

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LEGAL SERVICES CORP., :

4 Petitioner :

5 v. : No. 99-603

6 VELAZQUEZ :

7 - - - - -X

8 UNITED STATES, :

9 Petitioner :

10 v. : No. 99-960

11 VELAZQUEZ :

12 - - - - -X

13 Washington, D.C.

14 Wednesday, October 4, 2000

15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States at
17 11:04 a.m.

18 APPEARANCES:

19 ALAN LEVINE, ESQ., New York, New York; on behalf of
20 Petitioner Legal Service Corporation.

21 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
22 Department of Justice, Washington, D.C.; on behalf of
23 Petitioner United States.

24 BURT NEUBORNE, ESQ., New York, New York; on behalf of
25 Respondents.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 99-603, Legal Services Corporation v.
5 Velazquez, and United States v. Velazquez.

6 Mr. Levine.

7 MR. LEVINE: Levine, Your Honor.

8 CHIEF JUSTICE REHNQUIST: Levine.

9 ORAL ARGUMENT OF ALAN LEVINE

10 ON BEHALF OF THE PETITIONER LEGAL SERVICE CORPORATION

11 MR. LEVINE: May it please the Court, Mr. Chief
12 Justice:

13 This is a case concerning Congress' power to
14 allocate dollars in the federally subsidized Legal
15 Services program for the categories of civil
16 representation that Congress has chosen to furnish. Under
17 the Rust v. Sullivan line of cases, it is Congress itself
18 that has the power to decide which policies or programs it
19 will promote. It is not the participants in the program,
20 namely the Legal Services lawyers, the grantees, or even
21 the clients, that have that power.

22 Here -- here, the Government is acting to
23 promote its policy of providing free legal services for
24 certain categories or types of civil representation, and
25 it is the lawyers who are delivering those services. What

1 Congress did not do was create a Legal Services program to
2 promote diverse private expression by Legal Services
3 lawyers around the country.

4 In 1996, in response to criticism in Congress
5 that the Legal Services lawyers had veered off-course from
6 the program's original purpose by participating in
7 politicized and expensive litigations, a compromise
8 appropriations bill was enacted to limit the scope of the
9 kinds of civil representations that would be funded.
10 Specifically, Congress decided not to finance any longer,
11 litigation to amend or otherwise challenge the Federal or
12 State welfare reform system.

13 QUESTION: Mr. Levine, does the statute at issue
14 here in your view prohibit a Legal Aid attorney
15 representing an individual client from making a
16 constitutional challenge to the application of a
17 particular welfare law?

18 MR. LEVINE: Yes.

19 QUESTION: There seems to be some dispute about
20 whether it does that, but you think that's clear?

21 MR. LEVINE: Yes.

22 QUESTION: And if so I presume that it disables
23 him from undertaking representation in that case.

24 MR. LEVINE: That's correct.

25 QUESTION: And in fact, I take it, the same

1 prohibition applies if the law or regulation in question
2 is superseded by another Federal statute, or inconsistent
3 with the ADA, et cetera?

4 MR. LEVINE: That's correct.

5 QUESTION: What --

6 QUESTION: May I ask a question about precisely
7 how that would operate? Let's assume we had an attorney
8 who is funded by Legal Services Corporation and is going
9 to make just the argument that under existing law and
10 regulation the client should receive benefits.

11 That lawyer is joined by another lawyer who is
12 not Legal Services-funded, and that lawyer in the same
13 case, without using any Legal Service funds, urges, and
14 beyond that, the existing law, if it works to deny my
15 client benefits, it's unconstitutional.

16 In other words, I understand your answer so far,
17 that the Legal Services Corporation lawyer cannot present
18 arguments about existing law. Can that lawyer, sticking
19 to what Congress says it will pay for, present that part
20 of the lawsuit while another lawyer not funded by Legal
21 Services argues questions of the consistency of the
22 regulation, of the statute, questions of the compatibility
23 of the statute with the Constitution?

24 MR. LEVINE: I would say no, Your Honor.

25 QUESTION: And what is it in the 504(a)(16) that

1 makes it clear that not only can the Legal Services lawyer
2 herself engage in such representation, but cannot team up
3 with a lawyer who is not under that disability?

4 MR. LEVINE: Your Honor, your hypothetical would
5 have been that counsel would be co-counsel in one case on
6 behalf of an individual seeking to obtain benefits under
7 existing law and seeking to challenge --

8 QUESTION: Making arguments lawyers make all the
9 time.

10 MR. LEVINE: In the alternative.

11 QUESTION: Yes.

12 MR. LEVINE: And the position of -- I think the
13 statute on its face is clear, that a lawyer could not
14 participate in a case in which there was a challenge to an
15 existing Federal or State welfare reform statute.

16 The -- Congress made a determination that it did
17 not want to participate in funding Legal Services for
18 efforts to challenge existing welfare reform statutes, and
19 in the program integrity guidelines that are set up, that
20 have been established pursuant to the statute to assure
21 the independence of an affiliate organization of a Legal
22 Services program, it is stressed in those regulations that
23 it's very important that the Legal Services offices funded
24 by Federal Legal Services be separate and distinct from
25 the other, and it seems to me --

1 QUESTION: Okay, I understand the --

2 MR. LEVINE: -- and it seems to me that the
3 hypothetical that you're suggesting where two lawyers
4 essentially are co-counsel for one client, that the
5 arguments in the alternative offends that statute --

6 QUESTION: Yes, okay, I think you've been very
7 clear on that. You're saying the Legal Services attorney
8 cannot, in any way, shape, or manner, participate in a
9 lawsuit where anybody makes such a claim. It's not just a
10 limitation on use of the funds of Legal Services
11 Corporation, but of the funds -- he just can't
12 participate.

13 MR. LEVINE: That's correct.

14 QUESTION: The other thing I would like just to
15 make clear on what is the factual background, or what are
16 the limits of this 504(a)(16). Could a Legal
17 Service-funded lawyer make the argument, court, you must
18 read the regulation and statute this way, because if you
19 don't, the regulation will be under a statutory cloud, or
20 the statute would be under a constitutional crowd --
21 cloud. In other words, to urge interpretation of the
22 governing statute or regulation to avoid what the Legal
23 Services Corporation lawyer tells the court would be a
24 serious constitutional question?

25 MR. LEVINE: Well, it seems to me at the

1 beginning of the representation of an individual seeking
2 to obtain benefits under existing law, a Legal
3 Services-funded lawyer makes a determination whether he
4 can proceed in the category of case to just seek benefits
5 under the existing law, or whether the arguments that
6 would be made on behalf of his client would be in some
7 prohibited area, and if it's going to be in some
8 prohibited area --

9 QUESTION: Well, I'm -- the question I'm asking
10 is, is it a prohibited area to say, the reason why I'm
11 urging this reading of the existing law is, it would be
12 under a constitutional cloud if you read it any other way?

13 MR. LEVINE: Well, Your Honor, it seems to me
14 that the arguments that a Legal Services lawyer makes to
15 the court on behalf of his client are the permitted
16 arguments under the statute. I don't think a lawyer,
17 unless questioned by the court, ought to be raising with
18 the court a hypothetical argument that would be --

19 QUESTION: Not a hypothetical -- not a
20 hypothetical argument. Very often, lawyers urge, and this
21 Court, and other Federal courts will say they're going to
22 read the statute a certain way to avoid a serious
23 constitutional question. Nothing abstract about it.
24 Brandeis has said it, it's been said many times since,
25 that you read statutes, if possible, to avoid a

1 constitutional question. So I'm asking, is that such an
2 argument within the ball park for Legal Services
3 Corporation?

