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

AMICUS CRUIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

SUMMARY OF ARGUMENT

The Policy Requirement of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), 22 U.S.C. § 7631(f), extracts a pledge that prohibition on prostitution is good public policy as the price of securing the government's support to combat diseases. The compulsion of such speech is frontally inconsistent with the fundamental protection of the First Amendment that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that it entirely authored this brief and no party, its counsel, or any other entity but *amicus* and their counsel made a monetary contribution to fund the brief's preparation or submission. This *amicus curiae* brief is filed with the written consent of the parties, copies of which have been filed with the Clerk of Court for the Supreme Court of the United States.

force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). While the Spending Clause authorizes Congress to "condition the receipt of funds" on compliance "with restrictions on the use of those funds" as "the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare[,]'" "[c]onditions that do not . . govern the use of the funds . . . cannot be justified on that basis." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603–04 (2012). The Policy Requirement is not a condition on the proper use of the funds. Indeed, it has no effect on how recipients use the funds because, as Petitioners concede, applicants for funding "are not required to take additional, affirmative measures to certify their compliance with the statutory condition or to publicize their policy to third parties" after the funding is received. *See* Petitioners' Br. at 44.

By the same token, Petitioners' reliance on this Court's decisions upholding disbursements of "public funds to private entities to advance a governmental program or convey a governmental message," Petitioners' Br. at 18, is also misplaced. Given Petitioners' concession that the speech compelled by the Policy Requirement is akin to a whispered sidebar between the government and applicant, the compulsion of such speech cannot be justified as a means of advancing a government program or conveying a government message through a private speaker.

ARGUMENT

I. The Policy Requirement Exceeds Congress's Spending Clause Power

Petitioners are correct that Congress has "broad authority under the Spending Clause to attach conditions to the receipt of federal funds in order to further its policy objectives," Petitioners' Br. at 15, but such conditions must be directed at ensuring the proper use of the funds if they would otherwise be beyond the scope of Congress's enumerated powers. *See Sebelius*, 132 S. Ct. at 2603–04 (holding that the Spending Clause authorizes Congress to "condition the receipt of funds" on compliance "with restrictions on the use of those funds" as "the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare[,]'" but that "[c]onditions that do not . . . govern the use of the funds . . . cannot be justified on that basis").

If the conditions attached to the receipt of federal funds do not pertain to the proper use of the funds, they must be conditions that Congress could permissibly have imposed directly. Accordingly, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), this Court upheld the constitutionality of the Solomon Amendment, which required universities receiving federal funds to allow military recruiters access to their institution or else lose the entirety of their federal assistance, only because Congress could have directly required the universities "to provide equal access to military

recruiters without violating the schools' freedoms of speech or association." *Id.* at 70.

The Policy Requirement, however, is not a condition on the proper use of the federal funds by the recipient organizations but merely a pledge for its own sake that does not have any substantive impact on the work of the recipient organizations. The Petitioners concede as much by admitting that "[r]ecipients are not required to take additional, affirmative measures to certify their compliance with the statutory condition or to publicize their policy to third parties." Petitioners' Br. at 44.

Thus, to salvage the Policy Requirement, it would have to be shown that Congress would have been authorized to impose the requirement directly, apart from any funding. Neither the Spending Clause nor any other Article I power, however, authorizes Congress directly to compel persons to confess their faith in the correctness of the government's view that prohibition on prostitution is good public policy. *See Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no 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."); *Board of Education v. Pico*, 457 U.S. 853, 879 (1982) (per curiam) (Blackmun, J., concurring) (noting that the First Amendment bars "prescriptions of orthodoxy").

Thus, the Policy Requirement cannot be justified as a permissible exercise of Congress's authority under the Spending Clause.

II. The Policy Requirement is Not Supported by This Court's Decisions Upholding Disbursements of Public Funds to Private Entities to Advance a Governmental Program or Convey a Governmental Message

The Petitioners find no support in *Rust v. Sullivan* regarding regulations that prohibited Title X projects from "engaging in counseling concerning, referrals for, and activities advocating abortion as a method of family planning, and require such projects to maintain an objective integrity and independence from the prohibited abortion activities." 500 U.S. 173, 173 (1991). This Court held that the regulation merely prohibited a "grantee or its employees from engaging in activities outside of the project's scope," *id.* at 194, and that "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized," *id.* at 196. In the present case, by contrast, the condition attached to the receipt of the funds is not a restriction on how funds may be spent.

Likewise, the condition on the receipt of funds at issue in *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003), to wit, that libraries install software to prevent minors from accessing obscene or pornographic material, can be explained as a

condition on the proper use of the funds, namely, that funds should be utilized for libraries that are safe environments for minors. *Id.* at 211-12 ("Congress may certainly insist that these public funds be spent for the purposes for which they were authorized. . . . As the use of filtering software helps to carry out these [funded] programs, it is a permissible condition under *Rust*.") (internal quotation marks omitted).

The same can be said of *South Dakota v. Dole*, 483 U.S. 203 (1987), in which this Court upheld a condition on states receiving their full allocated share of federal highway funds that required states to increase the lawful drinking age to 21 based on Congress's interest in ensuring that the funds would be utilized for safe interstate highways. *Id.* at 208.

CONCLUSION

For these reasons, the *amicus curiae* respectfully urges this Court to affirm the judgment of the Second Circuit Court of Appeals in favor of the Respondents.

Respectfully submitted,

/s/ J. Joshua Wheeler

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