08-4917-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL,

Plaintiffs-Appellees,

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, THOMAS R. FRIEDEN, in his official capacity as Director of the U.S. Centers for Disease Control and Prevention, and his successors, KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, and her successors, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, RAJIV SHAH, in his official capacity as Administrator of the United States Agency for International Development, and his successors,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

PLAINTIFFS-APPELLEES OPPOSITION TO DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

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I. PRELIMINARY STATEMENT

Rehearing *en banc* is not warranted because this Court's decision does not conflict with controlling precedent and does not involve any particular question of exceptional importance to the Government.

This Court correctly held that a law requiring organizations involved in the fight against HIV/AIDS to adopt and espouse the government's viewpoint "falls well beyond what the Supreme Court and this Court have upheld as permissible conditions on the receipt of government funds." Maj. Op. 3. It also correctly decided that the District Court did not abuse its discretion in granting a preliminary injunction because a First Amendment challenge to such a law is likely to succeed.

The law at issue is a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act") that compels private non-profit organizations to speak the government's viewpoint by adopting and espousing a policy "explicitly opposing prostitution" (the "Policy Requirement"), as a condition of receiving federal funds to fight HIV/AIDS. 22 U.S.C. § 7631(f). This Court correctly concluded that this "bold combination . . . of a speech-targeted restriction that is both affirmative and quintessentially viewpoint-based" would likely violate the First Amendment. Maj. Op. 26. The Government does not disagree that the Policy Requirement compels recipients of federal funds to adopt and espouse the Government's message, even outside the federal program; nor does it disagree that the Policy Requirement is quintessentially viewpoint-based. Nevertheless, it asks the full body of this Court to rehear the case, claiming that the ruling conflicts with binding precedent and marks the end of Congress's ability to place conditions on the use of public funds. Neither of these overblown claims is true.

First, there is no binding precedent in conflict with this Court's ruling. As the majority explains, and contrary to the government's contention, this case falls far outside the ambit of *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219 (2d Cir. 2006) ("BLS"). Unlike the Policy Requirement here, the restrictions in those cases did not compel funding recipients to adopt and espouse the Government's policy; nor did they leave out grantees based on their point of view.

Second, although the Government decries that the ruling has "handcuff[ed]" Congress's ability to place conditions on the use of public funds, the ruling does no such thing. It simply reaffirmed long held Supreme Court precedent that conditions imposed under the Spending Clause may not unduly abridge other constitutional rights. And it leaves Congress free to impose a wide range of funding conditions that strike the proper balance with fundamental rights, for example, by limiting restrictions to the scope of the government-funded program or to non-expressive conduct as opposed to speech.

Under these circumstances, it cannot be said that the decision upsets the uniformity of this Court's opinions or raises a question of such exceptional importance as to warrant rehearing *en banc*. Fed. R. App. P. 35(a)(1) and (2). The decision does not conflict with any decision of this Court or the Supreme Court. Although it is in some tension with a decision of the D.C. Circuit, that case is readily distinguishable, and in any case, an inter-circuit conflict alone does not compel *en banc* review. *See* Fed. R. App. P. 35, Advisory Committee Notes (1998 Amendments). In addition, the Government has failed to identify any particular question that is so exceptionally important as to warrant *en banc* review. Fed. R. App. P. 35(a)(2). Accordingly, the Government's petition should be denied.

II. STATEMENT OF THE CASE

A. Plaintiffs' Participation in the Leadership Act Program

Plaintiffs are preeminent public health and international development organizations who share and contribute to the government's mission of fighting HIV/AIDS through education, research, prevention, treatment, and care. They seek to be eligible for government funds without being forced to surrender core First Amendment rights central to their missions as non-governmental organizations ("NGOs").