4 MR. LEVINE: It seems to me, Your Honor, in a
5 colloquy with the court with respect to a particular claim
6 for benefits under existing law, if a Legal Services
7 lawyer is asked questions that get into, if you will --

8 QUESTION: Nothing so shy, just up front in the
9 briefs --

10 MR. LEVINE: Up front, that said -- the lawyer
11 ought to be saying to that court, if Your Honor wants to
12 pursue that line of inquiry, I can answer it here today --

13 QUESTION: It's not a question -- it's not a
14 question by the judge. The lawyer wants to put forward a
15 principle of statutory construction, which is that you
16 avoid interpreting the statute a certain way if it would
17 lead to a serious constitutional issue, and we think it
18 would, says the lawyer. Is that prohibited?

19 MR. LEVINE: It seems to me, Your Honor, that
20 the lawyer can't participate in litigation which is
21 seeking to amend or alter the --

22 QUESTION: We know that.

23 MR. LEVINE: -- statute.

24 QUESTION: We know that.

25 MR. LEVINE: And so --

1 QUESTION: This is a matter of statutory
2 construction --

3 MR. LEVINE: The argument --

4 QUESTION: -- of statutory construction, that
5 you interpret it so as to avoid a serious constitutional
6 question.

7 MR. LEVINE: It seems to me in explaining the
8 argument, you can make the argument that I am making this
9 argument under existing law so that the court doesn't have
10 to reach another argument that I would not be permitted to
11 make.

12 QUESTION: Mr. Levine, how could you possibly
13 represent a client adequately if you believe there is a
14 serious constitutional question if the statute is
15 interpreted a certain way, and you make that argument to
16 the court, but then you don't take the next step, which I
17 have never seen avoided, moreover, if you do interpret it
18 this way, it's unconstitutional?

19 I mean, if he's going to make that argument he
20 has to stay out of the case, doesn't he?

21 MR. LEVINE: Yes.

22 QUESTION: Okay. That's the answer.

23 QUESTION: Then, here's the problem I have.
24 When you say that, or when the policy says that the lawyer
25 can bring the case when it amounts to a claim under

1 existing law, I assumed that that meant law properly
2 interpreted, but now you seem to be saying in response to
3 Justice Scalia that if the only way one can reach in
4 effect a proper interpretation of law is to look at the
5 constitutional problem that would result if you see it any
6 other way than favorably to my client, the lawyer can't
7 make that argument --

8 MR. LEVINE: Well --

9 QUESTION: -- because the lawyer can't go to the
10 point that Justice Scalia just mentioned.

11 MR. LEVINE: It's --

12 QUESTION: And it therefore seems to me that
13 your position is boiling down to saying that existing law
14 means whatever the law is, or only the law, as admitted or
15 stipulated to by the Government.

16 MR. LEVINE: Well, there are --

17 QUESTION: Because the Government is saying,
18 well, we're denying benefits under existing law, and
19 you're saying, if existing law can only be properly
20 understood in relation to the constitutional risks, you
21 can't understand existing law in that way, which virtually
22 limits the right of the Government lawyer even more than I
23 thought he was going to do.

24 MR. LEVINE: Your Honor, the statute permits a
25 Legal Services lawyer to assist a low income person obtain

1 benefits under existing law, and existing law under those
2 circumstances would be what the State welfare reform
3 statute and the regulations provide, and --

4 QUESTION: But we don't know what -- there's a
5 question about what it does provide, and the argument on
6 avoiding constitutional difficulty is an argument about
7 what the law is, what the law should be understood to be,
8 and that argument, based on your answer to Justice Scalia,
9 is an argument that the lawyer apparently cannot make.

10 MR. LEVINE: That lawyer cannot make that
11 argument, and he shouldn't take the case in the first
12 place. The bulk of --

13 QUESTION: So that client has to accept the
14 interpretation of the local welfare office as the law.

15 MR. LEVINE: Oh, no. No, no. That client would
16 go and get another lawyer with the assistance --

17 QUESTION: -- unless he gets outside counsel --

18 MR. LEVINE: -- with the assistance of the Legal
19 Services lawyer. If the Legal Services lawyer here makes
20 a determination that the case that ought to be brought is
21 one that would involve the issues that Justice Scalia has
22 said then the lawyer would say, my -- I can't --

23 QUESTION: Oh, I understand that, but all I'm
24 saying is --

25 MR. LEVINE: -- over --

1 QUESTION: -- if I understand your position,
2 then there is a category of arguments about what the law
3 is, what the law should be understood to be, that the
4 Legal Services lawyer cannot make.

5 MR. LEVINE: That's correct.

6 QUESTION: Yes.

7 MR. LEVINE: The over -- well over --

8 QUESTION: Is that some kind of viewpoint
9 discrimination?

10 MR. LEVINE: No. I mean, it's simply, Congress
11 is deciding to fund certain categories of welfare benefit
12 cases, and not other categories of cases.

13 QUESTION: What about a Legal Services lawyer
14 under this statute making an argument that a regulation
15 issued by the agency is invalid under the statute?

16 MR. LEVINE: That would not be permitted either.
17 That would be in the category of cases where Congress --
18 where Congress has decided that it will not permit
19 challenges to Federal or State welfare reform systems, and
20 the purpose, the purpose for this really makes sense.

21 At the same time that these funding -- that this
22 appropriations bill was enacted in 1996, Congress was
23 enacting the Personal Responsibility and Work Opportunity
24 statute, and in that statute Congress basically moved
25 responsibility for welfare reform from the Federal

1 Government to the State governments and invited the State
2 governments to develop the State welfare reform programs
3 different than had been done previously.

4 And at the same time, in the same Congress,
5 Congress said that at the same time that we are providing
6 this responsibility to the States, we are simply not going
7 to pay Federal Legal Services lawyers to get involved in
8 the litigation involving the mosaic and interplay of the
9 Federal and State welfare reform systems, and it made
10 perfect sense.

11 QUESTION: Thank you, Mr. Levine.

12 Mr. Kneedler, we'll hear from you.

13 ORAL ARGUMENT OF EDWIN S. KNEEDLER

14 ON BEHALF OF PETITIONER UNITED STATES

15 MR. KNEEDLER: Thank you, Mr. Chief Justice, and
16 may it please the Court:

17 As this Court made clear in West v. Sullivan,
18 the Government -- when the Government appropriates funds
19 to establish a Government program it is entitled, within
20 quite broad limits, to define the scope of that program.

21 QUESTION: Are there limits?

22 MR. KNEEDLER: There are limits, and the
23 principal --

24 QUESTION: And what are they?

25 MR. KNEEDLER: The only situation in which this

1 Court has struck down a Government funding restriction on
2 viewpoint grounds was in the Rosenberger case, and in that
3 case, what the Court held is, there the university had
4 made funds available to encourage a broad diversity of
5 private expression and had created what this Court there
6 termed a public forum and reiterated in the NEA case
7 that --

8 QUESTION: Well, in Rosenberger I do think that
9 the Government wasn't paying for the speaker, and here
10 it's paying for the speaker.

11 On the other hand, it seems to me unlike Rust,
12 in that the speech, the message, the communication that's
13 prohibited doesn't contradict the Government's purpose if
14 we say -- and I don't know if we can say, but if we were
15 to say that this was an unlimited forum of some kind, then
16 we have to ask whether or not this restriction is
17 reasonable, and I just don't see how it's reasonable for
18 the Government to restrict the presentation of a case on
19 important legal issues to the third branch.

