vagueness and overbreadth doctrines of the First Amendment.\textsuperscript{130}

The Court speculated that circumstances analogous to a university setting could call the unconstitutional conditions doctrine into action, but it found reasons to avoid deciding whether the doctor/patient relationship (where a doctor might have First Amendment rights to discuss abortion with a patient) provided such an analogy.\textsuperscript{131} However, the Second Circuit might find such an analogy in Velazquez, not through the lawyer/client relationship, but in the context of the nonprofit sector as a whole. The question should be asked whether a nonprofit, like a university, "is a traditional sphere of free expression so fundamental to the functioning of our society"\textsuperscript{132} that the unconstitutional conditions doctrine applies.

There are two obvious flaws in such an analogy. As a subset of the nonprofit sector, universities share some core common goals and functions within society, whereas an arts organization is likely to have a very different mission, constituency, and function than a legal services organization. Furthermore, if the sector did represent such a "traditional sphere," then the courts would have already recognized such. While both of these points stand, they do not necessarily end the argument.

First, as previously demonstrated,\textsuperscript{133} the nonprofit sector is also a traditional sphere of free expression. The Schaumburg assertion that solicitation invokes a "variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment,"\textsuperscript{134} is neither timid nor flippant. If the solicitation of funds alone represents these interests, it follows that program activity, the very product of the nonprofit, must also, if not to an even greater degree.


\textsuperscript{131} Id.

\textsuperscript{132} Id.

\textsuperscript{133} See supra Part III.A.3.

\textsuperscript{134} Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980).
Second, the nonprofit sector is fundamental to the functioning of our society as represented by its breadth and impact. There are now an estimated 1.3 million nonprofit organizations, employing 9% of the United States workforce. Each year, private donors give $207 billion to support their favorite organizations, and corporations and private foundations add another $41 billion. The capacity of the sector is supplemented by $9 million worth of volunteer hours. All of these resources are brought to bear on a range of social goods, including museums, symphonies, community theaters, private colleges and universities, independent elementary and secondary schools, noncommercial research institutions, zoos, land protection groups, hospitals, public clinics, housing and shelter providers, sport and recreation programs, overseas relief and development assistance organizations, private and community foundations, civil rights organizations, and houses of worship.

Perhaps more importantly, the sector exists to fill the gaps created by a free market and government, often in combination with representatives from both of these sectors. For example, nonprofit organizations played a vital role in immediate relief after Hurricane Katrina and will continue to play an integral role in reconstruction.

135. See generally INDEPENDENT SECTOR, supra note 2, at 9-12 (exploring the role and scope of the nonprofit sector in the United States).
136. Id. at 10-11.
137. Id. at 10.
138. Id. at 9.
139. Id. at 10.
140. Id. at 11.
Since most nonprofit organizations are corporations, like their for-profit counterparts, they are examples of private enterprises. But unlike their money-making mirrors, these corporations receive a vital government subsidy— their 501(c)(3) status. Thus, the formation of these nonprofit enterprises is a nexus of private and government interests which has developed as a response fundamental to the functioning of our society. The nonprofit sector reflects private and governmental interests, both of which must be protected. Nowhere does the history of the nonprofit sector suggest that the government interests supersede, as a matter of practice, principal, or law, those of private citizenry. If anything, as the discussion herein indicates, it suggests the contrary. The nonprofit sector as a whole is vital to the functioning of our society—socially, civically, and economically, and First Amendment freedoms of speech and expression should apply. Therefore, government action to control the speech of charities and non-profit agencies.” Press Release, Louisiana Disaster Relief Foundation, Civic & Community Leaders Tapped for Louisiana Disaster Recovery Foundation (Oct. 4, 2005), available at http://www.louisianahelp.org/pressrelease.html (last visited March 7, 2006). The LRA is a state agency that coordinates the response of various tax supported government agencies and units whereas the foundation was created to leverage private dollars to enable the direct relief and reconstruction work of private nonprofits. Given the enormity of the reconstruction, neither alone would be sufficient.


144. Admittedly, the Court has some difficulty with this concept. Compare Bob Jones Univ. v. United States, 461 U.S. 574, 591-92 (1983) (arguing that nonprofit tax exemption is based on the organization’s service to the public interest and must be aligned with “community conscience”—that is, almost an extension of government), with id. at 608-10 (Powell, J., concurring) (countering that nonprofits “‘contribute[] to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society’”) (quoting Walz v. Tax Comm’n, 397 U.S. 664, 689 (Brennan, J., concurring)).

145. Indeed, such a concern is an integral component of Professor Sullivan’s systemic theory of unconstitutional conditions. Sullivan, supra note 57, at 1421 (“Whatever the reason to preserve a realm of private autonomy from government encroachment, unconstitutional conditions present the same structural threat to that realm: they permit circumvention of existing constitutional restraints on direct regulation.”).
nonprofit organizations, such as the plaintiff legal services agencies in *Velazquez*, should receive the same level of scrutiny as would be given in the context of universities.