Under the Leadership Act, Plaintiffs receive funds to provide a variety of health and humanitarian services to at-risk populations throughout the world. These services include helping AIDS orphans and vulnerable children, establishing home-based care for people living with HIV/AIDS, and implementing best practices in maternal, child, and newborn health and nutrition. Plaintiffs all receive significant funding from non-governmental sources such as the World Bank, United Nations agencies, and private donors. In the five years since the District Court's first preliminary injunction went into effect for Alliance for Open Society International, Inc. ("AOSI") and Pathfinder International ("Pathfinder"), those organizations, and later Plaintiffs[1] as a whole, have not complied with the Government's Policy Requirement and yet the Government has failed to adduce any evidence (because there is none) that such non-compliance has had any negative effect on the Government.

B. The Policy Requirement

The Policy Requirement states that grantees must "have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. § 7631(f). On its face, the Policy Requirement expressly and purposefully compels speech and discriminates based on viewpoint. It requires

[1] This brief refers to Pathfinder, AOSI, Global Health Council, InterAction, and their members collectively as "Plaintiffs."

grantees to affirmatively speak the Government's viewpoint "explicitly opposing prostitution," by mandating adoption of an entity-wide policy that espouses that viewpoint. The Government's implementing regulations further require that grantees not engage in speech or conduct that the Government deems to be inconsistent with its viewpoint. Because a separate Leadership Act provision, which Plaintiffs do not challenge, already bars the use of government funds "to promote or advocate the legalization or practice of prostitution," 22 U.S.C. § 7631(e), the impact of the Policy Requirement falls squarely upon recipients' privately funded speech and conduct. To be sure, a cloud of unconstitutionality has hovered over the Policy Requirement since its 2003 enactment. For the first 16 months of its existence, the Government declined to enforce it against U.S.-based organizations, due to an opinion of the Department of Justice's Office of Legal Counsel ("OLC") that such enforcement would be unconstitutional. Maj. Op. 6.

C. Prior Proceedings

The Government has repeatedly delayed the proceedings since AOSI and Pathfinder commenced this litigation six years ago. The Government now seeks through their Petition to add yet another chapter to the unnecessarily long history of this case, which first went up on appeal in 2006, and which this Court has already heard twice. At the outset of this litigation, the district court preliminarily enjoined enforcement of the Policy Requirement against Plaintiffs in 2006. The Government appealed, and announced for the first time at oral argument that it would be issuing implementing Guidelines that it claimed would cure any constitutional problems. *AOSI v. USAID*, 254 Fed. Appx. 843, 846 (2d Cir. 2007). After the Guidelines issued, the panel remanded the case for consideration in light of the new Guidelines. *Id.*

In 2008, the District Court ruled that the new Guidelines did not cure the Policy Requirement's defects because, even with the Guidelines, the Policy Requirement continued to compel speech and discriminate based on viewpoint.[2] The Government appealed.

In July 2009, following the Government's appeal and on the eve of the deadline for Plaintiffs' brief to this Court, the Government announced that it intended to amend the Guidelines. The Government temporarily withdrew its appeal, and then reinstated it six months later. In that appeal, this Court considered the amended Guidelines, which had made only non-material modifications to the previous versions. The final Guidelines still require Plaintiffs to agree that they are opposed to prostitution in any grant agreement. 45 C.F.R. § 89.1.

D. This Court's Decision

This Court held that the Policy Requirement violates the First Amendment by compelling funding recipients to adopt a policy and espouse the government's viewpoint as a condition of receiving federal funding. Maj. Op. 32. Relying on a line of cases in which the Supreme Court struck down compelled speech requirements and on this Court's prior invalidation of a viewpoint discriminatory spending condition in *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757 (2d Cir. 1999) ("*Velazquez I*"), the panel here held that heightened First Amendment scrutiny was warranted. Maj. Op. 23-26 (citing *Wooley v. Maynard*, 430 U.S. 705, 714-717 (1977); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958);[3] *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633, 642 (1943)).

This Court rejected the Government's interpretation of *Rust v. Sullivan*, 500 U.S. 173 (1991), which, if the Government were correct, would essentially eliminate the doctrine of

[2] The District Court also extended preliminary injunctive relief to InterAction and the Global Health Council, two membership associations that sought to join the case to protect their members.