20 MR. KNEEDLER: Well, Congress did not establish
21 the Legal Services Corporation and the program under it as
22 a public forum. For purposes of forum analysis the
23 question is whether the Legal Services Corporation is a
24 forum. That is the program, because that was the program
25 in the Rosenberger case.

1 It was the precise expression or activity that
2 was funded by, in that case, the university's activities,
3 and it -- what Congress did in the Legal Services Act was
4 to provide for the furnishing of a particular professional
5 service, just like in Rust, the particular professional
6 service that is not the full expression of ideas of the
7 sort that has been covered by this Court's free speech
8 cases, it is a professional service in which there are
9 submissions made to a body, either administrative or
10 judicial body, under structural, procedural and
11 substantive --

12 QUESTION: It does carry down to free speech.
13 It's a petition to the Government.

14 MR. KNEEDLER: It is, but as this Court said in
15 the Walters case and the Yorkline case, the First
16 Amendment really doesn't add anything to what has been the
17 traditional source of constitutional guidance in that
18 area, which has been the Due Process Clause.

19 QUESTION: Well, but it does add something,
20 because given the fact, as Justice Kennedy has just
21 pointed out, given the limitations that this kind of forum
22 involve restrictions on relevance and so on, there still
23 is a speech, a central speech element in what's going on
24 here, and there is a general principle, I think, that when
25 the Government takes action to disfavor speech simply

1 because it disagrees with the Government, you're getting
2 just about to the molten core of the First Amendment.

3 And it would seem to me that because that's what
4 the policy does here, there would be a good reason for us
5 to say, we should not characterize this as simply the
6 Government paying for services. We ought to characterize
7 it as a speech case, because there's something very risky
8 going on when the Government's policy in effect says, you
9 can't make an argument that disagrees with the Government.

10 MR. KNEEDLER: With all respect --

11 QUESTION: So that's what I think is extra here.
12 that's why I think this is not merely a due process case.

13 MR. KNEEDLER: But there are many situations in
14 our legal system in which Congress has enacted laws that
15 favor one litigant over another, one sort of claim over
16 another, the furnishing --

17 QUESTION: This isn't merely favoring. This is
18 saying, in effect, you may not make the argument that the
19 Government is constitutionally wrong.

20 MR. KNEEDLER: No. I think what Congress did
21 here was say that a lawyer may not take on that case to
22 begin with. In other words --

23 QUESTION: Well, yeah. Then the result of that
24 is that the lawyer may take on the case insofar as it does
25 not involve a constitutional challenge, but insofar as it

1 involves or could reasonably involve a challenge to the
2 law as being a constitutional mistake, then the lawyer
3 cannot take on the case, which is another way of saying
4 the lawyer cannot, with the incentive of the Government
5 money, say that, or State money, say that.

6 MR. KNEEDLER: Well, any speech that would
7 happen in a courtroom first of all is not the lawyer's own
8 self-expression. The lawyer is advancing arguments on
9 behalf of a client, and not as a public forum with a free
10 debate. The lawyer is making arguments that have legal
11 consequences.

12 QUESTION: Is the Government the client?

13 MR. KNEEDLER: The Government is not the client,
14 but what the Government is, is, it is the Government that
15 established the program and, as this Court held in Rust,
16 that when the Government establishes a program, it is
17 entitled to encourage certain activities and not others,
18 and --

19 QUESTION: Well, but we said in Forbes, the
20 public television case, that when the Government
21 established its forum you have to give certain discretion
22 to the immediate speaker to preserve the integrity of the
23 message. In that case, the integrity of the message was
24 preserved by excluding certain views. Here, the necessity
25 is the argument, the argument is that the necessity is to

1 add certain speech to preserve the integrity of the
2 message for the forum that's been created.

3 MR. KNEEDLER: In Forbes it is possible to think
4 of what was going on there as a debate, and classically a
5 debate among candidates about political issues. We have
6 never thought in our legal system of a courtroom or
7 lawyers as engaging in a public policy or political
8 debate. They are --

9 QUESTION: Well, the terms of the debate by the
10 lawyer may not be political, but the lawyer's raising of
11 constitutional issues is normally a direct response to
12 what, in fact, is the result of a political debate. So
13 you can't exclude, in effect, the significance of politics
14 from constitutional challenge.

15 MR. KNEEDLER: No, but once the matter has been
16 reduced out of the lobbying or the political sphere into
17 the litigation sphere, we have a set of procedural and
18 substantive rules that have legal consequences. When a
19 complaint is filed in court, the other party must respond
20 and the court will enter a judgment.

21 QUESTION: Well, that's right, but if I may just
22 cut you short a little bit on that, those rules allow for
23 challenges to what are political determinations by the
24 Congress. They allow challenges to political results.

25 MR. KNEEDLER: If I could just go back to the

1 Rust case, what the Court said there, and it is very
2 similar, because it had to do with the furnishing of
3 particular services, and particular types of expression
4 were not permitted under that program.

5 QUESTION: But it was Government expression.

6 MR. KNEEDLER: No, it was -- I -- it was not --

7 QUESTION: The doctors, I thought, were hired to
8 give the Government's message, and only that message, to
9 the people that they counseled.

10 MR. KNEEDLER: I don't think that's a fair
11 characterization of the program in Rust, and in fact the
12 respondents in this case concede that the Government was
13 not the speaker. What the Government was doing was paying
14 for counselors to exercise their professional judgment in
15 their interactions with clients.

16 That did not lead to a one-directional urging
17 for every person who walked in the door to have family
18 planning. It was counseling to help the client come to
19 her own conclusion as to what the result was. It was
20 professional services, professional judgments just like
21 this one is, and what the Court said --

22 QUESTION: May I ask --

23 MR. KNEEDLER: -- some types of services are
24 outside the scope of the program, and that's exactly what
25 Congress said here.

1 QUESTION: Mr. Kneedler, may I ask you a
2 question about -- and you keep bringing up Rust, and it
3 seems to me that whatever else is wrong with this, it
4 fails the line that runs from Speiser v. Randolph. That
5 is, what you're saying is not only can't you use the
6 Government's money to speak the speech, but you can't use
7 your private money to do it, and I thought in all those
8 cases, the lobbying cases, sure, we don't have to pay for
9 your lobbying, but we can't stop you from doing it with
10 your own money.

11 MR. KNEEDLER: If I could make two responses to
12 that. First of all, in Rust itself, the Court recognized
13 that the matching funds that were required under Title X
14 were also subject to the restrictions, and that's in
15 footnote 5 of the Rust decision.

16 But beyond that, what the Legal Services
17 Corporation provided for here is exactly what was provided
18 for in Rust, which was allowing the recipient to set up a
19 separate entity to engage in the activities that could not
20 be engaged in by the recipient itself.

21 The LSC regulations were patterned directly
22 after the regulations in Rust, and --

23 QUESTION: And so the same lawyer could present
24 this -- the argument without any inhibition, using the
25 counterpart organization.

1 MR. KNEEDLER: The -- it would -- the matter
2 would have to be presented by the counterpart
3 organization.

4 Now, if the -- if the lawyer involved was a
5 part-time lawyer with the Legal Services-funded recipient,
6 and worked separately for the other entity, and there was
7 the requisite separation of functions, yes, that lawyer
8 could present the arguments, assuming that the separation
9 requirements were met in the other program.

10 But that -- what the Legal Services Corporation
11 did here is consistent with the Regan decision, with
12 League of Women Voters, and most significantly with Rust,
13 in providing for that private expression. But of course,
14 that's to allow for the recipient's private expression,
15 the association's private expression.

