No. 12-10

In the Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,

Respondents.

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

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AND THE CHRISTIAN LEGAL SOCIETY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ANDREW L. FREY
MICHAEL RAYFIELD
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

EUGENE VOLOKH
Counsel of Record
MAYER BROWN LLP
350 S. Grand Ave. #2500
Los Angeles, CA 90071
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amici Curiae

QUESTION PRESENTED

Whether it is consistent with the First Amendment for the government to condition the receipt of a grant on the recipient's agreement to make an affirmative policy statement that may be antithetical to the recipient's beliefs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Sources

INTEREST OF THE *AMICI CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm dedicated to the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund has frequently advocated both as counsel and as *amicus curiae* for equal access to government funding and facilities for religious organizations under the Free Speech Clause and the Religion Clauses. *See*, *e.g.*, *Bronx Household of Faith* v. *Bd. of Ed. of the City of New York*, No. 12-2730 (2d. Cir., argued Nov. 19, 2012; *amicus curiae* supporting Free Exercise challenge to City regulation denying equal access to public school buildings);[2] *ACLU of Mass.* v. *United States Conf. of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013) (*amicus curiae* opposing Establishment Clause challenge to government contract with Catholic bishops' conference to provide rehabilitation services to victims of sex trafficking).

The Becket Fund is concerned that adopting the government's theory in this case—under which the

---

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have consented to this filing.

[2] Brief available at http://www.becketfund.org/wp-content/uploads/2012/10/Bronx-2d-Cir-amicus-vFINAL-timestamped.pdf.

spending power would confer virtually unlimited authority to compel grant recipients to endorse the government's policy views—would give federal, state, and local governments unprecedented and unwarranted control over religious groups' expression of their own beliefs.

The Christian Legal Society ("CLS") has long believed that the pluralism that is essential to a free society prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their speech. For that reason, CLS was instrumental in passage of the Equal Access Act of 1984, which protects the right of all students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. 20 U.S.C. §§ 4071-4074 (2011); *see* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement). CLS is proud of its 35 years of work to protect free speech and expressive association for all citizens.

CLS is an association of Christian attorneys, law students, and law professors, with student chapters at public and private law schools. CLS law student chapters typically are small groups of students who meet for weekly prayer, Bible study, and worship at a time and place convenient to the students and who welcome all students who care to attend. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of traditional Christian belief.

CLS's legal advocacy arm, the Center for Law and Religious Freedom, works to protect religious beliefs and practices, as well as to preserve the autonomy of religion and religious organizations from the govern-

ment. The Center strives to preserve religious freedom in order that men and women remain free to do God's will. As the Nation's founding instrument acknowledges as a "self-evident truth," all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights are religious liberty and freedom of speech.

While the particular government-mandated policy at issue in this case would uphold religious and moral values that CLS supports, the legal principle that the government seeks to establish would allow federal, state, and local governments to coerce religious organizations to adopt policies completely contrary to their religious beliefs as the price for their participation in civil society. The consequent damage to free speech, religious liberty, and social pluralism would be immense.

SUMMARY OF ARGUMENT

This case is about far more than prostitution and HIV/AIDS. The expansion of the modern regulatory state has increasingly led to financial involvement of the government with private organizations—including churches, religious universities, and religious charities—in ways that potentially give the government power over those organizations.[3] Tax exemptions, which have been treated by this Court as tantamount to the provision of funds, are a prominent example. Student loans and grants, which are likewise treated as equivalent to direct payments to the uni-

---

[3] We use the generic term "church" in this brief to refer to houses of worship of all different religious traditions.

versity, are another. Numerous other examples exist, including the direct grants at issue here.

Under the government's theory in this case, federal, state, and local governments may use these kinds of government funding programs as leverage to pressure organizations into affirmatively expressing particular government-prescribed views as the organizations' own. For instance, if a government wants to pressure such groups to avow that they support or oppose contraception, pacifism, abortion, the death penalty, assisted suicide, or whatever other policy those then in control of the government choose, then that government would be free to do so.

For the reasons discussed below, that cannot be right. Such a "get with the program" power would let the government badly distort the marketplace of ideas by strengthening groups that toe the government line and financially crippling groups that refuse to say what the government demands. And such a power to coerce ideological conformity would unacceptably burden religious groups' rights to speak or not speak in accordance with the truth as they see it.[4] "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Va. Bd. of Ed.* v. *Bar-*

---

[4] Because of their exclusive focus on religious liberty, in this brief *amici* address the ill effects of the government's proposed rule on religious organizations. They note, however, that many, and perhaps most, non-religious organizations with moral or conscientious commitments will suffer identical problems under the rule proposed by the government.

nette, 319 U.S. 624, 642 (1943). Likewise, no official should be permitted to acquire such a power by using the government's vast resources as a tool for control of groups that participate in government programs.

