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.

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

REPLY BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulation:

Statutes and regulation—Continued: Page

In the Supreme Court of the United States

No. 12-10

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., PETITIONERS

v.

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

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

REPLY BRIEF FOR PETITIONERS

At bottom, respondents' view of the First Amendment boils down to this: the government may limit the ways in which recipients use federal funds, but it may do nothing more to ensure that those recipients will not undermine the goals of federal programs. Congress may not provide funds for racial justice in South Africa only to entities that oppose apartheid; it may not provide funds for social justice in Afghanistan only to entities that oppose the Taliban's oppression of women; and it may not provide funds for HIV/AIDS prevention in developing countries only to entities that oppose prostitution and sex trafficking. The government alone—unlike any private speaker or donor—may not condition the receipt of its funds on the recipient's willingness to further, or at least to abstain from undermining, the goals

of the very funding program at issue. That is not, and should not be, the law.

A. Congress Has Wide Latitude To Attach Conditions To The Receipt Of Federal Funds In Order To Further The Policy Objectives Of Federal Programs

Before the lower courts and before this Court at the certiorari stage, respondents largely treated the funding condition in 22 U.S.C. 7631(f) as if it were a direct regulation compelling their speech. See Resp. C.A. Br. 30-37; Br. in Opp. 18-21. The court of appeals effectively adopted that rationale. See Pet. Br. 33-36; Pet. App. 25a-29a. Now at the merits stage, respondents advance what amounts to the same argument, but dressed up in different language. Respondents acknowledge that Section 7631(f) is a condition on the receipt of federal funds, but they say that the condition is permissible only if it could be enacted as a direct regulation. Respondents thus contend (Br. 16, 20-25) that the Spending Clause provides Congress with no additional latitude when it comes to funding conditions: Congress may not place any condition on federal benefits that it could not enact as a direct regulation of speech or conduct. That contention is flatly inconsistent with this Court's Spending Clause jurisprudence.[1]

---

[1] As respondents note (Br. 13), the Office of Legal Counsel (OLC) initially opined in a one-page memorandum that Section 7631(f) could not be applied to "U.S. organizations." App., *infra*, 2a. OLC did not offer any reasoning for that conclusion. OLC also noted that, because of "the limited time available," it had not been able to conduct "a comprehensive analysis" and therefore its views were "tentative" and "might need to be altered after further analysis." *Id.* at 1a-2a. After more extensive analysis, OLC concluded that Section 7631(f) may be applied to domestic organizations.

1. This Court has repeatedly declared that "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *South Dakota* v. *Dole*, 483 U.S. 203, 209 (1987); see *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S.Ct. 2566, 2579 (2012); *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587-588 (1998). The Court thus has explicitly rejected respondents' argument that a funding condition is permissible only if it could be enacted as a direct regulation. See, *e.g.*, *ibid.*; *United States* v. *American Library Ass'n, Inc.*, 539 U.S. 194, 203 n.2 (2003) (plurality opinion). The reason for the constitutional distinction is straightforward: entities that do not wish to comply with funding conditions may avoid them by declining to apply for and accept the funds. See Pet. Br. 17-18.

a. Respondents relegate *Dole* and its progeny to a footnote, where they say that *Dole* "simply recognized that Congress may use the spending power to achieve objectives that lie beyond its enumerated legislative powers." Br. 22 n.3. *Dole* recognized more than that. This Court squarely held in *Dole* that Congress may achieve objectives under the Spending Clause that it may not command directly. Here, Congress could no more directly instruct respondents to adopt a policy concerning prostitution and sex trafficking than it could instruct South Dakota in *Dole* to establish a particular drinking age. But here, no less than in *Dole*, Congress may condition federal funding on respondents' willingness to have such a policy in their provision of HIV/AIDS-related services.

