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 FOR RESPONDENTS

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QUESTION PRESENTED

Whether the courts below correctly determined that respondents are likely to succeed on their claim that the First Amendment prohibits the government from requiring grantees, as a condition of receiving federal funds, to adopt and express as their own the government's viewpoint on an issue of public debate, while also prohibiting grantees from expressing any views or undertaking any activity, even with private funds, "inconsistent with" the government's viewpoint.

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BRIEF FOR RESPONDENTS

INTRODUCTION

The First Amendment prohibits the government from compelling private parties to adopt its chosen viewpoint as their own or from regulating their lawful, privately funded speech. The government in this case nonetheless claims a power almost as broad: the power to condition federal funding on restrictions of speech that apply not only within the scope of the federally funded program, but also to any funded entity's privately funded expression. While the government's spending powers are considerable, the government may not use them "to 'produce a result which [it] could not command directly.'" *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).

This case does not implicate the government's authority to subsidize some private speech or activity and not others or to ensure that public funds are confined to their intended use. The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act) already prohibits the use of government funds to "promote or advocate the legalization or practice of prostitution." 22 U.S.C. § 7631(e). The constitutionality of that provision is not disputed here.

The provision at issue in this case goes much further. It requires that any recipient of Leadership Act funds must "have a policy explicitly opposing prostitution" and must, in addition, refrain from any speech the government deems "inconsistent with" that policy, not only when operating government-funded programs, but in all the recipient's operations. 22 U.S.C. § 7631(f); Pet. App. 297a. This Policy Requirement thus imposes a condition not on the use of federal funds, but on the recipient itself.

The Court has never upheld such a funding requirement before, so the government advances a novel theory in its defense. The government contends that it may subject recipients of federal funds to an ideological purity test to ensure that they will not criticize or appear indifferent to the government's viewpoint when engaging in privately funded speech outside the scope of the federally funded program. That is permissible, the government reasons, because organizations that do not wish to espouse and adhere to the government's viewpoint may simply forgo federal funding. But this Court has held such "choices" unconstitutional where, as here, they compel speech, drive disfavored viewpoints from the marketplace of ideas, and seek to do indirectly what the government cannot do directly. The government concedes there must be some limit on its

authority to impose such conditions on its grant of public funds, but any limit is illusory if it does not reach the Policy Requirement.

The government cites this Court's government-speech decisions, but its reliance on that doctrine is incoherent. On the one hand, the government argues (at 12) that the Policy Requirement is necessary "to ensure that its message is effectively communicated, and not undermined," by grantees. On the other hand, it asserts (at 27) that no grantee is required to "actively disseminate th[e] [anti-prostitution] policy." Only the latter proposition is correct: Respondents receive Leadership Act funding to combat the transmission of and provide treatment for HIV/AIDS using a wide range of strategies, not to convey a government message against prostitution. In these circumstances, the government-speech doctrine simply does not apply. It certainly does not permit the government to compel grantees to endorse the government's viewpoint or to dictate the content of their private speech.

Whatever concerns the government has ever had that recipients of Leadership Act funds might "undermine" a government policy are, in any event, insubstantial. The government makes no claim that respondents or others have been unreliable partners in the fight against HIV/AIDS or that they have posed any threat to any government policy. For nearly a decade, respondents and other grantees have implemented successful programs to combat HIV/AIDS using Leadership Act funds without the extraordinary condition the government seeks to impose. The government did not enforce the Policy Requirement against U.S.-based organizations in the first year after its enactment because the Department of Justice had opined that it "cannot be constitutionally applied" to them. Opp. App. 2a. And

since 2006, the Policy Requirement has been enjoined. Four organizations, which collectively received more than 20 percent of all Leadership Act funding in 2012, are expressly exempted from the Policy Requirement. Yet nothing in the record suggests that any government policy has been "undermined" during this time. The Policy Requirement is thus as unnecessary as it is impermissible.

Respondents wish only to preserve their First Amendment rights to hold their own views and either to remain silent or to engage—with private funds, outside the scope of any government program—in the important, ongoing debate about how best to deal with prostitution in the fight against HIV/AIDS. The government has ample authority to ensure that recipients of federal funding perform their missions effectively and refrain from diverting federal funds to impermissible purposes without trampling those rights.

STATEMENT

A. Respondents' Work Against HIV/AIDS

Respondents are U.S.-based nongovernmental organizations (NGOs) engaged in the global fight against HIV/AIDS. They operate a wide variety of public-health programs. Some programs are privately funded, while others are funded in whole or in part by federal grants under the Leadership Act.

Respondent Pathfinder International has worked to improve reproductive health services throughout the developing world since 1957. Among other projects, Pathfinder has trained local health providers in Tanzania in methods of preventing mother-to-child HIV transmission, supported healthcare providers treating HIV/AIDS patients in Mozambique, and provided

counseling and testing services to more than half a million patients in Kenya. *See* JA86-90; CAJA445, 507-508; Pathfinder International, *Kenya*, http://www.pathfinder.org/our-work/where-we-work/kenya/ (last visited Mar. 26, 2013). In addition to Leadership Act grants, Pathfinder receives funding for these efforts from agencies of the United Nations and World Bank, foreign governments, and private foundations, corporations, and individuals. JA161-162. Pathfinder has also run privately funded programs aimed at organizing sex workers to engage in HIV-prevention methods and safe-sex practices. JA166-168.