[3] As is the case here, the loyalty oath struck down in *Speiser* was not a direct regulation of speech but rather a condition on the receipt of government funds, in that case, a tax exemption. The Supreme Court has since reaffirmed that tax exemptions and grants are indistinguishable for purposes of unconstitutional conditions analysis. *See Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983).

unconstitutional conditions and give the Government carte blanche to compel speech and engage in viewpoint discrimination as part of any federally funded program. This Court, however, disagreed with the Government's grandiose interpretation of *Rust*, holding instead that the Policy Requirement here goes "well beyond" the limitations on abortion-related speech upheld in *Rust*, which merely prohibited doctors and others from giving abortion-related advice to patients receiving federally funded family planning services, but did not compel them to stake out a position on abortion. Maj. Op. 28. Moreover, pointing to the Leadership Act's exemption of two high-profile organizations that have advocated for decriminalizing prostitution, the panel rejected the argument that anti-prostitution policy statements are "integral" to the HIV/AIDS program, and concluded instead that the central purpose of the Leadership Act is to combat HIV/AIDS, tuberculosis, and malaria. Maj. Op. 29-30.

The Court also rejected the Government's assertion that the constitutional burdens of viewpoint-discriminatory compelled speech were cured by implementing guidelines that permit funding recipients to set up physically and financially separate affiliates. "It simply does not make sense to conceive of the Guidelines here as somehow addressing the Policy Requirement's affirmative speech requirement by affording an outlet to engage in privately funded silence; in other words, by providing an outlet to do nothing at all." Maj. Op. 32.

E. The Dissent

Judge Straub dissented because, in his view, the Policy Requirement is "not subject to heightened scrutiny, does not compel speech, and does not violate the First Amendment." Diss. Op. 44. He wrote that this case should be governed by *Rust* because both the Leadership Act and the Title X family planning program at issue in *Rust* are programs designed to convey a government message and not to facilitate private speech. According to Judge Straub, *Rust* and its progeny allow the government to engage in viewpoint discrimination when designing such a

spending program, unless that spending program is designed to encourage a range of views from private speakers or facilitate private speech. Diss. Op. 39. Whereas the majority concluded that the Policy Requirement extends beyond the abortion restrictions in *Rust* because it compels speech, the dissent concluded that the Policy Requirement does not compel speech because Plaintiffs are not required to take the funds and because the Guidelines permit Plaintiffs to set up wholly separate entities to receive government funds. Diss. Op. 26-33. Moreover, the dissent rejected the majority's view that the affiliate regime could not cure compelled speech. Diss. Op. 32-33.

III. ARGUMENT

It is a "well-established principle that *en banc* courts are the exception, not the rule." *Watson v. Geren*, 587 F.3d 156, 158 (2d Cir. 2009) (Pooler, Katzmann, Parker, Wesley, Hall, *JJ.*, concurring *per curiam* in denial of rehearing *en banc*) (internal quotation marks and alterations omitted). *En banc* review "is not favored and ordinarily will not be ordered unless: (1) [it] is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Here, the Government has neither demonstrated that the panel's decision threatens the uniformity of this Court's decisions nor has it demonstrated that the importance alone of any particular question requires *en banc* rehearing. Accordingly, *en banc* review should be denied.

A. En Banc Review is Not Warranted Because the Panel Decision Does Not Conflict with Controlling Precedent

The Government asserts that *en banc* review is warranted because the panel applied heightened scrutiny to the Policy Requirement. However, the Government is unable to point to any controlling precedent that compels a standard other than heightened scrutiny for a viewpoint-

discriminatory First Amendment restriction that also compels speech in the context of government spending.