To be sure, this Court in *Dole* explained that a funding condition may not induce the recipient to take an action that would itself be unconstitutional. See 483 U.S.

at 210-211. Nor may a funding condition "be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). But neither of those limitations is relevant here. If respondents elect to accept Leadership Act funds and represent to the granting agencies that they oppose prostitution and sex trafficking, that conduct by respondents, as private actors, does not violate the First Amendment. And respondents have not asserted that they are compelled to take Leadership Act funds. Many of respondents provided public health services decades before the passage of the Leadership Act in 2003, see, *e.g.*, Resp. Br. 4-6, and since that time all respondents have had a voluntary choice whether to apply for funding under the Act.

b. Respondents likewise have no answer for this Court's decision in *Finley*. They quote (Br. 22 n.3) a portion of the relevant passage, but it bears repeating in full: "[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." 524 U.S. at 587-588. The Court in *Finley* thus rejected respondents' central argument that Congress may not distinguish among funding recipients according to criteria (like having a policy opposing prostitution and sex trafficking) that would be impermissible as a direct speech regulation. The *Finley* Court observed, however, that "if a subsidy were manipulated to have a coercive effect, then relief could be appropriate." *Id.* at 587 (internal quotation marks omitted). Again, respondents have no colorable claim that Section 7631(f) amounts to a coercive penalty on contrary viewpoints.

Respondents argue that this case differs from *Finley* because the policy condition is not a "selection criterion," *i.e.*, the government does not use the policy condition to select "organizations that have standing policies opposing prostitution." Br. 25 n.4. But that cannot be a relevant distinction. If the government awarded funds only to organizations with preexisting policies opposing prostitution and sex trafficking, that would amount to exactly the same thing in practice. Either way, the policy condition in Section 7631(f) would serve as a "selection criterion," whether the government verifies, or the recipient vouches for, the existence of an anti-prostitution policy. In the end, respondents' argument really is that Congress cannot adopt the policy condition as a prophylactic measure to prevent them from undermining Leadership Act programs in their privately funded operations.

2. Respondents' proposed test—that a funding condition is permissible only if it could be imposed as a direct regulation—obviously is at odds with *Rust* v. *Sullivan*, 500 U.S. 173 (1991). Respondents do not argue that Congress could have commanded doctors and public health providers to counsel patients only about certain methods of family planning. Yet this Court held in *Rust* that Congress was entitled under the Spending Clause to "selectively fund a program to encourage certain activities it believes to be in the public interest" and "insist[] that public funds be spent for the purposes for which they were authorized." *Id.* at 193, 196. Respondents assert that the restrictions at issue in *Rust* were limited to ensuring that federal funds alone were "properly applied to the prescribed use." Br. 23 (quoting *Rust*, 500 U.S. at 195 n.4). That assertion cannot be squared with the facts of *Rust* or this Court's opinion.

In *Rust*, the restrictions applied to programs receiving federal funds under Title X of the Public Health Service Act, 42 U.S.C. 300 *et seq*. See 500 U.S. at 178. Most Title X grantees "receive[d] funds from a multitude of other governmental and private sources," Pet. Br. at 27, *Rust*, *supra* (No. 89-1391), and indeed Title X required recipients to contribute matching nonfederal funds to Title X programs, see 500 U.S. at 199 n.5. The challengers in *Rust* argued that because their Title X programs also received substantial nonfederal funds, they had a First Amendment right to engage in abortion-related counseling with those nonfederal funds. See Pet. Br. at 24-28, *Rust*, *supra* (No. 89-1391). The Court squarely rejected that argument. See *Rust*, 500 U.S. at 199 n.5. The Court reasoned that "Title X subsidies are just that, subsidies," and "[b]y accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any [nonfederal] funds." *Ibid.* Contrary to respondents' assertion (Br. 23), this Court in *Rust* upheld a restriction on the use of both federal and nonfederal funds, and it should do so again here for the same reasons.

That leaves respondents with only one way to distinguish *Rust*: the funding condition here is different, they say, because the condition is on "the *recipient* of the subsidy rather than on a particular program or service." Br. 24 (quoting *Rust*, 500 U.S. at 197). But the Court in *Rust* understood that even the "particular program" operated with both federal and nonfederal funds. See 500 U.S. at 199 n.5. Moreover, the Court's point in *Rust* was that when a condition applies on an entity-wide basis, *and the government does not allow an alternative means of expression*, then the recipient may be effectively prevented from engaging in the restricted expres-

sion altogether. See *id.* at 197-198. The Court therefore pointed to its decisions in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), and *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983), as approving the use of affiliate structures to alleviate the burden placed on privately funded expression by a federal funding condition. See *Rust*, 500 U.S. at 197-198.