Respondent Alliance for Open Society International (AOSI) works to promote democratic governance, human rights, and public health in Central Asia, where war-driven changes in drug-trafficking routes caused injection-drug use to skyrocket. To fight the spread of HIV, AOSI has used Leadership Act funds and private grants to reduce injection-drug use, including among sex workers. *See* Pet. App. 119a.

With nearly 200 member organizations, respondent InterAction is the largest alliance of U.S.-based international-development and humanitarian NGOs. InterAction's members collectively receive more than $1 billion annually from the U.S. government and more than $7 billion annually from private donors, foreign governments, and international agencies to support their work around the world. JA101. For example, Cooperative for Assistance and Relief Everywhere, Inc. (CARE), a member of InterAction, has provided emergency-relief and health services in poor communities worldwide since 1945. In 2011, CARE projects reached over 122 million people in 84 countries. CARE, *CARE USA Annual Report 2011*, at 1 (2012), *available at* http://www.care.org/newsroom/publications/annualreports/

care-usa-annual-report-2011/download/AR_2011_Final_singles.pdf. CARE has used Leadership Act funds, grants from the United Nations, World Bank, and foreign governments, and private donations to provide services to children affected by HIV/AIDS throughout Africa and South Asia. JA148-149.

At the time this action was filed, respondent Global Health Council (GHC) was the world's largest professional association of organizations dedicated to international public health. Founded in 1972, GHC has sponsored conferences, forums, briefings, and other events for members and guests to share information, experiences, and best practices and to debate public-health issues. JA131-132.

B. The Leadership Act And The Policy Requirement

Congress passed the Leadership Act "to strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics and other related and preventable infectious diseases." 22 U.S.C. § 7603. The Act outlines a comprehensive set of strategies to improve the treatment of HIV/AIDS, to care for those affected by the disease, and to prevent the disease's further spread. *Id.*; *see id.* § 7611(a). The Act takes a multifaceted, all-inclusive approach. With respect to HIV prevention, for example, the Act supports numerous strategies ranging from counseling on abstinence, monogamy, and faithfulness to education on the proper use of condoms. *Id.* § 7611(b)(2)(K). As President Bush explained when signing the Act:

> Under this legislation, America will … prevent mother-to-child transmission[;] … purchase

> low-cost anti-retroviral medications[;] … set up a broad and efficient network to deliver drugs to the farthest reaches of Africa[;] … train doctors and nurses and other health care professionals [to] treat HIV/AIDS patients[;] … renovate and … build and equip clinics and laboratories[;] … support the care of AIDS orphans by training and hiring child care workers[;] … provide home-based care to ease the suffering of people living with AIDS[;] … provide HIV testing[;] … support abstinence-based prevention education for young people[;] … assist faith-based and community organizations to provide treatment, prevention, and support services[;] … [and] … develop[] a system to monitor and evaluate this entire program, so we can truly say to people, "We care more about results than words."

CAJA377.

To achieve these purposes, Congress has appropriated billions of dollars to support the work of NGOs engaged in HIV/AIDS treatment and prevention overseas. Congress found in the Leadership Act that the federal government's partnerships with such organizations have been "critical to the success of … efforts to combat HIV/AIDS," 22 U.S.C. §§ 7603(4), 7621(a)(4), and should be sustained and expanded, including by "combining financial and other resources, scientific knowledge, and expertise," *id.* § 7621(a)(3).

To qualify for Leadership Act funds provided through petitioner United States Agency for International Development (USAID), organizations must meet "[a]uthorizing legislation and governing program requirements," USAID, ADS 303.3.6.2.a (2012), *available*

at http://transition.usaid.gov/policy/ads/300/303.pdf, including, for example, by demonstrating "[t]echnical merits," "[c]ost effectiveness," and "[p]ast performance," *id.* at 303.3.6.3 (Evaluation Criteria). To demonstrate past performance, "[a]n applicant must provide a list of all its contracts, grants, or cooperative agreements involving similar or related programs during the past three years." *Id.* at 303.3.6.3.a; *see also* JA173-174 (citing ADS 303.3.6.3 and USAID, *Request for Applications Number USAID-Tanzania-08-001-RFA*, at 5, 18 (CAJA831, 833)); *see also* 22 U.S.C. § 2151u(a) (organizations should demonstrate "capacity to undertake effective development activities"); JA102, 106-107, 165; CAJA699-700. Organizations must also have been incorporated for at least 18 months, 22 C.F.R. § 203.3(f)(4); *see also* JA173, and receive at least 20 percent of their funding from sources other than the U.S. government, *see* CAJA770 (USAID Frequently Asked Questions); USAID, *USAID Primer* 24, http://transition.usaid.gov/about_usaid/PDACG100.pdf (2006).[1]