16 Here, I think it's also important to bear in
17 mind that the vast majority of the funds, non-LSC funds
18 that are received, are also public funds, the IOLTA funds,
19 the State funds, so we're not talking about an entity that
20 has a large amount of private funds of the sort a typical
21 private association would have.

22 QUESTION: Well, this would be tagged onto, say,
23 State funds, this restriction, as well as --

24 MR. KNEEDLER: This fund does -- this
25 restriction does apply to State funds.

1 QUESTION: Mr. Kneedler, let me -- would you
2 just clear up one factual thing for me? If, after a
3 lawyer's been working on a case for a month or two, he
4 finds out there's an argument of this kind in the picture,
5 must he withdraw?

6 MR. KNEEDLER: Yes. The statute does it. I
7 would like to reserve the balance of my time, if I may.

8 QUESTION: Very well, Mr. Kneedler. Mr.
9 Neuborne, we'll hear from you.

10 ORAL ARGUMENT OF BURT NEUBORNE

11 ON BEHALF OF THE RESPONDENTS

12 MR. NEUBORNE: Mr. Chief Justice, and may it
13 please the Court:

14 The principal legal issue before the Court this
15 morning is narrow and precisely tailored. May Congress
16 choose to provide Federal subsidies to a broad array of
17 private lawyers in order to commit them to represent poor
18 clients in litigation in a particular area of the law, in
19 this case welfare law, but forbid the subsidized lawyers
20 from using the Federal funds to raise any argument in
21 court which seeks to challenge or amend existing law, for
22 the extraordinary sweep that the Legal Services
23 Corporation has conceded that those words are to be given.

24 In short, may Congress condition a subsidy to a
25 lawyer for the poor on an explicit requirement that the

1 subsidized lawyer argue only in favor of enforcing the
2 legal status quo as that is defined by the last regulation
3 to be issued down the legal chain, and not challenging in
4 any way, by raising its constitutionality, its
5 insufficiency to follow statutes, or its inappropriate
6 construction and creation -- yes, sir.

7 QUESTION: You can put it that way, but you can
8 just as readily put it, may the Government fund
9 representation in cases that raise certain issues and not
10 fund representation in cases that involve other issues.
11 It's not a matter of muzzling someone who's taking on a
12 case. It's a matter of the Government saying, this is the
13 category of cases where we pay for representation. This
14 is another category of cases where we don't pay for
15 representation. We're not muzzling anybody.

16 MR. NEUBORNE: Yes, sir. We have no quarrel
17 with the general principle that the Government has broad
18 power to determine the kinds and categories of cases that
19 it wishes to fund.

20 QUESTION: What's wrong with a category of case
21 that involves welfare recipients, but does not involve a
22 challenge to the constitutionality of the welfare law, or
23 the validity of regulations enacted under the welfare law?
24 What is wrong with that as a category?

25 MR. NEUBORNE: What's wrong with it, Justice

1 Scalia, is that it is overtly too broadbased. When the
2 Government simply merges its idea of category into the
3 notion of whether or not the Government -- a lawyer for
4 the poor is to be permitted to raise an argument that
5 challenges the Government's own viewpoint about what the
6 law should be, the Government has simply taken and
7 broadened a power of categorization but used it to permit
8 the argument of one side of this question and not the
9 argument of another.

10 QUESTION: It doesn't favor one side or the
11 other. It just denies representation in certain
12 categories. It seems to me any category of case is
13 viewpoint-based. It's hard to imagine picking out a
14 category of case that doesn't simply eliminate other
15 categories that have a particular viewpoint.

16 MR. NEUBORNE: With respect, this is a unique
17 restriction. This is the only restriction that I've
18 ever -- or that I believe exists, in which the Government
19 has said that you can represent someone in court, in a
20 particular subject matter area, but you cannot challenge
21 the existing legal status quo.

22 QUESTION: But it hasn't said that. It has
23 said, you can represent someone in court so long as it is
24 a case that does not involve a challenge to this event.

25 MR. NEUBORNE: Yes, but that's simply --

1 QUESTION: There's a big difference.

2 MR. NEUBORNE: Well, with respect, I don't think
3 so, because all it does is impose an unconstitutional
4 provision on the subsidy. What it says to the lawyer and
5 to the client is that it will give you this money. It
6 will give you this money on condition that there is to be
7 no argument raised in this case that challenges the legal
8 status quo.

9 QUESTION: What if the statute said, Mr.
10 Neuborne, that these Legal Service lawyers could represent
11 low income clients seeking welfare benefits, but they --
12 once a case went to court, they could not handle it?

13 MR. NEUBORNE: In other words, a categorical
14 restriction saying no welfare cases.

15 QUESTION: Well, at the administrative level,
16 yes --

17 MR. NEUBORNE: Yes.

18 QUESTION: -- but you --

19 MR. NEUBORNE: That would be --

20 QUESTION: -- we won't fund you going into
21 court.

22 MR. NEUBORNE: That, Chief Justice, would be a
23 very different case. That --

24 QUESTION: What would be your answer to that?

25 MR. NEUBORNE: There is -- it would depend on

1 the motive with which the restriction was imposed. If the
2 motive had been imposed in order to weaken the enforcement
3 to dissipate in legal rights, then it would be
4 viewpoint-discriminatory then. If the motive --

5 QUESTION: Well, why wasn't Rust a situation
6 involving some kind of viewpoint discrimination under your
7 view? I mean, we have to deal with Rust.

8 MR. NEUBORNE: Under the Court's decision in
9 Rust, a fundamental distinction was raised, and if I could
10 compare two cases that the Chief Justice wrote, I think it
11 would demonstrate that.

12 In TR -- in TWR, this Court held that there is
13 substantial power to differentiate among speakers in
14 granting subsidies as long as viewpoint-neutral criteria
15 are used. In Rust, the Court went one step further. The
16 Court then said, where the Government is in fact not -- is
17 in fact a participant in this speech forum -- in other
18 words, where the Government wishes to expound its own
19 message --

20 QUESTION: Well, Mr. Neuborne, Rust doesn't say
21 where the Government wishes to expound its own -- Rust
22 didn't say that the Government is the speaker.

23 MR. NEUBORNE: Well, my understanding, Chief
24 Justice, is that is the way the Court has construed
25 subsequent cases.

1 QUESTION: Well, are you talking about the Rust
2 opinion -- you say you're going to compare two cases which
3 I wrote, one of them being TWR --

4 MR. NEUBORNE: I'm sorry.

5 QUESTION: -- and one being Rust. Did you get
6 out of the Rust opinion?

7 MR. NEUBORNE: That'll teach me to do that.

8 (Laughter.)

9 MR. NEUBORNE: The -- as I read the Rust case,
10 and this is before Rosenberger put the gloss on it that
11 I've attempted to present this morning, but as I
12 originally read the Rust opinion, and as I believe it's
13 fairly read, Rust was a case in which the Government had a
14 substantive program with a particular point of view that
15 it wished to have disseminated and was hiring doctors to
16 disseminate that point of view and not the other point of
17 view, and as long as the Government --

18 QUESTION: Well, maybe here the Government has a
19 welfare program and they believe in it, and they don't
20 want it challenged.