The Government's case for *en banc* review rests heavily upon *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2006) ("*BLS*"). But *BLS* did not involve viewpoint discrimination and has nothing to say about compelled speech. Indeed, *BLS* involved a set of funding restrictions that this Court held to be viewpoint *neutral*. *See Velazquez v. Legal Servs. Corp.*, 164 F.3d 757 (2d Cir. 1999) ("*Velazquez I*). In *BLS*, federally funded legal aid programs were prohibited from bringing class actions, soliciting clients, and receiving attorneys' fee awards. *Id.* at 222. In contrast to the Plaintiffs in the instant case, the legal aid programs in *BLS* were not required to affirmatively state their position on a contested issue – such as by adopting a policy explicitly opposing the use of class actions by indigent plaintiffs, for example; nor were they required to adopt a particular viewpoint – such as being opposed to class action litigation. Thus, try as the Government might to bring this case within the *BLS* ambit, *BLS* simply does not control.

Moreover, to the extent *BLS* is relevant, it buttresses this Court's decision. First, *BLS* ought to be read in conjunction with *Velazquez I*, in which this Circuit applied strict scrutiny to, and struck down, a viewpoint discriminatory LSC restriction barring federally funded civil legal aid lawyers from arguing that welfare reform laws were unconstitutional. *Velazquez I*, 164 F.3d at 771-72 (noting that the law at issue was "viewpoint discrimination subject to strict First Amendment Scrutiny," as it "muzzle[d] grant recipients from expressing any and all forbidden arguments"). The court struck down the restriction there even though there was an ostensible opportunity to engage in forbidden speech through affiliates, as Defendants' Guidelines purportedly provide.

Second, in *BLS*, this Court reiterated the need for "closer attention" or "heightened scrutiny" when faced with "speech on the 'highest rung' of First Amendment values," for example, speech expressing views on "public issues," "critici[zing] government," or "advocat[ing] change in government policy." *BLS*, 462 F.3d at 230; *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values") (internal quotation marks excluded). That is precisely the sort of speech the Policy Requirement targets here. *See* Maj. Op. 26 (Policy Requirement targets views "concerning prostitution in the context of the international HIV/AIDS-prevention effort, a subject of international debate" and a "matter[] of public concern").

The Government's claim that the Panel decision conflicts with *Rust* is no more successful. *Rust* permitted the government to fund one activity and not another with its money. 500 U.S. at 193 (The "[government] has merely chosen to fund one activity to the exclusion of another."). But, *Rust* drew a critical distinction between the government-funded *program*, which prohibited abortion-related speech, and *the grantee*, which did not have to hold a particular position regarding abortion. *Id.* at 196. Moreover, as the Court pointedly noted, unlike here, the challenged regulations in *Rust* did not involve compelled speech. *Id.* at 200 (stating that the regulations did not *"require[] a doctor to represent as his own any opinion that he does not in fact hold,"* they permitted staff to remain "silen[t] with regard to abortion," and they provided that if asked about abortion, staff were "free to make clear that advice regarding abortion is simply beyond the scope of the program.") (emphasis added). Had Title X recipients been forced to state that they opposed abortion, *Rust* would have been a very different case with a very different outcome. As this Court said in *Velazquez I* when it rejected the very same

interpretation of *Rust* that the Government is advancing here: "[W]e think it inconceivable that the Supreme Court that approved the *Rust* regulation would have intended its language to authorize grants funding support for, but barring criticism of, governmental policy." 164 F.3d at 771.

The Government also argues that if an alternative channel cures a negative speech restriction, so too should it cure a requirement that compels speech. Pet. 9. But the case the Government cites in support of this argument, *Riley v Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988), has nothing to say about alternative channels.[4] In fact, no case holds that providing an alternative channel cures the unconstitutional burdens imposed by a policy compelling speech. While in some circumstances Congress may burden the First Amendment rights of funding recipients if it leaves them with adequate alternatives, *see, e.g.*, *BLS*, 462 F.3d at 231, this Court and the Supreme Court have never applied the alternative channel rule to a scenario where, as here, Congress has affirmatively compelled speech supporting a particular view. Therefore, this Court's holding that the affiliate regulations did not cure the compelled speech problem cannot be said to depart from precedent.