The Leadership Act places certain conditions on recipients' use of funds. For instance, section 7631(e) bars recipients from using Leadership Act funds "to

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[1] These last two requirements apply to respondents and organizations like them because they are considered "Private Voluntary Organizations," meaning that they are U.S. nonprofit organizations that receive private funding and conduct foreign assistance programs abroad. *See* 22 C.F.R. § 203.3; USAID, *PVO Registration Frequently Asked Questions*, http://idea.usaid.gov/ls/pvo/faq (last visited Mar. 27, 2013) ("PVOs are required to be registered in order to be eligible to compete for development assistance grants and cooperative agreements."). Similar rules apply to foreign nonprofits. *See* 22 C.F.R. § 203.6.

promote or advocate the legalization or practice of prostitution or sex trafficking." But the provision at issue in this case—the "Policy Requirement"—imposes a further condition that is not tied to the use of Leadership Act funds; rather, it affects each recipient on an entity-wide basis:

> No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

22 U.S.C. § 7631(f). Implementing regulations require the policy to be included in all sub-agreements entered into by the recipient and assert the government's right to inspect the recipient's books and records to assess compliance with the Policy Requirement. *See* 70 Fed. Reg. 29,759-29,760 (May 4, 2005); *see also* JA125. As implemented by petitioners USAID and the United States Department of Health and Human Services, the Policy Requirement additionally prohibits recipients from "engag[ing] in activities inconsistent with … opposition to the practices of prostitution and sex trafficking," even when using private funds. Pet. App. 297a-298a, 309a. Neither the Leadership Act nor the implementing regulations define the types of speech or activities that would be deemed "inconsistent with" an opposition to prostitution.

The Act allows four organizations to receive Leadership Act funds without complying with the Policy

Requirement and attendant regulations. 22 U.S.C. § 7631(f). Three of these organizations are international agencies, while the fourth—the International AIDS Vaccine Initiative—is a U.S.-based NGO that not only develops HIV vaccines but also builds clinics, trains staff, and provides HIV/AIDS testing and counseling through programs in the field. CAJA407-408; IAVI, *Where We Work*, http://www.iavi.org/Where-We-Work/Scientific-Network/Clinical-Research-Centers/Pages/default.aspx (last visited Mar. 27, 2013). The statute also provides that organizations need not endorse or participate in every program or activity of the comprehensive strategy adopted by the Leadership Act, but may receive funds to undertake some efforts against HIV/AIDS while opting out of or disagreeing with other programs or activities on the basis of a "religious or moral objection." 22 U.S.C. § 7631(d)(1). There is no opt-out provision for the Policy Requirement.

Aside from the Policy Requirement and the funding restriction in section 7631(e), the Leadership Act refers to prostitution only twice. In one of the Act's 41 findings, Congress found that prostitution degrades women and contributes to the spread of HIV/AIDS and that "it should be the policy of the United States to eradicate such practices." 22 U.S.C. § 7601(23). Another section includes within one of the Act's 29 strategies the education of men and boys about the risks of procuring sex commercially and the support of alternative livelihoods for commercial sex workers. *Id.* § 7611(a)(12). Although the eradication of prostitution was previously included among the Act's enumerated strategies, *see* Pub. L. No. 108-25, § 101(a)(4), 117 Stat. 711, 718 (2003), Congress removed that language in

2008, *see* Pub. L. No. 110-293, § 101(a), 122 Stat. 2918, 2923-2927 (2008).

C. The Policy Requirement's Impact On Respondents

Respondents do not support or wish to support prostitution. *E.g.*, JA97, 102, 116, 137. Respondents nonetheless would not have adopted policies expressly opposing prostitution absent the Policy Requirement. *See, e.g.*, JA150, 163. Because they focus on public health—operating clinics, training doctors, importing medications, and the like—and operate in countries with disparate laws and social norms, respondents typically "make every effort to remain neutral on issues of political or cultural conflict." JA96; *see* JA115, 127, 138, 164. When respondents do adopt a particular policy, they do so based on the merits of the policy, in most cases only after studying the issue and determining that the policy would promote a desired health outcome. JA115, 127, 138, 164.

As respondents explained in declarations supporting their preliminary-injunction motion, the Act's requirement that they adopt a policy explicitly opposing prostitution harms them in at least three ways. *First*, espousing an anti-prostitution policy diminishes the effectiveness of some public-health programs by making it more difficult to organize, educate, and motivate sex workers in the fight against HIV/AIDS. The policy chills communication and cooperation with the very individuals whose trust and cooperation is critical to respondents' efforts to combat HIV/AIDS. As HIV/AIDS experts and public-health authorities have recognized, organizing and working cooperatively with sex workers is often necessary not only to provide care to those individuals, but also to educate them about the

importance of HIV-prevention methods, recognizing that the rates of infection and multiplicity of partners among sex workers contribute to the spread of HIV "into the general population." CAJA55; *see also* 149 Cong. Rec. 11,804 (2003) (statement of Sen. Frist). If compelled to adopt a policy explicitly opposing prostitution, respondents' work with this critical population could be compromised. JA98, 102-103, 117-118, 127, 137, 152. Moreover, because the Policy Requirement would preclude respondents from doing anything "inconsistent" with a policy opposing prostitution—even with private funds—it is unclear whether respondents could continue the community-organizing efforts that lead to the adoption of safe-sex practices and other reforms that ultimately reduce the spread of HIV/AIDS. JA97, 128, 136-139, 150-153, 166-168; CAJA238-239, 389.