21 MR. NEUBORNE: Well, but that point of view --
22 yes, the only difference here is that the Government does
23 have a Rust speaker in this case. The Government's Rust
24 speaker in this case is the Government's lawyer. That's
25 the Government program that the Government speaks through,

1 through its program. What the Government is attempting to
2 do here --

3 QUESTION: It's not the Government's lawyer,
4 it's the client's lawyer.

5 MR. NEUBORNE: No, what I meant, the Government,
6 the other lawyer in the case --

7 QUESTION: Oh. Oh.

8 MR. NEUBORNE: -- is the speaker that would fall
9 within the Rust parameters. That is a situation where the
10 Government has hired somebody to speak for the Government,
11 to advance a Government message.

12 What the Government is attempting to do here is
13 to commandeer the voice of the other lawyer in the case as
14 well, and this Court has already unequivocally held that a
15 subsidized lawyer for the poor does not act under color of
16 law precisely because the subsidized lawyer doesn't speak
17 for the State, may not be permitted to even think about
18 speaking for the State, because the lawyer's duty is to
19 the client, and to insulate the lawyer from the
20 possibility of being controlled by the State, in the --
21 this Court has held unequivocally that the lawyer doesn't
22 act under color of law. Now, if --

23 QUESTION: Mr. Neuborne, I want to get you to
24 state your first premise, and I think it's this, but if
25 I'm wrong, that's what I want to find out.

1 You've got one principle. To state it crudely,
2 the Government can decide what to pay for and what not to
3 pay for.

4 MR. NEUBORNE: Yes.

5 QUESTION: You've got another principle that
6 says, the Government cannot use its leverage, whether it
7 be by subsidization or otherwise, to engage in viewpoint
8 discrimination.

9 MR. NEUBORNE: Yes, sir.

10 QUESTION: Is your basic principle that whenever
11 a given set of facts could be characterized by either one
12 or the other of those principles, that the First Amendment
13 principle always prevails, that trumps the other one, that
14 there always should be a choice to characterize the issue
15 as a speech issue, not as a mere subsidization issue?

16 MR. NEUBORNE: I'm not sure I understand what --
17 your question, but I'll try to answer it. My principle is
18 this --

19 QUESTION: He's asking you if Rust has to be
20 overruled to decide this case.

21 (Laughter.)

22 MR. NEUBORNE: Thank you, Justice Stevens.

23 QUESTION: Why don't you answer my question?

24 (Laughter.)

25 MR. NEUBORNE: I used to have a fantasy saying I

1 was going to put one of you on hold while I answered this
2 question.

3 (Laughter.)

4 MR. NEUBORNE: The question -- may I answer them
5 in order? Justice Souter's question I think applies where
6 the activity itself that the Government is funding is so
7 permeated with First Amendment overtones, as this Court
8 has noted.

9 I mean, speech in court on behalf of a poor
10 client can be a petition to redress grievances. It is a
11 forum of ideas. Of course it's not a public forum, but
12 it's a specialized forum in which the clash of ideas is
13 crucially important, and in which the Government may never
14 be permitted to put its thumb on the scales of those ideas
15 in an effort to use law to control viewpoint, and the
16 viewpoint here is the viewpoint of legality.

17 As Justice Kennedy pointed out in the
18 Rosenberger opinion, when you exclude an entire
19 perspective from the forum you have skewed that forum
20 forever.

21 QUESTION: But Rosenberger was a definite
22 creation by the Government of a forum, and I really
23 question your analogizing the -- what many people call a
24 forum in court, as the same thing as the Government
25 creating a forum. It really isn't at all.

1 MR. NEUBORNE: It's not necessarily the same
2 thing. The forum in Rosenberger, of course, was the
3 creation of a limited public forum for widespread speech.

4 The forum that we have here is the creation of a
5 funding scheme designed to enhance and permit speech
6 within a court. Now, that's not the same thing as a
7 public forum. Nobody can walk in off the street --

8 QUESTION: So you would concede that it's lawful
9 to prevent the attorney, using Government funds, from
10 engaging in lobbying activities, or writing a Senator
11 saying please change this law to make it more clear?

12 MR. NEUBORNE: Well, unless one could identify a
13 forum in which that would take place. I don't concede
14 that that's unconstitutional -- that that's necessarily
15 constitutional, because if it was done with the intention
16 of making it difficult to provide a particular point of
17 view to the Government, it would raise problems. But for
18 the purposes of the argument this morning, we do have the
19 most discrete forum that you can think of. It is a
20 forum --

21 QUESTION: My next question was going to be, we
22 then have to identify something that looks like a forum
23 and that we can call a limited forum.

24 MR. NEUBORNE: Well, or, as you wrote in
25 Arkansas Public Television, a private forum, because in

1 Arkansas Public Television, which I believe is the most
2 relevant precedent, in Arkansas Public Television, the
3 Court was confronted with a forum that itself had
4 constitutional protection, where the participants in that
5 forum, the public journalists, were themselves entitled to
6 a degree of First Amendment protection.

7 And I think what this Court, as I read Arkansas
8 Public Television, what this Court held is that when the
9 journalists are essentially exercising their own editorial
10 discretion, when they're speaking for themselves, then
11 they're essentially Rust participants, and they're
12 entitled to say what they would, to engage in all sorts of
13 viewpoint determination, and no one has the right, simply
14 because public funds are being used, to claim that there
15 is a command that other types of speech have been
16 determined.

17 QUESTION: I confess to being really confused by
18 this forum discussion. I don't see the creation of any
19 forum here. It seems to me the forums involved are
20 courtrooms that are deciding particular cases. There is
21 not one single forum; there are courtrooms deciding
22 particular cases. And it seems to me the Government has
23 said, you can go into this forum and you can't go into the
24 other forum.

25 MR. NEUBORNE: Yes, but it --

1 QUESTION: It's not a matter of discriminating
2 between speakers in some single forum that the Government
3 has invented.

4 MR. NEUBORNE: With respect, Justice Scalia, I
5 don't think the Government has said -- is saying you can
6 go into this forum and not that forum based on an effort
7 to insulate its complaint from challenge.

8 It is the fact that these are
9 viewpoint-discriminatory criteria that the Government is
10 using to condition access to the forum.

11 QUESTION: Perhaps so, but not conditionally
12 access to a single forum. They're saying you can go into
13 some forums, and you can't go into some other forums.

14 MR. NEUBORNE: Well, you can go into a courtroom
15 as long as you argue in favor of the Government's status
16 quo. You cannot enter the courtroom --

17 QUESTION: That's not so.

18 MR. NEUBORNE: -- if you argue against the
19 Government's status quo.

20 QUESTION: That's not so. You cannot go into
21 the courtroom if certain issues are involved. I don't
22 care what side you're on here.

23 MR. NEUBORNE: No, but --

24 QUESTION: We're not going to fund if certain
25 issues are involved in the case. Now, there are other

1 forums where those issues aren't involved, and you can go
2 into theirs.

3 Now, maybe there's something against that, but
4 it seems to me it doesn't analogize to creating a single
5 forum and then discriminating among speakers in some
6 single forum.

7 MR. NEUBORNE: With respect, Justice Scalia, I
8 don't mean to belabor the point. The forum here is a
9 courtroom. The forum is one of the most traditional
10 places where ideas are exchanged and where individuals
11 petition for redress and speak on important issues.

12 QUESTION: It's not all courtrooms. It's only
13 courtrooms involving certain categories of cases.

14 MR. NEUBORNE: I know, but --

15 QUESTION: Isn't that right?

16 MR. NEUBORNE: Yes, but the --

17 QUESTION: So --

18 MR. NEUBORNE: But the statute defines those
19 courtrooms. What the statute says is, you can speak
20 freely in a forum in which you advance the status quo.
21 You cannot speak freely in a forum in which you do not.
22 Now, whether --

23 QUESTION: We do have in some States, the State
24 of California I know, the rule that an administrative
25 agency cannot question the constitutionality of a statute.