Again, that reasoning applies equally here. There is no difference between choosing to establish two affiliated broadcast stations (one that uses federal funds and one that does not), see *League of Women Voters*, 468 U.S. at 400; two affiliated charitable organizations, see *Regan*, 461 U.S. at 544-546; or two affiliated public health organizations. This case is thus indistinguishable from *League of Women Voters* and *Regan*, where the required separation necessarily would have been at an organizational rather than a programmatic level. Because respondents may "establish 'affiliate' organizations" that do not have policies opposing prostitution and sex trafficking—and that therefore may espouse contrary views on those subjects with "nonfederal funds"—the regulatory scheme here is "plainly * * * valid." *League of Women Voters*, 468 U.S. at 400.

3. Respondents rely (Br. 22, 24) on the fact that this Court invalidated federal funding conditions under the First Amendment in *Legal Services Corporation* v. *Velazquez*, 531 U.S. 533 (2001), and *League of Women Voters*. But in both of those cases, the government was funding and facilitating private speech rather than promoting its own program and policy through private actors. See *Velazquez*, 531 U.S. at 542, 548; *League of Women Voters*, 468 U.S. at 378-380, 386-387, 395. The Court further determined that the funding conditions in those cases attempted "to suppress speech inherent in

the nature of the medium." *Velazquez*, 531 U.S. at 543; see *id.* at 544-545 (restricting lawyers from advancing certain arguments as a condition of funding "distorts the legal system" and "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"); *League of Women Voters*, 468 U.S. at 396-399.

Velazquez thus stands for the proposition that a federal funding condition, even if it does not cross the line between inducement and coercion, may not fundamentally distort the medium for private expression at issue in a way that severely impairs an important public function. Here, however, respondents do not argue that the ability to favor, advocate for, or remain neutral toward prostitution and sex trafficking is inherent to providing HIV/AIDS-related services in foreign countries. To be sure, respondents believe that if they adopt policies opposing prostitution, "[their] work with this critical population could be compromised." Br. 12. That concern is without merit, however, because as respondents acknowledge (Br. 35), Section 7631(f) requires a recipient to affirmatively convey its policy opposing prostitution only to the funding agency, not to any sex workers to whom it provides services. See Pet. Br. 22, 27.

But even if respondents are right that the policy condition might render them less effective in their work with prostitutes via federal programs, that is a far cry from demonstrating that Section 7631(f) "distorts the [public health] system by altering [respondents'] traditional role" or "aim[s] at the suppression of ideas thought inimical to the Government's own interest." *Velazquez*, 531 U.S. at 544, 549. Rather, Section 7631(f) is addressed to entities that receive substantial federal funds and that are publicly associated with the United

States in implementing the federal government's programs and policies abroad. See 22 U.S.C. 7611(h) (Supp. V 2011) (requiring that the Global AIDS Coordinator "develop a message, to be prominently displayed by each program receiving funds under this chapter" that "the program is a commitment by citizens of the United States to the global fight against HIV/AIDS" and "is an effort on behalf of the citizens of the United States").

Moreover, in both *Velazquez* and *League of Women Voters*, this Court relied on the absence of any alternative channel for the restricted expression. See *Velazquez*, 531 U.S. at 546-547 ("[W]ith respect to the litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict. This is in stark contrast to *Rust*."); *League of Women Voters*, 468 U.S. at 400. That is not the case here, because the agencies' affiliation guidelines allow Leadership Act funding recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f).

4. Respondents also rely (Br. 20, 25) on this Court's statement in *Speiser* v. *Randall*, 357 U.S. 513 (1958), that the government may not use the denial of benefits to "produce a result which [it] could not command directly." *Id.* at 526; see *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser*). But in *Speiser*, the state property tax exemption at issue—which required veterans to swear an oath not to advocate overthrow of the federal or state government—had "the effect of coercing the claimants to refrain from the proscribed speech." 357 U.S. at 519. The *Speiser* exemption thus "frankly aimed at the suppression of dangerous ideas." *Ibid.* (quoting *American Commc'ns Ass'n* v. *Douds*,

339 U.S. 382, 402 (1950)). Similarly in *Perry*, a state college professor alleged that his employment contract had not been renewed "based on his public criticism of the policies of the college administration." 408 U.S. at 595; see *id.* at 598.