Second, adopting a policy explicitly opposing prostitution could complicate respondents' efforts to operate in countries with disparate legal regimes relating to prostitution. JA103, 115-116, 137-138. Maintaining the option of neutrality enables organizations to work in countries whose policies toward prostitution vary "from highly tolerant to harshly punitive," without alienating host governments. JA116; *see* JA120.

Third, the Policy Requirement would require respondents to censor their privately funded discussions about the best policies and practices on a range of topics, including how best to prevent the spread of HIV among sex workers. Respondents actively engage in such debates in publications, at conferences, and in policy arenas. The Policy Requirement would stifle that debate, even when undertaken only with private funds outside the scope of any government program. *See, e.g.*, JA105, 118-119, 128, 135-136, 152-154, 168-170. For example, although respondents and their members rec-

ognize the harms associated with prostitution, they nonetheless hold a range of opinions from a public-health perspective on whether legalization or decriminalization of prostitution might create the best opportunity to improve health and prevent HIV transmission in that population. *See* JA97, 128, 135. The government has indicated, however, that advocating for the legalization of prostitution would violate the Policy Requirement. Pet. App. 131a, 133a. The Policy Requirement, if imposed, would preclude respondents from engaging in debate—even privately funded debate—on that subject and related public-health issues "for fear of being barred from federal HIV/AIDS funds." JA136; *see* JA128, 135.

D. Procedural History

For more than a year after the Leadership Act's enactment, the government did not enforce the Policy Requirement against U.S.-based NGOs because the Department of Justice's Office of Legal Counsel had opined that it "cannot be constitutionally applied to U.S. organizations." Opp. App. 2a. OLC noted that the "organization-wide restrictions" would "prevent or require certain advocacy or positions in activities completely separate from the federally funded programs." *Id.*; *see* Pet. App. 127a-128a. In 2005, OLC changed its view, and the government began enforcing the Policy Requirement against U.S.-based NGOs shortly thereafter. Pet. App. 128a-129a, 132a-134a.

AOSI and Pathfinder filed this action in September 2005 and immediately sought to enjoin enforcement of the Policy Requirement on First Amendment grounds. In May 2006, the district court entered a preliminary injunction that remains in place today. Pet. App. 112a-219a. Addressing respondents' "as applied challenges,"

Pet. App. 137a, the court first agreed with the government's interpretation of the Policy Requirement as both requiring recipients to have a policy explicitly opposing prostitution and prohibiting recipients from engaging in activities "inconsistent" with that policy, even with private funds. Pet. App. 139a-162a. The court then held that respondents were likely to succeed on their claim that the Policy Requirement violates the First Amendment. Pet. App. 163a-214a. The court also found that enforcement of the Policy Requirement would irreparably harm respondents by chilling their speech and undermining their work with sex workers in vulnerable communities. Pet. App. 217a-219a.

The government appealed. At oral argument, the government announced its intent to issue new implementing regulations. Those regulations, issued in July 2007, allowed grantees to affiliate with legally separate organizations that could engage in "activities inconsistent with a policy opposing prostitution," so long as the recipients maintained "objective integrity and independence" from those affiliates. 72 Fed. Reg. 41,076 (July 26, 2007); *see* Pet. App. 224a-226a. Leaving the preliminary injunction in place, the court of appeals remanded the case for reconsideration in light of the new regulations. *See Alliance for Open Society Int'l, Inc.* v. *USAID*, 254 F. App'x 843 (2d Cir. 2007).

On remand, the district court held that the new regulations did not cure the Policy Requirement's constitutional defects. Pet. App. 241a-250a.[2] The court noted that "the clause requiring [respondents] to adopt

[2] The court also allowed InterAction and GHC to join the case and expanded the preliminary injunction to protect their members.

the government's view regarding the legalization of prostitution remains intact" and that compliance with the regulations' affiliate-separation requirements would be excessively burdensome. Pet. App. 242a, 246a-250a.

The government again appealed. In April 2010, while the appeal was pending, HHS and USAID issued revised implementing regulations, which remain in place today. *See* Pet. App. 297a-298a, 299a-336a (2010 Guidelines). The 2010 Guidelines require that each Leadership Act grantee "affirmatively state in the funding document that it is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children" and reaffirm that a recipient "cannot engage in activities that are inconsistent with [its] opposition to prostitution." Pet. App. 11a (internal quotation marks omitted); *see also* Pet. App. 308a-309a. Like the previous regulations, the 2010 Guidelines do not indicate what activities may be deemed "inconsistent" with an "opposition to prostitution." Pet. App. 11a (internal quotation marks omitted).