1 MR. NEUBORNE: Yes, but of course that's, one,
2 in an administrative proceeding, it is not in a judicial
3 proceeding, and there's no effort to condition a subsidy
4 on a willingness to either agree or not agree with the
5 Government's status quo.

6 QUESTION: Well, I'm saying it's not unheard of
7 to have forums for the adjudication of legal issues where
8 that forum itself is limited. It's of course --

9 MR. NEUBORNE: Oh, yes.

10 QUESTION: -- not a Federal court.

11 MR. NEUBORNE: Yes.

12 QUESTION: Well, there's also a doctrine from
13 this Court that municipal corporations created by the
14 State can't challenge State regulations.

15 MR. NEUBORNE: Yes, and those are substantive
16 rules of law governing power here, but here what the
17 Government has done is taken a subsidy, a speech subsidy,
18 a crucially important --

19 QUESTION: Suppose that I was worried about the
20 public forum doctrine, not knowing what happens if you
21 start applying it in the way you want, but suppose I
22 accepted your argument -- this is all hypothetical.

23 MR. NEUBORNE: Yes, I mean, could I just --

24 QUESTION: Suppose I accepted your argument --

25 MR. NEUBORNE: -- it's a private forum.

1 QUESTION: Well, whatever kind of a forum.
2 There's a whole speech mechanism there that you're
3 suddenly transposing here, and suppose I nonetheless
4 agreed with you, for hypothetical sake, that this is a
5 very unreasonable thing in respect to a client who may be
6 entitled to money, i.e., property owed by the Government.
7 Well, why wouldn't it be unlawful under the Due Process
8 Clause?

9 MR. NEUBORNE: Well, it would. It would be
10 unlawful under the --

11 QUESTION: All right, so --

12 MR. NEUBORNE: -- Due Process Clause. It would
13 also be unlawful under --

14 QUESTION: -- if it's unlawful under the Due
15 Process Clause, why do we even have to get into this
16 argument?

17 MR. NEUBORNE: We don't. We urged the Due
18 Process Clause below. We would welcome a Due Process
19 Clause decision from the Court.

20 QUESTION: May I suggest one other strand that,
21 I wondered why you didn't pick it up? One could view this
22 as a classic unconstitutional condition case. That is,
23 here we give you a pot of money, like we give you whatever
24 the benefit was in Speiser, but if with your own money
25 you're going to do what we don't want to have heard, then

1 not only are we not going to fund that, but we're going to
2 pull the money, and -- but you didn't explicitly argue
3 that, and I wondered why.

4 MR. NEUBORNE: Well, I was going to answer
5 Justice Breyer along those terms. There is a powerful --
6 entirely apart from viewpoint discrimination, there's a
7 very powerful, really two-pronged unconstitutional
8 conditions argument.

9 The first prong of the unconstitutional
10 conditions argument says that what's happening here is,
11 the Government's conditioning the formation of an
12 attorney-client relationship, not only that, the formation
13 of an attorney-client relationship of great intensity,
14 because it looks forward to actual litigation in court.
15 It is welfare litigation that's being funded here.

16 So that the Government is funding this intense
17 associational relationship, but it is imposing a condition
18 in which you waive the ability to make certain arguments
19 under it. In other words, you can only have --

20 QUESTION: And what constitutional provision
21 does that violate?

22 MR. NEUBORNE: Freedom of association. It's a

23 -- QUESTION: All right, so it's a free speech case
24 anyway.

25 MR. NEUBORNE: Well, it's a First Amendment

1 case, but it doesn't require Justice Breyer's concern
2 about dealing with forum analysis. It is a First
3 Amendment case.

4 The other argument that --

5 QUESTION: Before you get off of
6 unconstitutional conditions, it seems to me you can
7 convert Rust and, indeed, every Government-funding case
8 into an unconstitutional condition case if you're of such
9 a mind.

10 MR. NEUBORNE: Well, I --

11 QUESTION: The Government decides to fund art.
12 Well, you know, as a condition of your getting this money
13 you have to produce art. You can't produce, you know,
14 history or something else. Every funding you could
15 character -- it doesn't seem to me to advance the ball a
16 bit.

17 MR. NEUBORNE: Well, that's a fair critique, but
18 what's different here from, say, an art funding case, or
19 something like that, is here you're funding an intense
20 associational relationship that this Court has already
21 held is entitled to protection against Government
22 manipulation. It's the language, it's the dictum in Rust
23 itself that said, if this were a traditional
24 doctor-patient relationship, if this were a traditional
25 relationship between a university teacher and a student,

1 and I believe certainly a traditional relationship between
2 a lawyer and a client, that the First Amendment guarantees
3 a degree of autonomy to that relationship. The Government
4 cannot, simply because it's paying for the relationship --

5 QUESTION: Well now, Rust did not say that.

6 MR. NEUBORNE: No, it was dictum. It was
7 dictum.

8 QUESTION: Well, it was not only dictum, but it
9 said it might be a different case.

10 MR. NEUBORNE: Yes.

11 QUESTION: It didn't say that the opposite rule
12 would prevail.

13 MR. NEUBORNE: Yes, that's absolutely true, Your
14 Honor. I'm not suggesting that Rust --

15 QUESTION: I thought you were.

16 MR. NEUBORNE: -- demands this. I was simply
17 saying that in Rust you alluded to it in your opinion and
18 said it might be a different case, and I'm suggesting this
19 is that different case.

20 QUESTION: Mr. Neuborne, I don't quite
21 understand your answer to Justice Scalia, because I would
22 have thought you would have said about the art is, sure,
23 the Government doesn't have to buy a painting that it
24 doesn't like.

25 It doesn't have to buy an indecent painting, but

1 it can say to this artist that's painting on Government
2 funds, it's a lovely portrait, but with your -- in your
3 own -- for your own collection, or for your other gallery
4 owner, you can't do indecent art, and that's --

5 MR NEUBORNE: No, I was certainly not -- I
6 certainly didn't intend to suggest that you could
7 condition restrictions on the use of private money based
8 on an art subsidy, and that's the other unconstitutional
9 condition here.

10 QUESTION: Yes.

11 MR. NEUBORNE: The other unconstitutional
12 condition here is, it takes the very substantial -- and I
13 must disagree with the Solicitor General. It takes very
14 substantial private resources.

15 There are State resources, but there are also
16 very substantial private resources donated to Legal
17 Services offices to enable them to provide certain service
18 to the poor. It takes that money, and it essentially
19 says, you can't use that money to advance these arguments
20 unless you set up an enormously expensive, enormously
21 burdensome separate facility from which to carry out the
22 entity, so that it essentially places a huge burden on the
23 use of private money, and it's a burden different from
24 Rust, because the burden in Rust that was justified
25 because it was the Government speaking, and because it was

1 the Government speaking -- I'm sorry, sir.

2 QUESTION: Rust did not say it was the
3 Government speaking.

4 MR. NEUBORNE: No, sir, but I'm trying to
5 distinguish Rust. In Rust, as Justice Kennedy and as the
6 Court has indicated on a number of occasions, there were
7 at least three cases in which Rust has been explained as a
8 Government speech case, not necessarily the Government
9 itself.

10 QUESTION: No. What Rosenberger said, which
11 perhaps you're referring to, is that the Government used
12 private speakers to transmit specific information
13 pertaining to its own program.