Section 7631(f) is nothing like the restrictions at issue in *Speiser* and *Perry*; it does not require respondents to swear a loyalty oath to, or retaliate against them for public criticism of, the government. Section 7631(f) simply requires respondents, as a condition of receiving federal monies, to support a policy that Congress adopted as its own in the Leadership Act and that Congress is funding respondents in part to further in their overseas operations. See Part C, *infra*; 22 U.S.C. 7601(23) (finding that "it should be the policy of the United States to eradicate" prostitution, sex trafficking, and sexual violence). Accordingly, this Court's Spending Clause jurisprudence makes clear that Section 7631(f) is permissible, because it does nothing more than induce respondents to oppose prostitution and sex trafficking when they receive funds to carry out a federal program. It does not coerce respondents to accept those funds; it does not fundamentally distort respondents' expression related to their provision of HIV/AIDS services; and it does not aim at the suppression of dangerous ideas.

B. Section 7631(f) Is A Noncoercive Funding Condition, Not A Direct Speech Regulation

Because respondents apply the wrong test, they reach the wrong result. Respondents argue (Br. 26-34) that if Section 7631(f) were enacted as a direct regulation of speech, then it would impermissibly compel speech and discriminate on the basis of viewpoint. That counterfactual approach allows respondents to ignore the basic difference between a noncoercive funding con-

dition enacted pursuant to Congress's spending power and a coercive direct speech regulation enacted pursuant to some other power.

1. The court of appeals reasoned that the Act's funding condition is impermissible because it compels recipients to speak rather than remain silent with respect to prostitution and sex trafficking. See Pet. App. 25a. That distinction between compelled speech and compelled silence should not be determinative here, see Pet. Br. 33-36, and respondents no longer defend it. Rather, respondents say (Br. 27) simply that if Section 7631(f) were a direct regulation of speech, it would compel speech and thus be unconstitutional. They analogize the funding condition to laws requiring fundraisers to provide certain disclosures, see *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-796 (1988); employees to contribute fees to unions for political activity, see *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977); motorists to display a state motto on their license plates, see *Wooley* v. *Maynard*, 430 U.S. 705, 707, 717 (1977); or schoolchildren to recite the Pledge of Allegiance and salute the flag, see *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943).

Unlike those types of direct regulation, Section 7631(f) does not require individuals to express or fund particular views as a condition of employment or access to a generally available public benefit. As the District of Columbia Circuit has explained, "[o]ffering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message on pain of losing their public education or access to public roads." *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758, 762 n.2 (2007) (*DKT*)

(internal citations omitted). Or as this Court has put it in a similar context, conditioning the availability of federal HIV/AIDS assistance on adhering to that program's policy opposing prostitution and sex trafficking "is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

2. Respondents also claim that the policy condition "suppresses speech expressing a disfavored point of view." Br. 30. But respondents do not mean by "suppress[ion]" what this Court's subsidy cases mean. The Court's test in those cases is whether the denial of the subsidy threatens "to drive certain ideas or viewpoints from the marketplace." *Finley*, 524 U.S. at 587 (internal quotation marks omitted). Respondents have never made *that* type of claim. Even before this Court, respondents say not a word about why it is practically impossible for them to decline Leadership Act funds—or why even if all of respondents are coerced to accept the funding, that would unduly skew the foreign marketplaces of ideas in the countries where respondents operate. When respondents say that Section 7631(f) "suppresses" their speech, what they appear to mean is that the Leadership Act offers them an *incentive* to participate in the federal program and thus to accept the condition imposed by Section 7631(f). On respondents' view, every subsidy carrot is a suppression stick—and thus Congress may never offer subsidies that promote a particular viewpoint.

Respondents also appear to mean (Br. 30-33) by "suppression" that Section 7631(f) discriminates on the

basis of viewpoint. That is the only claim respondents made to the lower courts. See, *e.g.*, Resp. C.A. Br. 17-18, 31-36. But respondents do not point to any case in which this Court has invalidated a federal funding condition on the ground that it discriminates on the basis of viewpoint. That is because "[w]hen it communicates its message, * * * the government can—and often must—discriminate on the basis of viewpoint." *DKT*, 477 F.3d at 761. This Court has therefore held that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). The question then is whether in the Leadership Act Congress has "appropriate[d] public funds to promote a particular policy of its own." *Ibid.* As explained below and at length in our opening brief (at 19-33), it has.