The 2010 Guidelines maintain the requirement that Leadership Act grantees must have "objective integrity and independence" from any affiliate engaged in activities inconsistent with an opposition to prostitution. Pet. App. 297a, 309a. Under the Guidelines, the government assesses "objective integrity and independence" under a non-exclusive five-factor test that considers: (1) whether the affiliate is a legally separate entity; (2) whether the affiliate has separate personnel or some other allocation of personnel that maintains "adequate" separation; (3) whether the affiliate has separate accounting and timekeeping records; (4) the degree of separation between the recipient's facilities and facili-

ties where "restricted activities" occur; and (5) the extent to which signs and other forms of identification distinguish the recipient from the affiliate. Pet. App. 298a, 310a.

In July 2011, a divided panel of the Second Circuit affirmed the preliminary injunction. Pet. App. 1a-96a. The court held that the Policy Requirement "falls well beyond" any funding condition previously upheld by this Court because it mandates that recipients affirmatively espouse the government's position "as if it were their own." Pet. App. 25a, 31a. The court rejected the government's reliance on the government-speech doctrine, Pet. App. 30a-35a, and held that the 2010 Guidelines failed to cure the constitutional violation, Pet. App. 35a-36a. Judge Straub dissented. Pet. App. 37a.

On February 2, 2012, the court of appeals denied the government's petition for rehearing en banc, over the dissent of three judges. Pet. App. 97a-111a.

SUMMARY OF ARGUMENT

I. The Policy Requirement imposes an unconstitutional condition by mandating that recipients of government funds adopt and express the government's viewpoint as their own and by prohibiting recipients from engaging in any speech—even if privately funded—that the government deems "inconsistent" with its orthodoxy. There can be no question that such a law, if imposed by direct regulation, would be unconstitutional. And this Court has made clear that, where the government is prohibited from infringing on protected speech through direct regulation, it may not achieve the same result indirectly by imposing a condition on government benefits.

The unconstitutional-conditions doctrine applies just as robustly when the government acts pursuant to its spending power. Thus, in *FCC* v. *League of Women Voters of California*, 468 U.S. 364 (1984), and *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), this Court invalidated conditions on federal funding under the First Amendment, even though the funding recipients could have avoided any restriction on their speech simply by forgoing the federal funds. The government relies on *Rust* v. *Sullivan*, 500 U.S. 173 (1991), but that decision only confirms that, although the government may ensure that federal funds are *used* for their intended purpose, it may not "place[] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* at 197.

Under this precedent, the Policy Requirement cannot stand. The Policy Requirement compels grantees to espouse the government's viewpoint on an important public-health issue, even if they do not agree with it or prefer to take no position, without affording them the freedom to form and express their own judgments on the issue. The Policy Requirement also restricts what grantees may say when speaking with their private funds, outside the scope of the federal program. Indeed, the government concedes that the Policy Requirement's very purpose is to prevent grantees from using their private funds to engage in speech that it deems "inconsistent with" or indifferent toward the government's view. The result is to deprive the marketplace of ideas of the views of many who are most likely to be knowledgeable about the public-health issue at hand. This Court has never upheld a funding condi-

tion like this one that imposes an entity-wide, viewpoint-based restriction on a grantee's private speech.

II. The Policy Requirement cannot be upheld under the government-speech doctrine. When an organization adopts the policy opposing prostitution, it is required to make that statement on its own behalf, not on behalf of the government. As the government concedes, respondents have not been enlisted to disseminate a government message to any audience. Rather, the Policy Requirement requires recipients to adopt an anti-prostitution policy as their own and convey it only to the government. The Policy Requirement entails no government speech at all.

Citing *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995), the government argues (at 21-22) that the Policy Requirement is a "'legitimate and appropriate means'" of "'ensur[ing] that its [anti-prostitution] message is neither garbled nor distorted by the grantee.'" But even if some Leadership Act grantees conveyed an anti-prostitution message on behalf of the government—and the government identifies none—it would not be "legitimate and appropriate" to require those grantees to adopt the government's viewpoint on an organization-wide basis, much less to impose that requirement on grantees like respondents that are not enlisted as government speakers. The government-speech doctrine permits the government to control its own speech and to contract with private parties to convey its message, but it cannot be used as a pretext for controlling the viewpoints of all recipients of federal funding.

Nor is the Policy Requirement necessary to advance any government message or protect the integrity of a separate government anti-prostitution policy. The

Policy Requirement has not been enforced against respondents for years—first because OLC originally believed it unconstitutional and then because it was enjoined below—and some of the government's largest partners are exempt from the Policy Requirement altogether. Yet the government points to no evidence that its policy opposing prostitution has suffered as a result or that its projects to eradicate prostitution, whatever they may be, have suffered from any confusion as to the government's position. Meanwhile, the government and its NGO partners have worked together effectively to combat HIV/AIDS for nearly a decade.