The Government makes two additional arguments that fare no better. First, the Government relies on the bald, unsupported assertion that "[t]he most effective way to ensure recipients [adhere to a funding program] *may be* to require them to state—affirmatively—that they in fact adhere to the program's fundamental goals." Pet. 10 (emphasis added). There is no support in the record for such speculation, and even if there were, the argument is nonetheless

[4] It is also worth noting that *Riley* applied "exacting scrutiny" to a North Carolina regulation that effectively compelled speech. *See Riley*, 487 U.S. 795-798. Moreover, as Judge Sack has recently observed, the language in *Riley* requiring compelled speech to be treated with the same level of constitutional protection as a prohibition on speech does not "imply the converse conclusion that compelled speech can never receive *more* solicitude than compelled silence." *Jackler v. Byrne*, -- F.3d ----, 2011 WL 2937279 *18 (2d Cir. July 22, 2011) (Sack, *J.*, concurring).

irrelevant because it says nothing about whether *en banc* review is necessary to secure uniformity of the court's decisions. No decision of this Court has ever held that the Government may require grantees to adopt and speak a certain viewpoint, and the Supreme Court has strongly suggested in *dicta* that it would reject any such mandate. *See, e.g.*, *Rumsfeld v. Forum for Academic & Int'l Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 59-62 (2006) (upholding a funding condition mandating that universities permit military recruiters on campus, but only because the mandate regulated conduct (not speech), and because nothing in the case "approach[ed] a Government-mandated pledge or motto that the school must endorse" and it even allowed schools to voice their disagreement with the recruitment policy).

Second, the Government argues that the panel decision conflicts with *DKT*. Although this Court's decision is in some tension with the D.C. Circuit's decision in *DKT*, the panel in that case barely even addressed the compelled speech issue that was the core of this Court's decision.[5] Moreover, the D.C. Circuit decided *DKT* before the Guidelines were issued, so the factual situation there was quite different. The D.C. Circuit did not have the benefit of knowing with any certainty how the Government would ultimately choose to interpret and implement the Policy Requirement. Nor did it have the benefit – as this Court did – of remanding the case to the lower court for appropriate reconsideration in light of the Guidelines. As it turned out, the Guidelines impose on grantees wishing to establish affiliates burdens that are appreciably higher than the D.C. Circuit could have known. *See AOSI v. USAID*, 570 F. Supp. 2d 533, 548 (S.D.N.Y. 2008) ("[T]he D.C. Circuit was not aware of the restrictions placed on recipients, such that compliance with the Guidelines is not as straightforward as the simple organization of a

[5] *See, e.g.*, Maj. Op. 16 ("We conclude that Plaintiffs have demonstrated a likelihood of success on the merits because the Policy Requirement likely violates the First Amendment by impermissibly compelling Plaintiffs to espouse the government's viewpoint on prostitution."); *id.* at 32-33 ("Because the Policy Requirement compels grantees to espouse the government's position on a controversial issue, the district court did not abuse its discretion in preliminarily enjoining its enforcement pending a trial on the merits.").

subsidiary, which normally does not entail the separations imposed by the Guidelines."). In light of these significant differences, it cannot be said that this Court's holding *conflicts* with the D.C. Circuit's holding in *DKT*, much less that a lone, distinguishable decision of another circuit somehow compels rehearing *en banc*. *See* Fed. R. App. P. 35(b)(1)(B).

Even if the decision here were in conflict with *DKT*, that would not "requir[e]" rehearing, as the Government suggests. PFR 3. To the contrary, the commentary to Rule 35 makes clear that "[i]t [was] not . . . the Committee's intent to make the granting of a . . . rehearing *en banc* mandatory whenever there is an intercircuit conflict." *See* Fed. R. App. P. 35, Advisory Committee Notes (1998 Amendments). Indeed, the Second Circuit has declined to rehear *en banc* a number of decisions that allegedly conflicted with those of other circuits.[6]