C. Section 7631(f) Ensures That The Leadership Act's Policy Opposing Prostitution And Sex Trafficking Is Effectively Implemented By Funding Recipients

1. The policy condition ensures that recipients do not undermine the Act's policy opposing prostitution and sex trafficking

a. Respondents suggest (Br. 39, 41-42) that it is not clear what Section 7631(f) is meant to accomplish. Most obviously, the policy condition ensures that respondents do not advocate or promote the legalization of prostitution or sex trafficking with nonfederal funds. Section 7631(f) thus complements the parallel restriction on federal funds in Section 7631(e). For instance, suppose that an employee of respondent Pathfinder International, in the course of administering one of its federally funded programs, is asked by a reporter or a sex worker

about the organization's position on the legalization of prostitution. Assuming that the employee is being paid at that moment with federal funds, he cannot "promote or advocate" the legalization of prostitution under Section 7631(e). On respondents' view, however, the same employee could appear at a debate or on a television show minutes later—and so long as he were ostensibly being paid for that time with nonfederal funds—he could advocate for the legalization of prostitution.

It is hard to imagine a system that would more "garble[]" or "distort[]" Congress's opposition to prostitution. *Rosenberger*, 515 U.S. at 833. Like Penelope nightly unraveling Laertes's shroud, respondents' privately funded operations could spend their time undoing the prostitution-related aspect of their federally funded operations. According to respondents, they have a constitutional right to apply for and accept billions of dollars for the treatment and prevention of HIV/AIDS—under a program that has a policy calling for the reduction of prostitution and sex trafficking—and yet to undermine Congress's efforts to eliminate those practices. The Court has never recognized such a right, and indeed it explicitly rejected any such right in *Rust*. There simply is no First Amendment right to use federal monies to speak out of both sides of one's mouth: to convey one viewpoint with federal funds and to convey a contrary viewpoint with nonfederal funds.

b. The policy condition also ensures that respondents do not undermine Congress's opposition to prostitution, sex trafficking, and sexual violence in their many different interactions with commercial sex workers and others linked to the sex trade. Only some Leadership Act programs directly involve "educating men and boys about the risks of procuring sex commercially and about the

need to end violent behavior toward women and girls"; "promot[ing] alternative livelihoods, safety, and social reintegration strategies for commercial sex workers"; or "working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children." 22 U.S.C. 7611(a)(12)(F), (H) and (J) (Supp. V 2011). Congress therefore has determined that it would not make sense to require all recipients to affirmatively and actively disseminate its message opposing prostitution and sex trafficking. See Pet. Br. 27 & 43 n.6.

Many respondents, however, have the potential through their provision of foreign HIV/AIDS services to come into contact with numerous foreign officials and individuals, including commercial sex workers and others related to the sex trade. Those countless interactions are typically impossible to anticipate in advance. And because the interactions occur overseas and often in distant locales, they are exceedingly difficult, if not impossible, for the government to supervise or monitor in any cost-effective way. Section 7631(f) ensures that in those myriad, foreign interactions, respondents act consistently with opposition to—rather than support for or indifference toward—prostitution and sex trafficking. See 22 U.S.C. 7601(23) ("[I]t should be the policy of the United States to *eradicate* such practices.") (emphasis added). Congress reasonably concluded that if, like the United States, recipients have a policy opposing prostitution and sex trafficking, they are far more likely to act in accordance with that policy.

Respondents focus (Br. 35, 39) on the fact that their particular programs do not aim specifically at reducing the commercial sex trade. On their approach, that fact should be irrelevant; respondents do not believe that Section 7631(f) may limit any recipient's privately fund-

ed operations, no matter what kind of programs the recipient operates. Regardless, respondents assert (Br. 32-33) the right to publicly counter the government's policy on prostitution and sex trafficking, and they do not deny (Br. 11-12) that many of their programs can bring them into contact with workers in the commercial sex trade. Thus, in ways both large and small, respondents seek the right to undermine the very program under which they apply for and accept federal funds. No private speaker or donor would dream of partnering with entities that did not share its goals and objectives. Yet respondents claim a constitutional right to that type of adversarial relationship.