14 MR. NEUBORNE: That's what --

15 QUESTION: It didn't say that the Government was
16 the speaker.

17 MR. NEUBORNE: I stand corrected.

18 QUESTION: Even Rosenberger didn't say that.

19 MR. NEUBORNE: That's what I meant. When the
20 Government has a substantive message that it wishes
21 conveyed, and it either uses its own employees or private
22 people to do so, the Government then is essentially acting
23 as a participant in the speech process and can engage in
24 viewpoint discrimination.

25 That is clearly not the case here. Here, no one

1 could argue that a lawyer for the poor is somehow
2 disseminating a Government-approved set of information
3 pursuant to some substantive approach.

4 QUESTION: Unless you say the Government here,
5 acting through Congress, wants everybody to say the
6 welfare laws are fine as written.

7 MR. NEUBORNE: Well, and that's exactly what --

8 QUESTION: That's the message.

9 MR. NEUBORNE: Yes. That's exactly what --

10 QUESTION: And that's kind of close to Rust.

11 MR. NEUBORNE: Well, but it's also kind of close
12 to Barnetti. If -- to Barnett -- that the Government
13 cannot -- West Virginia v. Barnett.

14 The Government simply can't compel everyone to
15 say that the welfare laws are fine as written, and they
16 can't use the sub -- a subsidy to breach that.

17 QUESTION: Well, Barnett was where you
18 required someone to affirmatively say something they
19 didn't believe. I don't see any requirement of that
20 degree here.

21 MR. NEUBORNE: Well, if you're a Legal Services
22 lawyer, you either stay out of the case if there's an
23 important constitutional question, or, if you're going to
24 take the case, you have to take the case on condition that
25 you don't raise certain arguments about the validity of

1 the Government's program. That essentially silences --

2 QUESTION: Oh, I don't think that's an option. I
3 think given professional responsibilities, the only option
4 is the first.

5 MR. NEUBORNE: Well --

6 QUESTION: They cannot take the case.

7 MR. NEUBORNE: The option of not taking the case
8 is very difficult, first because Legal Services clients,
9 or welfare clients don't appear on your doorstep, Justice
10 Scalia, color-coded by argument. When you enter the
11 relationship of attorney-client in these cases, you do so
12 with someone that appears, you have to -- you speak to
13 them, you have to interview them, you have to investigate
14 the case. It is --

15 QUESTION: It may be an unintelligent law, then,
16 but I don't know that that --

17 MR. NEUBORNE: Well, but it --

18 QUESTION: -- has any bearing upon its
19 unconstitutionality.

20 MR. NEUBORNE: If it --

21 QUESTION: It may be a lot of trouble to sort
22 out those cases that the Government wants to subsidize and
23 those cases that it doesn't want to --

24 MR. NEUBORNE: Well --

25 QUESTION: -- maybe it's too much trouble.

1 MR. NEUBORNE: Can I suggest a very bright line,
2 and it may be too bright a line, but the line is this, and
3 I think it's the line that emerges from the Court's cases.

4 When it is a private speaker, speaking on behalf
5 of a private person, and the speech is directed to a
6 forum, in this case a courtroom, which is important for
7 the clash of ideas, the Government may not use viewpoint
8 as a criteria for determining how the funds are going to
9 be used.

10 QUESTION: Suppose I told you that I begin with
11 the premise that the restriction on lawyers lobbying for
12 legislative changes or writing legislators, et cetera, is
13 valid. How could I reach that conclusion and adopt the
14 premise you just suggested to the Court?

15 MR. NEUBORNE: Well, I -- under those
16 circumstances -- you mean the lawyer lobbying on behalf of
17 a client --

18 QUESTION: I want you to assume that that's a
19 valid statute and a valid restriction.

20 MR. NEUBORNE: Yes, and the lawyer can't lobby
21 on behalf of a client as well as on his own -- on behalf
22 of his own beliefs.

23 QUESTION: Could I reach that conclusion and
24 still adopt the premise that you just suggested to the
25 Court?

1 MR. NEUBORNE: Yes, I believe you could. I
2 believe you could first because of the --

3 QUESTION: Then why isn't the Congress a forum,
4 et cetera, or a legitimate place to petition, et cetera?

5 MR. NEUBORNE: Well, it is, and I believe that
6 that would be an unconstitutional statute. But I believe
7 that that statute does not require you to lobby on one
8 side of the issue and not lobby on the other.

9 In other words, if the restriction were written,
10 you can't lobby to change the status quo, but you can
11 lobby to somehow cement the status quo, that would be a
12 viewpoint-based discrimination.

13 QUESTION: But --

14 MR. NEUBORNE: If it is simply a categorical ban
15 on all types of conduct, regardless of whether it is
16 viewpoint-based or not, that's a very different story.

17 QUESTION: But your status quo argument is a
18 very fast, you know, moving target too. You can certainly
19 say that an attorney who goes into court and urges that
20 his client receive a welfare benefit is -- argues to
21 change the status quo. The status quo is that the
22 Government now has the money. He wants to change the
23 status quo, have his client get the money.

24 MR. NEUBORNE: Yes.

25 QUESTION: So it's not just all --

1 MR. NEUBORNE: In fairness, though, it's the
2 legal status quo. It's the legal --

3 QUESTION: Well, yeah, but, sir, that is just a
4 question of how you define the thing.

5 MR. NEUBORNE: Well, but that's what the statute
6 says. The statute says you can't go into court, and you
7 heard today the Legal Services Corporation concede the
8 enormous reach of it. You cannot go into a court and
9 challenge whether or not a particular regulation or
10 statute is or is not a valid regulation or statute. You
11 must take it as written, and apply it as written.

12 That, I suggest to you, is a core
13 viewpoint-based discrimination, and a core interference
14 with what attorneys ordinarily do for clients, and so it
15 is an interference with the autonomous relationship,
16 because it tells the lawyer what arguments the lawyer is
17 allowed to make and what arguments he's not.

18 Now, if --

19 QUESTION: Mr. Neuborne --

20 MR. NEUBORNE: -- it is not the viewpoint --

21 QUESTION: -- suppose during World War II -- I
22 don't know if the Government did this, but suppose it
23 decided to subsidize patriotic films. It wanted to give
24 Hollywood producers money to produce films that would buoy
25 up the spirit of the American people during the war. We

1 don't want Ginger Rogers, we want Humphrey Bogart and
2 Casablanca and all the anti-Nazi --

3 MR. NEUBORNE: Well, Ginger Rogers could be
4 patriotic.

5 QUESTION: Okay. Is that okay?

6 MR. NEUBORNE: It might be, sir, yes.

7 QUESTION: But you can't do Ginger Rogers and
8 Fred Astaire, just Bogart, or you know, other
9 patriotic-type films.

10 MR. NEUBORNE: Well, that's very close to the
11 hypothetical that you used on a number of occasions about
12 the National Endowment for Democracy. We don't claim --
13 it is not our argument that just because you fund the
14 National Endowment on Democracy you have to fund the
15 National Endowment on Totalitarianism.

16 Where the Government sets up a program to
17 express its own views, the Government has broad power to
18 do so, and during the war, to set up a program to help
19 patriotism --

20 QUESTION: It's not expressing its own views. I
21 mean, it's just a particular category of views that it
22 wants to subsidize. These aren't -- it's not writing the
23 movies. It wants patriotic views subsidized.

24 MR. NEWBORN: Well, but with respect, Your
25 Honor, that is precisely the kind of program in which the

1 Government -- it's like Rust. The Government says there
2 are a series of ideas we want to get out there. Those are
3 good ideas, and we're prepared to pay for them, and we are
4 prepared to in a sense subsidize people to speak for us,
5 for the Government. If that's what's happening, then its
6 constitutional.