Contrary to the government's view, a government's recognized power to *limit* speech within the programs that it funds cannot justify a power to *compel* speech as a condition of government funding. Government programs that limit what can be said within the programs typically leave participants ample alternative means of exercising their rights to speak as they see fit. The participants just have to engage in their preferred speech outside those programs.

But when the government compels an organization to say things—even if only through an affiliate—as a condition of participating in a program, then the organization cannot avoid saying those things. It thus has no alternative means of exercising its Free Speech Clause right *not* to speak while still participating in the program.

Moreover, once an organization is pressured to state a policy with which it does not agree, even through an affiliate, its ability to express contrary views outside the program will be undermined. Saying one thing in the program and the opposite outside will make the organization appear at best equivocal and at worst hypocritical. Thus, by compelling the endorsement of a government policy as a condition of accessing government-controlled funds, the government will have the power to effectively restrict the program participant's speech even outside the government program—a power this Court's cases have rightly rejected.

ARGUMENT

I. The government's proposed rule would give it startling power over religious and educational institutions, and thus badly damage the marketplace of ideas

Federal, state, and local governments spend over 35% of the nation's Gross Domestic Product every year,[5] with much of it flowing directly or indirectly through nearly all American churches, religious universities, and other nonprofits founded around deeply felt moral beliefs. Under the government's theory in this case, a government could use these funds as leverage to pressure any such group into pledging allegiance to the government's preferred policies.

Take, for example, the income and property tax exemptions for nonprofits (including religious nonprofits, which will be the main focus of this brief) and the income tax deduction for charitable contributions. This Court has held that these tax provisions are "a form of subsidy that is administered through the tax system":

> A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of sub-

---

[5] *See* Office of Management & Budget, *Historical Tables* tbls. 1.2 & 15.2 (2011 data), http://www.whitehouse.gov/omb/budget/Historicals.

> sidy to nonprofit civic welfare organizations * * *.

Regan v. *Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983) (footnote omitted);[6] *see also Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 n.29 (1983) (categorizing a tax exemption as involving "public support" for the exempt institution). This means that, under the government's theory, Congress could require that all tax-exempt nonprofits adopt a policy explicitly supporting, say, abortion or contraception. After all, the government could argue, much as it does in this case, that,

> Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives. Private entities that do not wish to comply with those conditions may avoid them simply by declining federal funds. * * * [The tax exempt entities] have been given a voluntary choice: whether to assist in carrying out a comprehensive governmental [charitable assistance] strategy that, among other things, aims to [reduce the need for public services by preventing unplanned births]. Offering private entities that type of choice does not violate the First Amendment.

Gov't Br. 11. And the government could argue, as it also does in this case, that such a "funding condition" is not "aimed at suppressing dangerous ideas or dis-

---

[6] *Amici* question this understanding of the charitable deduction, but for purposes of this brief what matters is that this Court has endorsed this understanding.

favored viewpoints" and thus is not "subject to heightened scrutiny." *Id.* at 13. The condition requiring express support for contraception or abortion would, after all, just "enlist private entities in communicating a governmental message." *Id.*

Governments also distribute funds in more direct ways, such as through government-subsidized student grants and loans. This Court has held that there is no "substantive difference between direct institutional assistance and aid received by a school through its students." *See Grove City College* v. *Bell*, 465 U.S. 555, 564 (1984); *id.* at 560 n.6, 561 n.8, 568 (noting that loans were treated the same as grants by the Department of Education for Title IX purposes).

Say then that Congress amends Title VI of the Civil Rights Act to bar discrimination based on sexual orientation by universities that indirectly receive student loan funds or GI Bill funds. Under the government's theory, Congress could then require that all universities receiving such funds publicly express support for the equal moral propriety of homosexual conduct and heterosexual conduct. There too, after all, the government could say that the universities "have been given a voluntary choice: whether to assist in carrying out a comprehensive governmental [educational] strategy that, among other things, aims to [reduce hostility towards homosexuals]." Gov't Br. 11.

Likewise, under the government's theory, research grants could be conditioned on the grantee's willingness to adopt policies favored by the grant-giving government. If the federal government wants to influence public attitudes about assisted suicide, it could require that medical research grant recipients

adopt a policy supporting the practice, under the theory that such mandated advocacy is part of a "comprehensive governmental [health care] strategy." *Id.* If a state government wants to influence public attitudes about the death penalty, it could require that recipients of state research grants investigating crime control strategies adopt a policy supporting the death penalty.

And these conditions would be permissible regardless of whether the grant was itself focused on research into assisted suicide or the death penalty. In any of these situations, the grant could be seen as simply "designed * * * to enlist private entities in communicating a governmental message," so long as the message bears some relation to the government's "comprehensive" strategy. *Id.* at 11, 13.