III. The affiliate regime established by the 2010 Guidelines does not cure the Policy Requirement's constitutional defects. When a recipient of federal funding is compelled to adopt and express the government's viewpoint as its own, that injury cannot be undone by allowing a separate affiliate to remain silent. By the same token, even if the separate affiliate may engage in its own speech "inconsistent" with the government's viewpoint, the grantee remains subject to an entity-wide, viewpoint-based restriction on its privately funded speech. The government's proposed solution—that respondents create "special-purpose affiliates" to receive federal funding and comply with the Policy Requirement—simply shifts that constitutional injury to the affiliate and would still leave respondents in the position of having been denied federal funds because they exercised their First Amendment right to free speech.

The affiliate regime is also unworkable as a practical matter. Grantees that accept Leadership Act funds but do not wish to give up their speech rights would have to set up new affiliates in every country in which they operate. That process is extraordinarily burden-

some, requiring grantees to navigate complicated or even unwelcoming foreign bureaucracies and make wasteful expenditures on duplicative staff, equipment, and office space. Without a track record of their own, and unable to rely on the main organization's reputation and brand, the newly created affiliate would find it difficult or impossible to obtain funding. The vagueness of the Guidelines only amplifies these burdens. The 2010 Guidelines thus fail to provide an adequate alternative channel for the free expression that the Policy Requirement prohibits.

ARGUMENT

I. THE POLICY REQUIREMENT IMPOSES AN UNCONSTITUTIONAL CONDITION ON GOVERNMENT FUNDING

A. The First Amendment Bars The Government From Imposing Conditions On Government Funding That Prohibit Or Compel Private Speech

The government does not and cannot dispute that the Policy Requirement, if imposed as a direct regulation, would violate the First Amendment. The government nonetheless advocates a radically expansive view of its spending power, under which it can disregard the First Amendment and compel citizens, as a condition of obtaining public funds, to give up their right to choose what they say even in the context of their privately funded speech and activities. This argument cannot be reconciled with this Court's longstanding precedent that the government may not manipulate the granting of benefits "to 'produce a result which [it] could not command directly.'" *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)) (alteration in original); *see also Elrod* v. *Burns*, 427 U.S. 347, 361 (1976)

(government cannot use discretion over benefits to "creat[e] an incentive enabling it to" limit the exercise of constitutional rights).

This Court has consistently held that "[g]overnmental imposition of … a choice" between forgoing benefits and relinquishing constitutional rights can violate the First Amendment no less than direct regulation. *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). "[E]ven though a person has no 'right' to a valuable governmental benefit," and even though he may choose to forgo it, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." *Perry*, 408 U.S. at 597. Denying a benefit because of a person's protected speech "in effect … penalize[s] and inhibit[s]" that speech. *Id.*; *see also Sherbert*, 374 U.S. at 405-406. Thus, it is unconstitutional for the government to "condition[] hiring decisions on political belief and association" with a particular political party, even though applicants can avoid the condition by simply choosing not to seek public employment. *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 78 (1990). Similarly, the government cannot force the unemployed to choose between working on Saturday, in violation of their religious beliefs, and losing eligibility for unemployment benefits. *Sherbert*, 374 U.S. at 406. Were the government correct that it could freely force recipients of public benefits to choose between forfeiting benefits and accepting restrictions on their First Amendment rights, these unconstitutional-conditions cases would have been decided the other way. Instead, this Court has made clear that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing in-

directly" by imposing conditions on discretionary benefits. *Rutan*, 497 U.S. at 77-78.

The unconstitutional-conditions doctrine applies equally when Congress acts pursuant to its power under the Spending Clause. Thus, in *FCC* v. *League of Women Voters of California*, 468 U.S. 364, 399-402 (1984), this Court invalidated a funding condition that banned editorializing by non-commercial broadcast-television stations, even though the stations could avoid the restriction by forgoing federal funding. Similarly, in *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 542-549 (2001), the Court invalidated a condition on the use of federal funds for civil legal-aid services because it violated the First Amendment rights of grantees and their clients. As these cases demonstrate, nothing in the Spending Clause immunizes government action from First Amendment scrutiny.[3]

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[3] The government cites (at 17) *South Dakota* v. *Dole*, 483 U.S. 203 (1987), but the Court there simply recognized that Congress may use the spending power to achieve objectives that lie beyond its enumerated legislative powers. *Id.* at 207 (spending power "'is not limited by the direct grants of legislative power'"). *Dole*—which addressed only federalism standards for assessing conditions on federal funding to States—did not hold that the Spending Clause creates a First Amendment-free zone. To the contrary, it recognized that "other constitutional provisions may provide an independent bar" to particular conditions. *Id.* at 208. The government's other authorities are also inapposite. In *United States* v. *American Library Ass'n*, 539 U.S. 194, 203 n.2 (2003), the question was whether a condition on federal funding to State-run public libraries would cause the libraries unconstitutionally to restrict the First Amendment rights of library patrons, where the restriction in question was intended to protect children and was easily avoided by adults. And, contrary to the government's contention, *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587