IV. THE LINE REDRAWN: A PROPOSAL FOR FUTURE JURISPRUDENCE

The above critical exploration of what is and what is not a permissible non-subsidy directly informs the answer to the question posed earlier: is there a line, and if so, where is it? In *Rust v. Sullivan*, Regan v. Taxation With Representation of Washington, the *Velazquez* quintet, and the hypothetical case of Language for Life, the linchpin is permissible non-subsidy. If a challenged condition is a permissible non-subsidy, its constitutionality will be upheld. There is a strict dichotomy between unconstitutional conditions and permissible non-subsidies, and a standard of review is employed in each case to distinguish one from the other. Given the all or nothing nature of a facial review, any such battleground should be in as-applied challenges where there is a clear standard of review – to balance the legitimate interests of the government against the protected free expression of nonprofit sectors. A condition can be distinguished from a permissible non-subsidy by balancing the government's interests in protecting its desire to not subsidize certain activity against the costs of that condition to one or more of the following: (1) the First Amendment rights of the organization; (2) the First Amendment rights of donors to that organization; and, (3) the function of the nonprofit sector as a traditional sphere of free expression. Applying this standard would be a fact specific inquiry. Courts would determine the interest the government seeks to protect, the actual costs to the organization of protecting that interest in the prescribed way, the valid expectation of donors in terms of free expression and the costs to that

148. See supra notes 63-68 and accompanying text.
expectation, and the chilling effect of any regulation on expression within the nonprofit sector as a whole.

Measuring the costs to the organization is probably the simplest inquiry. For example, the court in Velazquez IV quantified the costs of the LSC program integrity requirements by looking at the increased expense budget and decreased number of clients served. The more difficult question is just how large the costs must be to tip the scale to unconstitutionality. A plaintiff’s claim is strengthened if both types of costs are present. For example, the cost of the LSC program integrity requirements to South Brooklyn Legal Services was approximately 8% of its budget and 500 fewer clients served, which seemed to be enough for the court in Velazquez IV.

Furthermore, given the quantified costs to the organization, it may not be difficult to derive the real costs to donors and what those costs mean to the both the donors’ and the organizations’ First Amendment interests. For example, with the right data, the court could determine how much more private donors would have to give in order to enable the expression of the donor and the organization burdened with the implementation of the challenged restriction. The difference between that figure and what the donors would need to give to enable the organization to conduct the protected activity without the challenged restriction would be the quantifiable costs to the donors. Obviously, the larger the cost in both real dollars and as a percentage of an overall budget, the greater the burden placed on the donors’ protected speech.

The most difficult inquiry is determining to what extent any challenged regulation has on a nonprofit’s ability, or that of the nonprofit sector, to serve as a traditional sphere of free expression. Having good data on the costs to the organization and the donor will be helpful, as the higher the costs, the greater the chilling effect on the speech. But perhaps more important is the aggregate costs of the challenged regulation to an entire class of organizations. For instance, in the case of legal service agencies, many such organizations are impacted by the same government regulations.

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151. *Id.* at 606.
Indeed, Madeline Lee of the New York Foundation argues, "[i]n practice, this wasteful and duplicative alternative [of establishing separate organizations with separate facilities and staff] is impossible. Of the approximately 200 legal services programs nationwide, only a handful of them have even attempted to set up such facilities, and those that have done so have struggled." Thus, if such regulations are given effect, the costs are not just felt by individual organizations, but to an entire class of nonprofit organizations, chilling speech in an otherwise traditional sphere of free expression.

The benefits of this proposed standard are worth repeating. The government ought to be able to attach conditions to its grants, and nonprofit organizations and donors ought to have their First Amendment rights protected. These interests are bound to collide, and at times it will be easy to tell which is superior. This standard provides the courts the nuanced guidance needed when the task is not so easy.

CONCLUSION

In Velazquez V, the Second Circuit should find that the LSC program integrity requirements are unconstitutional as-applied. The court has enough data on the high costs to the plaintiff organizations in terms of both dollars and clients served to conclude that the requirements place an excessive burden on the First Amendment rights of the plaintiff organizations. Furthermore, with a little more data, the court would likely find that the government’s interests also were not enough to overcome the burden placed on the First Amendment rights of the donors. Finally, if Madeline Lee is correct, the court should recognize the aggregate chilling effect that the program integrity requirements have on a traditional sphere of free expression.

The balancing test proposed in this Note would achieve the proper balance between legitimate government interests and protected free expression of nonprofit sectors. The clumsiness with

152. Lee, supra note 13, at 24.
153. Id., see also text accompanying supra note 13.
which the courts have developed and applied the doctrine of permissible non-subsidies threatens to skew the balance toward the government and allow it to “do indirectly what it may not do directly.”\textsuperscript{154} If the program integrity requirements are given effect, a nonprofit organization will not be able to serve the clients it so desires, and it cannot express or defend its own ideas, even with private dollars. Furthermore, the government would be nullifying any support for those ideas that private citizens expected to enable with their charitable donations, as well as altogether limiting the donors’ marketplace for ideas. The costs of such an imbalance are not just felt by nonprofit organizations, but by society as a whole. The First Amendment demands that the balance be maintained.

\textsuperscript{154} Sullivan, \textit{supra} note 57 and accompanying text.