Indeed, the government's brief states that it does not matter whether "only some recipients" of government grants will "implement[] federally funded projects" that are themselves focused on the topics covered by the policy (in this hypothetical, assisted suicide or the death penalty). *Id.* at 27. It is enough, according to the government, that the grant-making agency "saw a value in having all recipients, whatever their particular focus, have [such] a policy" and "reasonably believed that if all program participants] adopt [such] policies," "they will together advance [the government's] goal with consistency, force, and scope." *Id.* at 27-28. Under the government's reasoning, then, every participant in virtually any government program could be required to expressly state its endorsement of whatever viewpoints the government prescribes.

The power to impose such conditions is inconsistent with the Free Speech Clause because, among other things, it would badly damage the marketplace of ideas. Churches, religious universities, religious social services institutions, and other similar organizations are crucial components of civil society. They are key institutional counterweights to the government's tremendous power to shape citizens' moral or political opinions.

Yet this Court's adoption of the government's view would allow governments to commandeer or stifle these rival voices. The government's assertion that groups that are unwilling to accede to the government's demands could "simply" forgo participating in the government program ignores the actual effect of the power the government seeks to arrogate to itself.

First, many institutions, facing the possibility that they would suddenly be deprived of access to government funding or tax exemptions, may bend to the government's wishes and endorse the government's views. Such endorsement may well represent not the institutions' true views but simply what the government has successfully pressured them to say. To the public, however, it would appear from these endorsements as though many organizations—including ones whose history, expertise, or perspective makes them appear especially credible—sincerely share the government's views, when in reality the apparent diversity of supporting voices is merely a government-induced echo chamber. The government would thus have skewed the marketplace of ideas by making its own policies seem more widely accepted than they actually are. Pluralism would give way to conformity.

Second, many other institutions—especially religious ones—would refuse to bow to the government's threats, though it means giving up equal access to student loan and grant funds, property and income tax exemptions, the tax deductibility of charitable contributions, and more. As a result, some of these institutions may have to close their doors because of the huge competitive advantage the government has given to rivals who either agree with the government-prescribed statement or in any event feel themselves willing to pledge loyalty to it. The dissenting institutions' voices would thus be lost to public debate.

And whatever institutions might survive without equal access to government funding would become smaller and less able to carry out their respective missions. Fewer students would go to universities that do not take student loans. Fewer people would donate to religious charities that do not provide a charitable tax deduction. Even congregants who are committed to donating to their churches might not be able to afford to donate as much without the charitable tax deduction. These institutions' voices, even if not entirely silenced, would therefore become on average much less audible, especially in comparison to the now much louder voice of the government and those who agree with it.

For government officials, this might all seem very good. Institutions that are willing to comply with a government's demands would parrot the government's views and would thrive financially. Institutions that refuse to go along with the government would weaken or disappear. And the government's power, already vastly greater than it has been in past eras of American life, would become greater still. Yet for the nation, the results would be dire.

To be sure, as the majority below noted, the government is entitled to hire groups specifically for the purpose of conveying a particular message. *See* Pet. App. 32a (government can offer funds for speech if "the government's program *is*, in effect, its message"). A public university, for instance, could pay student groups specifically to come up with "Buy War Bonds" posters or "Use Contraceptives" campaigns. In these circumstances, the student group's decision would be much more likely to be truly voluntary, because it would be paid directly (and only) for what it would be asked to say.

But it cannot follow that a public university could insist that all recognized student organizations—even those that seek access to school facilities or financial support only on the same terms as other student organizations—pledge to support the war effort or endorse the propriety of contraception. The university must lack this power even if the university (or the state legislature) thinks that helping protect national security or increasing contraceptive use will advance the university's mission.

The government's power to pay for speech that it wishes to promote should be confined to specific payments for such speech, not turned into an unlimited power to demand that all participants in government programs publicly endorse a government-imposed orthodoxy. Yet that unlimited power is the logical outcome of the government's position here.

II. The power claimed by the government would let it impermissibly penalize organizations for exercising their right not to endorse the government's ideology

The power that the government seeks in this case would do more than skew the marketplace of ideas—it would impermissibly penalize organizations for exercising their First Amendment right not to speak in support of the government's ideology, and also constrict their right to speak as they see fit outside the context of the government program.

The Religion Clauses offer a helpful analogy here. As a plurality of this Court reasoned in *Mitchell* v. *Helms*, this Court's "decisions * * * have prohibited governments from discriminating in the distribution of public benefits based upon religious status." 530 U.S. 793, 828 (2000). See also *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."). Excluding people from government programs because they or their pursuits are religious would thus usually violate the Religion Clauses. By parity of reasoning, it violates the Free Speech Clause to exclude institutions from participating in programs because of their refusal to endorse the government's ideological positions.