Congress's authority under the Spending Clause does entail the "ancillary power to ensure that … funds are properly applied to the prescribed use." *Rust* v. *Sullivan*, 500 U.S. 173, 195 n.4 (1991). This Court has accordingly upheld conditions on federal funding that serve "to ensure that the limits of the federal program are observed" and that government funds are not expended "outside the scope of the federally funded program." *Id.* at 193. In *Rust*, for example, the Court upheld a funding condition that prohibited grantees from "engaging in activities outside of the project's scope" when using federal funds. *Id.* at 194. Similarly, in *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 545 (1983), the Court upheld Congress's power to choose not to "pay for … lobbying out of public monies" and to condition an organization's eligibility for tax-exempt status in accordance with that choice. *See also United States* v. *American Library Ass'n*, 539 U.S. 194, 211-212 (2003); *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587-588 (1998). Under these decisions, it was permissible for Congress to provide in the Leadership Act that federal funds may not be used "to promote or advocate the legalization or practice of prostitution or sex trafficking," 22 U.S.C. § 7631(e), and respondents have never challenged that provision.

Crucially, however, the Court has never upheld a speech restriction that reached beyond the limited purposes of ensuring that government programs are properly administered and that government funds are applied to their intended use. Congress's "ancillary

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(1998), recognized that the First Amendment "certainly … appli[es] in the subsidy context."

power" to impose such restrictions does not include the much broader power to control what recipients of government funds say and do with their *private* funds or to dictate what views recipients must hold and express when acting outside the scope of the federal program. Thus, although Congress could prohibit a grantee from engaging in abortion-related speech or activity when using federal funds, it could not "den[y] [the grantee] the right to engage in abortion-related activities" altogether. *Rust*, 500 U.S. at 198. As the Court explained, it would be unconstitutional for the government to "place[] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* at 197; *see also* Resp. Br. 20-21, 27, 30, *Rust*, 500 U.S. 173 (Nos. 89-1391 & 89-1392), 1990 WL 10012655. Nor does the spending power entail the authority to "suppress[] … disfavored viewpoints." *Finley*, 524 U.S. at 587.

Where Congress has exceeded its power to prevent misuse of government funds, and where funding conditions restrict or compel speech in ways that could not be accomplished by direct regulation, this Court has not hesitated to invalidate funding conditions as unconstitutional. Thus, this Court struck down the ban on editorializing in *League of Women Voters* because it barred the recipients from editorializing on the air completely, even when using private funds. 468 U.S. at 400. Although Congress could decline to subsidize editorials, it could not "bar[] [recipients] absolutely from all editorializing." *Id.*; *see also Finley*, 524 U.S. at 587 ("even in the provision of subsidies, the Government

may not 'ai[m] at the suppression of dangerous ideas' (quoting *Regan*, 461 U.S. at 550)).[4]

In short, the Spending Clause does not empower Congress to impose conditions that prohibit the recipients of federal funding from speaking or compel them to speak in ways that could not be accomplished through direct regulation. That result is true to the principle that Congress cannot, by virtue of conditions on benefits, indirectly "place limitations upon the freedom of speech which if directly attempted would be unconstitutional." *See Speiser*, 375 U.S. at 518; *cf. Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (*FAIR*) (condition that schools receiving federal funding grant access to military recruiters "would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students").

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[4] The government cites (at 17) this Court's observation in *Finley* 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, but it makes no serious argument that the Policy Requirement operates as a subjective selection criterion akin to the "esthetic judgments" applied to particular art projects by the NEA, *id.* at 586. Moreover, as the government's brief makes clear (*e.g.*, at 6-7, 15, 22, 27-28, 44), the government does not use the Policy Requirement to select anti-prostitution projects or organizations that have standing policies opposing prostitution. Rather, grantees are selected for other reasons, including their track records of effectiveness in fighting HIV/AIDS, *see supra* pp. 7-8, and comply with the Policy Requirement "simply by accepting federal funds" and "signing award documents" that recite the policy, Pet. Br. 44; *see id.* 6-7.

B. The Policy Requirement Is An Unconstitutional Condition

When the unconstitutional-conditions doctrine is applied as this Court has consistently applied it in cases like *League of Women Voters* and *Rust*, the unconstitutionality of the Policy Requirement becomes plain. The Policy Requirement both compels speech and restricts privately funded speech in a manner that unquestionably could not be sustained if imposed through direct regulation.

1. The Policy Requirement unconstitutionally compels grantees to adopt the government's viewpoint and express it as their own

At the core of the Policy Requirement is a condition never before countenanced in this Court's jurisprudence: a "mandate[] that recipients affirmatively *say* something." Pet. App. 25a. Demanding "affirmation of a belief and an attitude of mind" precludes freedom of thought, *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633 (1943), and distorts the marketplace of ideas, *see Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Accordingly, "[s]ome of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say," *FAIR*, 547 U.S. at 61, for "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State," *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977); *see also Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994); *Wooley* v. *Maynard*, 430 U.S. 705,

715 (1977). "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." *Barnette*, 319 U.S. at 642.