Respondents and their amici contend that upholding Section 7631(f) would vest the government with unbounded authority to regulate private speech. See, *e.g.*, Resp. Br. 39; Becket Fund Amicus Br. 4. This Court, however, has not taken an extreme, all-or-nothing approach in this area. Rather, it has struck a careful balance by recognizing that the government has broad, but by no means unlimited, authority with respect to funding conditions. Among those limits, the government may not leverage funding or other benefits to suppress a viewpoint that the government deems subversive or dangerous. See *Speiser*, 357 U.S. at 519; *Perry*, 408 U.S. at 597-598. Again, even respondents have not claimed *that* is what Section 7631(f) does. The policy condition is hardly an effort to crack down on subversive speech. The subject of the funding condition—opposition to prostitution and sex trafficking—is not only germane to the goals of the funding program, see *Dole*, 483 U.S. at 208, but integrally related to Congress's objectives in the Leadership Act. Moreover, that funding flows to foreign countries where respondents' interactions with

foreign officials, organizations, and individuals are exceedingly difficult to oversee.

In addition, as respondents recognize, those foreign nations have adopted different stances to prostitution, from "highly tolerant to harshly punitive." Br. 12. Congress has occupied a middle ground: discouraging the practice but supporting HIV/AIDS treatment and care for those who engage in it. That is the foreign policy Congress has determined should be furthered in other nations with divergent views. The First Amendment does not prevent Congress, when it funds a program abroad, from placing reasonable limits on the expression of recipients in that foreign marketplace. When agencies like HHS and USAID themselves conduct the Leadership Act programs at issue, they are required to conduct the programs in the manner that Congress intended. The same result should obtain when Congress engages private partners to perform work in the agencies' stead—and when it clearly communicates in advance precisely how it wants those private partners to perform. In those circumstances, Section 7631(f) is a reasonable effort to ensure that recipients do not distort or undermine Congress's policy opposing prostitution and sex trafficking.

c. To be sure, those features mean that this case involves a less direct kind of government speech. Congress could have funded respondents to speak directly to commercial sex workers and others about the risks of prostitution and sex trafficking. Respondents acknowledge (Br. 40-41) that type of government speech would be permissible. Instead, respondents conduct other types of HIV/AIDS-related work. But Congress recognized that as part of that work, respondents inevitably have many opportunities to address the dangers of pros-

titution and sex trafficking. Congress wanted its private partners to adhere to its viewpoint—*i.e.*, the viewpoint that Congress expressly adopted as part of the federal program—in those interactions. That is no less government speech, simply because a foreign official, organization, or individual rather than a recipient may initiate the relevant conversation. Either way, the recipient may be called upon to deliver some message, and Congress is funding the recipient to convey *its* message—and to do so with consistency throughout its operations.

To give an example, suppose that Congress provides federal funds to conduct after-school and community programs for at-risk youth. One of those programs' stated purposes is reducing drug use by teenagers. Accordingly, as a condition of receiving federal funds, recipients must have a policy opposing teenage drug use. It should be irrelevant (Resp. Br. 41) that recipients are not conducting an actual "Just Say No To Drugs" campaign. In operating their academic or athletic programs, recipients inevitably will have many opportunities to address drug use by minors. Congress may seek to ensure that, in those countless private interactions, recipients act consistently with opposition to—not neutrality toward or promotion of—teenage drug use. And certainly Congress may ensure that recipients do not use nonfederal funds to publicly advocate for the legalization of drugs, including for minors. The National Organization to Reform Marijuana Laws would not have a constitutional right to federal funding simply because it wants to run a basketball camp or a reading program in addition to its drug legalization activities.[2]

---

[2] Similarly, as the government observed in its opening brief (at 32-33), respondents' approach means that Congress could not provide