Governments, of course, can impose conditions on grant recipients that *restrict* what the recipients can say or do within the government program. *See, e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 192-200 (1991). But the potential influence of such conditions on free ex-

pression is limited, because the speaker can still say what it wishes on its own time and its own dime. *Id.* at 198-99; *Taxation With Representation*, 461 U.S. at 545; *FCC* v. *League of Women Voters of Cal.,* 468 U.S. 364, 400 (1984). Such speakers "are not being denied [access to a program] because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets." *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959).

Many religious institutions can therefore in good conscience participate in various government programs that *limit* what can be said within the programs, because those institutions can still express their views outside the programs. Programs such as those approved in *Rust* and *Taxation With Representation* let organizations participate without compromising their ability to exercise their Free Speech Clause rights through alternative means.

But if the government *compels* an organization to say things—even if only through an affiliate—as a condition of participating in the program, then the organization cannot avoid expressing views that it may consider immoral or false. It has no alternative means to exercise its Free Speech Clause right *not* to speak while still participating in the program.

The government's suggestion (Gov't Br. 14) that objecting organizations create an affiliate cannot help institutions that have a moral objection to the viewpoint that the affiliate is told to express in order to receive the funding. Consider a church that opposes abortion, and a government program that requires that all participants have a policy of endorsing abortion rights. The church can no more participate in the

program through an affiliate than it can directly. The church's religious beliefs bar *any* of its branches from expressing support for abortion.

We expect our religious and educational institutions to operate with integrity—to say only what they actually believe. Indeed, the law requires that religious beliefs be sincere to garner First Amendment protection. *See*, *e.g.*, *Frazee* v. *Illinois Dept. of Emp't Sec.*, 489 U.S. 829, 833 (1989). An institution can usually maintain its integrity when it must remain silent about some matters within one of its programs, so long as it can speak about such things outside that program. Silence does not imply assent. Yet an institution cannot maintain its integrity when it is pressured to say what it does not believe, even if it says that in only one part of its organization.

And for this reason, a condition that requires program participants to endorse the government's viewpoint effectively strips participants even of their ability to express their true, contrary views outside that program. Any such expression, after all, would brand the organization as a hypocrite for using different legal personas to speak out of both sides of its mouth. Thus, contrary to the government's view, the Leadership Act's "affiliation guidelines" fall far short of "obviat[ing] any conceivable constitutional difficulty." Gov't Br. 14.[7]

---

[7] To the extent the affiliates are sufficiently distinct from one another as to avoid this problem, all the government will have succeeded in doing is creating two entities that both suffer constitutional injury—one that is deprived of access to the government program because of its unwillingness to compromise its

These concerns help explain why, in *Rust*, the majority took pains to stress that "[n]othing in the [regulations] requires a doctor to represent as his own any opinion that he does not in fact hold." 500 U.S. at 200. The government's approach in this case would eviscerate that limitation: it would indeed require program participants to represent as their own—whether through the main organization or a daughter organization—opinions that they do not in fact hold. This power to require dishonesty as a condition of participation in virtually any government program cannot be squared with the Free Speech Clause.

Most religious organizations (and presumably most conscience-based organizations of all sorts) adhere to the view famously urged by Alexander Solzhenitsyn: "Live not by lies"—refuse to endorse in any way those beliefs that you hold to be false.[8] Each person, Solzhenitsyn argued, must resolve never to "write, sign or print in any way a single phrase which in his opinion distorts the truth," never to "take into hand nor raise into the air a poster or slogan which he does not completely accept," and never to "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth." Solzhenitsyn said this to his fellow Russians, but many religious organizations believe that God imposes the same command

---

principles, and a second that sacrifices its right to be free from speech coercion as the price of enjoying the benefits offered by the government.

[8] Alexander Solzhenitsyn, *Live Not by Lies*, WASH. POST, Feb. 18, 1974, at A26, *reprinted at* http://www.washingtonpost.com/wp-dyn/content/article/2008/08/04/AR2008080401822.html.

on them, and presumably many nonbelievers also think that this is what their consciences dictate.

Institutions that resolve to "live not by lies" therefore cannot "cabin the effects of [a requirement to endorse a government policy] to the scope of the federally funded programs at issue" simply by pushing the policy requirement off to an affiliate. Gov't Br. 14, 46. The government's proposal in this case is thus an interference with the Free Speech Clause rights of religious institutions far greater than anything this Court has ever approved.

CONCLUSION

For these reasons, requirements that participants in government programs endorse government-supplied messages should be held to violate the Free Speech Clause. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

ANDREW L. FREY
MICHAEL RAYFIELD
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

EUGENE VOLOKH
Counsel of Record
MAYER BROWN LLP
350 S. Grand Ave.
#2500
Los Angeles, CA 90071
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amici Curiae

APRIL 3, 2013