7 If, on the other hand, what they're doing is
8 subsidizing large numbers of private individuals to speak
9 without creating a Government program -- and the big
10 difference here is *Pope v. Johnson*. *Pope v. Johnson* says
11 you can't think of a subsidized lawyer as someone who is
12 simply parroting the Government's line.

13 QUESTION: Yeah, but why can't the Government
14 say the things we're interested in subsidizing here is,
15 where someone has been denied benefits to which he's
16 entitled under the text, we're not going to get into, you
17 know, whether the regulations are okay, or the statutes
18 are okay. It's just this one thing we want to
19 subsidize.

20 MR. NEWBORN: No, because in order to --

21 QUESTION: Just like we want to subsidize
22 patriotism, we don't want to subsidize Ginger Rogers, we
23 want to subsidize, you know, making -- defending claims
24 under the text of a statute. We just don't want to go
25 beyond that.

1 MR. NEWBORN: Because they're speaking through a
2 person who cannot possibly be thought of as expressing the
3 Government's view, and if what it wishes to do is speak
4 through someone who does not express the Government view,
5 it cannot use viewpoint-based criteria for allocating
6 the subsidies.

7 QUESTION: Well, I don't think Humphrey Bogart
8 would want to be thought of as being a mouthpiece for the
9 Government's view --

10 MR. NEWBORN: Well, he would be.

11 QUESTION: -- or the producer of the case for
12 that matter --

13 MR. NEWBORN: He would be.

14 QUESTION: -- of the movie.

15 MR. NEWBORN: He would be, if he was funded
16 pursuant to a Government program that was designed to
17 foster patriotism during war as part of the Government's
18 propaganda apparatus.

19 Now, he may not like being called that, but
20 that's what he is.

21 QUESTION: Well --

22 MR. NEWBORN: And -- but that's very different
23 from saying they're going to fund a bunch of university
24 professors to conduct some research and then say to the
25 university professors, the only kind of things that you

1 could say are things that support the status quo, not
2 things that don't support the status quo, because the
3 university professors cannot be perceived as speaking for
4 the Government under those circumstances, any more than
5 the lawyer here can be seen as speaking for the
6 Government.

7 The bright line, the test that this Court has
8 set out --

9 QUESTION: Well, it can --

10 MR. NEWBORN: -- is a good test, it works. I'm
11 sorry, Justice O'Connor.

12 QUESTION: I didn't notice your light was on.
13 I'm not going to ask you.

14 MR. NEWBORN: Thank you.

15 The test that this Court has set out is not a
16 perfect test. It's hard to decide whether or not someone
17 speaks for the Government or does not speak for the
18 Government. In Rust, I think the Court got it wrong. The
19 Court treated the doctors as though they were speaking for
20 the Government, which means that the principle with
21 Rust --

22 QUESTION: Thank you. Thank you, Mr. Neuborne.

23 MR. NEUBORNE: Thank you, Your Honor.

24 QUESTION: Mr. Kneedler, you have 5 minutes
25 remaining.

1 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

2 ON BEHALF OF PETITIONER UNITED STATES

3 MR. KNEEDLER: Thank you, Mr. Chief Justice.

4 It's important to bear in mind that what we have
5 here is what type -- is a question concerning what type of
6 professional services is the Government going to pay for
7 under a Government program which is neither a regulation
8 nor is it a funding restriction that affects private
9 expression of the sort that was involved in NEA. It is
10 funding professional services.

11 I also take substantial issue with respondent's
12 claim that all that Rust covers is Government speech. As
13 the Chief Justice pointed out, Rust itself did not say
14 that, and this Court's subsequent cases have not said
15 that.

16 In the Rosenberger case, for example, in
17 addition to the passage the Chief Justice quoted about
18 using private persons to deliver a message pertaining to
19 the Government's own program, on page 630 -- or 834, the
20 Court further said, it does not follow from the Government
21 speaking -- where the Government itself speaks, that it
22 does not follow that viewpoint-based restrictions are
23 proper when the university does not itself speak, or
24 subsidized transmittal of a message that it favors, but
25 instead expends funds to encourage a diversity of views

1 from private speakers.

2 The dichotomy that was created in Rosenberger
3 was one where the Government is subsidizing essentially a
4 forum where the Government gives money to a forum and asks
5 the private speakers to have at it with one another for
6 the benefit of the public at large, which is different
7 from subsidizing a message the Government favors.

8 Here, although the Legal Services lawyer
9 opposing a State agency may not be advancing the
10 Government's speech, the Government has decided that when
11 it comes to a challenge of a State welfare regulation,
12 that is not a message that the Government favors within
13 the meaning of Rust.

14 And again, NEA and the Wisconsin case last term
15 did not suggest that Rust was limited to situations where
16 it is the Government's own speech.

17 One way in which this case raises even less of a
18 First Amendment question than Rust is the fact that in
19 Rust the doctor was not even permitted to advise the
20 client where other services could be obtained. Under this
21 program, the Legal Services lawyer, if he or she
22 identifies a possible challenge to a statute or
23 regulation, may tell the client that, may refer the client
24 to another agency, to a pro bono list.

25 Every LSC recipient is required to have a

1 private attorney involved in the program with a list of
2 attorneys to whom cases may be referred, so there is no
3 gagging of communications at all. Even though there's no
4 attorney-client relationship, the LSC fund recipient can
5 refer the client.

6 Also, in the context of litigation, to the
7 extent the courtroom is a forum, it's a forum that exists
8 independent of the Legal Services Corporation. What the
9 Legal Services Corporation does is decide what sorts of
10 cases are going to be funded, and there isn't enough money
11 to go around. Congress had to decide how those moneys
12 should be allocated. Lawyers do this all the time. Legal
13 Services recipients do this all the time, in terms of
14 setting their own priorities.

15 With respect to issues concerning challenging
16 the Government's position, one need look no further than
17 sovereign immunity on the State level to the Eleventh
18 Amendment to recognize that there are many situations in
19 which the Government may decline to allow challenges in
20 court to its own positions and, by the same token,
21 Congress could certainly choose not to -- could repeal the
22 Equal Access to Justice Act and not provide attorney's
23 fees to people who want to sue the Government, even though
24 it may provide attorney's fees for suits against private
25 parties.

1 And as we point out in our brief, Congress has
2 provided differential standards for the award of
3 attorney's fees, favoring plaintiffs in certain types of
4 cases like environmental cases or civil rights cases, but
5 not favoring the defendants in those cases.

6 As Justice Scalia pointed out, all litigation
7 has two sides, and in one respect could be viewed as
8 viewpoint, but this Court has never analyzed regulations
9 on attorney conduct or the attorney-client relationship in
10 that way.

11 Also, with respect to the argument that this is
12 an anti-Government -- a prohibition against
13 anti-Government speech, this is -- there's not a
14 monolithic Government here. This statute prohibits an LSC
15 recipient from taking on a case where what she would be
16 doing would be challenging a State regulation as being in
17 violation of Federal law.

18 In other words, it would be a situation where
19 the lawyer might even be trying to vindicate, in her view,
20 what Federal law says on the subject, but still the client
21 is not, or the attorney is not permitted to take that on.
22 Congress could reasonably determine in the allocation of
23 scarce resources that that was a better allocation of the
24 resources.

25 CHIEF JUSTICE REHNQUIST: Thank you,

1 Mr. Kneedler. The case is submitted.

2 (Whereupon, at 12:05 p.m., the case in the
3 above-entitled matter was submitted.)

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