2. Congress determined that the policy condition is an important part of the Leadership Act's comprehensive strategy

Respondents and their amici argue that the policy condition is unnecessary or is even counterproductive to reducing the spread of HIV/AIDS. See Resp. Br. 43-45; Deans and Professors of Public Health Amicus Br. 14-27. Respondents do not explain the legal relevance of that argument, and they cite nothing to support it. Perhaps respondents intend what they meant at the certiorari stage: that Section 7631(f) is a "marginal provision" which is not "integral to the Leadership Act's goals." Br. in Opp. 29, 31 (internal quotation marks omitted). As the government has explained, however, see Pet. Br. 28-30, it is for Congress to decide when a condition on the receipt of federal funds is integral to a funding program, and it has done so here. Respondents are incorrect then to assert that they "have been enlisted by the government to fight the spread of HIV/AIDS, not to oppose or eradicate prostitution." Br. 39. Respondents have been enlisted to fight the spread of HIV/AIDS under a program that *includes*, among other things, opposing prostitution.

Perhaps respondents mean to claim instead that Congress lacked a reasonable basis for Section 7631(f), but that too would be incorrect. As respondents recognize (Br. 33), there is a current debate over how to address the public health consequences of prostitution.

---

funds for racial justice in South Africa only to entities that oppose apartheid. Neither respondents nor their amici deny that. Respondents say that the hypothetical is "inapposite." Br. 42. But in discussing the sorts of limitations that they view as permissible, see Br. 42-43, it is clear that respondents do not believe the government could condition funding in that common-sense way.

Congress adopted a particular policy on that question in the Leadership Act, and it was reasonable for Congress to determine that prostitution should be eliminated (rather than legalized or neutrally condoned) because it is a "cause[] of and factor[] in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23). That should end this Court's inquiry. Respondents do not point to any case in which the Court has invalidated a Spending Clause enactment on the ground that, even if it has a reasonable basis, in the Court's view the legislation is unnecessary to further Congress's stated objectives.

D. The Agencies' Affiliation Guidelines Obviate Any Constitutional Difficulty

1. Although Section 7631(f) is a permissible exercise of Congress's authority under the Spending Clause, the agencies' affiliation guidelines alleviate any difficulty by allowing recipients to cabin the effects of the funding condition to federally funded Leadership Act programs. Respondents repeat (Br. 47-48) their claim that the guidelines are inadequate because they require separation among affiliated organizations rather than programs. But as explained above, that was equally true in *Regan* and *League of Women Voters*, where recipients would have had to form separate charitable organizations and broadcast stations.[3] The Court's point in those cases and *Rust* was that when a recipient has some other outlet for the restricted activity—whether that is a

[3] Respondents argue (Br. 51) that the recipients in *Regan* and *League of Women Voters* were only prevented from expressing themselves through their chosen media (lobbying and broadcast television, respectively). That is a distinction without a difference. Just as in this case, the funding conditions in those cases prevented recipients from expressing themselves precisely as they wished, but affiliate structures provided alternative outlets for the restricted expression.

related entity or program—the recipient may limit the effects of the funding condition to the federal program at issue. See, *e.g.*, *DKT*, 477 F.3d at 763 ("Nothing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution.").[4]

Respondents argue (Br. 46-47 & n.13) that only compelled silence, not compelled speech, can be alleviated by providing an alternative outlet for expression. This Court has not endorsed that distinction in any other context, and it should not do so here. Respondents are simply incorrect that when a recipient must remain silent, the affiliate's ability to speak somehow "undo[es]" the compelled silence—but that when a recipient must speak, the affiliate's ability to remain silent "does nothing to undo" the compelled statement. Br. 47. Either way, the effect on the recipient is the same: its decision to accept federal funding means that its expression is permanently altered. An affiliate structure does not cancel out or negate that effect on the recipient. Rather, the value of the affiliate structure is that it allows the recipient to cabin the condition's effect to the federally funded program or services at issue. Here, nothing prevents respondents from forming affiliates and continuing to operate as they do now.