B. The Government Has Failed To Identify A Question of Such Exceptional Importance As To Warrant Rehearing *En Banc*

Although this case involves questions of importance to Plaintiffs, the Government has failed to identify any particular question of such exceptional importance as to warrant rehearing *en banc*. The Government first argues that "[t]he invalidation of an Act of Congress is itself a 'question of exceptional importance.'" PFR 1. But, the Leadership Act and the Policy Requirement have not been invalidated; they remain in effect. This Court merely affirmed the district court's grant of a preliminary injunction as to the instant Plaintiffs, finding that the Plaintiffs are *likely* to succeed on the merits. The government concedes, as it must, that no final decision has been made regarding the validity of the statute. *See* PFR 8 ("the decision, affirming

[6] *See, e.g., Amnesty Int'l USA v. Clapper*, -- F.3d ----, 2011 WL 4381737, *9 (2d Cir. Sept. 21, 2011) (order denying rehearing en banc despite dissenters' belief that the panel decision "creates a split between this court and our sister circuits") (Raggi, Jacobs, Cabranes, Wesley, Livingston, *JJ.*, dissenting from order); *id.* at *1 (Lynch, *J.*, concurring in order, despite acknowledging that panel decision "may be in some tension with opinions from other circuits"); *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379, 380 (2d Cir. 2011) (order denying rehearing *en banc* despite dissenters' belief that panel decision "generates a circuit split") (Lynch, Pooler, Katzmann, Chin, *JJ.*, dissenting from order); *Brown v. City of Oneonta, New York*, 235 F.3d 769, 781, n.1 (2d Cir. 2000) (order denying rehearing *en banc* despite dissenters' belief that the panel opinion "is in direct conflict with the law of two circuits") (Calabresi, Straub, Parker, Sotomayor, *JJ.*, dissenting from order); *Koehler v. Bank of Bermuda*, 229 F.3d 187, 187 (2d Cir. 2000) (order denying rehearing *en banc* despite dissenters' belief that the panel decision "is squarely in conflict with that of the other circuit courts") (Sotomayor, Leval, *JJ.*, dissenting from order).

a preliminary injunction, strictly speaking only rules § 7631(f) is likely to be unconstitutional"). Further, the only relief that Plaintiffs have requested in this case is that enforcement of the Policy Requirement be enjoined against themselves. The invalidation of the Leadership Act or Policy Requirement, therefore, will not result from this litigation, even after the merits stage. Further, Plaintiffs' prayer for relief does not request that the Policy Requirement or the Leadership Act be struck down. Rather, it seeks only the very narrow remedy of a permanent injunction against enforcement as to these particular Plaintiffs. Therefore, there is no merit to the Government's argument that this case involves the "invalidation" of a federal statute and thus presents a question of "exceptional importance."

The Government also suggests that this Court's application of heightened scrutiny is important because it conflicts with *BLS* and "handcuffs" Congress's ability to place conditions on the use of public funds. PFR 8. As discussed in Section III. A., *supra*, the panel decision does not conflict with *BLS*. Nor does it "handcuff" Congress. This Court did not tell Congress that it can no longer place conditions on the use of public funds.[7] This Court merely recognized that Congress's ability to place conditions on the use of those funds has reasonable limits where the First Amendment is concerned, and that no controlling precedent holds that Congress is within those limits when it compels recipients to voice the government's viewpoint on a matter of public concern. In this respect, this Court's decision is consistent with well-established Spending Clause authority, which necessarily and properly checks Congress' misuse of its considerable spending power to encroach on fundamental rights enshrined in the Constitution. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987) (finding that Congressional

[7] *See, e.g.*, Maj. Op. 29 ("We do not mean to imply that the government may never require affirmative, viewpoint-specific speech as a condition of participating in a federal benefit program.").

conditions imposed pursuant to the Spending Clause can properly be struck down if they violate "other constitutional provisions").

IV. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that *en banc* review be denied.

Respectfully submitted,

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October 13, 2011

CERTIFICATE OF SERVICE

I certify that on this 13th day of October, 2011, I caused a pdf version and two paper copies of the foregoing Brief for Plaintiffs-Appellees to be sent via electronic mail and overnight delivery service to:

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