2. Finally, respondents no longer contend (Br. 45 n.12) before this Court that the agencies' guidelines are unconstitutionally vague. They argue more narrowly,

---

[4] Respondents incorrectly contend (Br. 50) that they could not form special-purpose affiliates whose sole purpose is to receive and administer federal HIV/AIDS funding. Respondents primarily rely on regulations concerning private voluntary organizations (PVOs), but affiliates do not have to qualify as PVOs in order to receive Leadership Act funds.

however, that the guidelines do not provide an adequate alternative channel for expression because it can be difficult to establish an affiliate (Br. 52-56) or to determine when an affiliate is independent (Br. 48-49, 57). Those arguments are unpersuasive for largely the same reasons as respondents' previous vagueness challenge. The agencies have recognized respondents' practical concerns, amended their guidelines to accommodate them, and expressed their continued willingness to work with respondents to address them. See Pet. Br. 51.[5] Accordingly, the appropriate solution is not to enjoin the statutory scheme (as the lower courts did), but to allow respondents to bring as-applied challenges in concrete factual situations in the event that is even necessary once the agencies are permitted to implement the guidelines.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

APRIL 2013

---

[5] Respondents challenge only Section 7631(f) of the statute, not the agencies' guidelines or award documents. In any event, HHS has informed this Office that it is currently revising its award documents to reflect its amended regulation, 45 C.F.R. 89.1(b). USAID informs this Office that it already has revised its award documents to include similar language.

APPENDIX

Constitutionally Permissible Funding Restrictions for Sex Trafficking and HIV/AIDS Prevention

OLC has considered the constitutional implications of the following funding restrictions in the Trafficking Victims Protection Reauthorization Act (TVPRA), the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (USLAHATMA), and the Consolidated Appropriations Act:

(1) restrictions on the use of program funds, which require (with a minor difference between TVPRA and USLAHATMA) that program funds not be used to promote, support, or advocate the legalization or practice of prostitution, *see* 22 U.S.C. § 7110(g)(1) (as added by TVPRA § 7(7)); USLAHATMA § 301(e);

(2) organization-wide restrictions, which would require an organization receiving funds either to refrain from promoting prostitution or its legalization, *see* 22 U.S.C. § 7110(g)(2) (as added by TVPRA § 7(7)), or to have a policy explicitly opposing prostitution and sex trafficking, see USLAHATMA § 301(f); and

(3) a restriction on what may be said when an organization wants to provide information about the use of condoms as part of a project or activity funded by the Consolidated Appropriations Act, *see* Pub. L. No. 108-199, Div. D, Title II (2004).

In the limited time available to us, we have not been able to conduct a comprehensive analysis, but we have

reached the following tentative views, which might need to be altered after further analysis:

- With regard to category (1), the restrictions on the use of program funds can be constitutionally imposed on all grant recipients and sub-recipients, whether they are U.S. or foreign organizations.[*]

- With regard to category (2), the organization-wide restrictions, which would prevent or require certain advocacy or positions in activities completely separate from the federally funded programs—

  - cannot be constitutionally applied to U.S. organizations, whether they are recipients or sub-recipients, and whether they are operating inside or outside the United States;

  - can be constitutionally applied to foreign organizations whether they are recipients or sub-recipients, but only when they are engaged in activities overseas. The government could exercise its foreign-affairs and plenary immigration powers to exclude from the United States a foreign organization that advocates certain views.

---

[*] A simple definition of a foreign organization is contained in the Mexico City Policy: an organization "that is not organized under the laws of any State of the United States, the District of Columbia, or the Commonwealth of Puerto Rico." *Restoration of the Mexico City Policy,* 66 Fed. Reg. 17303, 17303 (2001). The Mexico City Policy has withstood First Amendment challenges (though not every question has been fully litigated). Our constitutional advice here essentially mirrors the limits of the Mexico City Policy with regard to category (1) and category (2).

> The government could also argue, albeit with considerable litigation risk, that it could deport a foreign organization that advocates certain views. But powers to exclude or deport are separate from grant funding, and an organization's advocacy in the United States cannot justify termination of or failure to renew a grant.

• With regard to category (3), the medical-accuracy provision can be constitutionally applied to all grant recipients and sub-recipients that choose to provide information related to condom use as part of a program or activity funded by the Consolidated Appropriations Act. We note, however, that the term "public health benefits" is not terribly clear, and an organization could not be punished for conveying views that can be reasonably characterized as an accurate statement of "public health benefits"—even if those views do not correspond to the Administration's. That ambiguity, however, could be mitigated by a suitably formal agency interpretation.