The Policy Requirement prescribes what recipients of government funds must say and profess to believe in order to receive Leadership Act funds. It forces respondents to adopt and express a view on an important public-health issue that they may not agree with or simply may not wish to express. It deprives respondents of the freedom to determine and hold their own views on the issue and to form their own judgments about whether and how to express those views. The government does not dispute that it could not constitutionally impose such a requirement by direct regulation. The government is therefore barred from imposing the same requirement indirectly by means of a condition on federal funding. *See supra* pp. 20-25.

Even in cases where this Court has upheld funding conditions that restrict speech, it has relied specifically on the fact that the condition did not compel a private statement of agreement with the government's views. In *Rust*, for example, the Court emphasized that "[n]othing in [the regulation] requires a doctor to represent *as his own* any opinion that he does not in fact hold." 500 U.S. at 200 (emphasis added). Similarly, in *FAIR*, the Court explained that the Solomon Amendment "neither limit[ed] what law schools may say nor require[d] them to say anything." 547 U.S. at 60. Distinguishing *Barnette* and *Wooley*, the Court emphasized that the statute at issue in *FAIR* "d[id] not dictate the content of the speech at all" and that "[t]here [wa]s nothing in this case approaching a Government-

mandated pledge or motto that the [grantee] must endorse." *Id.* at 62. Here, by contrast, a "Government-mandated pledge" is precisely what the Leadership Act imposes.

The government responds (at 41) that grantees are not "compelled to do anything" because the compulsion exists only "as a result of their own choice to accept federal funds." (Emphasis omitted.) But that simply repeats the same mistaken premise that pervades the government's brief. The fact that a recipient may choose to forgo federal funding does not permit the government to disregard the First Amendment when imposing funding conditions that restrict even privately funded speech. *Supra* pp. 20-25. That theory did not save the funding conditions struck down in *League of Women Voters* or *Velazquez*, and it cannot do so here.

Citing *Riley*, the government also argues (at 33-36) that the court of appeals erred in distinguishing the Policy Requirement's compulsion of speech from the conditions upheld in *Rust* and *Regan*. But the cited language in *Riley* merely rejected the argument that the First Amendment provides less protection against compelled speech than it does against compelled silence. *See* 487 U.S. at 796 (holding that both are offensive to free speech). *Riley* did not confront, much less uphold, a funding condition like the one here that both compels the adoption of government orthodoxy and prohibits any contrary expression, thus completely depriving the recipient of the freedom to "decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys.*, 512 U.S. at 641.

2. The Policy Requirement unconstitutionally suppresses private speech based on the speaker's viewpoint

In addition to compelling recipients to adopt and express a "policy explicitly opposing prostitution," the Policy Requirement prohibits grantees from engaging in speech or activities the government deems "inconsistent" with its chosen viewpoint. *Supra* p. 9; Pet. App. 3a. This requirement independently violates the First Amendment for two related reasons.

First, the Policy Requirement impermissibly restricts privately funded speech. As noted, respondents receive substantial funding from private donors and other sources in addition to Leadership Act grants. *Supra* pp. 4-6; *see* JA96-97. The Policy Requirement, however, applies to any "group or organization" that receives Leadership Act funding. 22 U.S.C. § 7631(f). Accordingly, the moment an organization receives one dollar of Leadership Act funds, the entire organization—including all of its programs worldwide, whether HIV/AIDS-related or not, and whether government-funded or not—becomes subject to the Policy Requirement and the prohibition on "inconsistent" speech and activities. Indeed, the government acknowledges that the very purpose of the Policy Requirement is to prevent recipients from expressing "a contrary message with their *private funds*." Cert. Reply 8 (emphasis added); *see also*, *e.g.*, Pet. Br. 20, 27.

In *Rust*, this Court explained that the unconstitutional-conditions doctrine prohibits the government from "plac[ing] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the feder-

ally funded program." 500 U.S. at 197. Distinguishing *Perry* and *League of Women Voters*, the Court upheld the regulations at issue in *Rust* because they "govern[ed] the scope of the Title X *project's* activities, and le[ft] the grantee unfettered in its other activities." *Id.* at 196. Here, unlike *Rust* but like *Perry* and *League of Women Voters*, a Leadership Act recipient must "give up … speech" the government finds inconsistent with an opposition to prostitution, even when engaging in activities independent of the federally funded program. *Id.* Nothing in the government's authority to "insist[] that public funds be spent for the purposes for which they were authorized" permits the government to restrict private speech outside of the federal program altogether. *Id.*; *see also League of Women Voters*, 468 U.S. at 400.

Second, the Policy Requirement unconstitutionally suppresses speech expressing a disfavored point of view. In general, a "government regulation may not favor one speaker over another," *Rosenberger* v. *Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995), especially when doing so threatens to "drive certain ideas or viewpoints from the marketplace," *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *see also, e.g.*, *Knox* v. *Service Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) ("The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves."); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 431 (1992) (where a law seeks "to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." (internal quotation marks omitted)); *Rosenberger*, 515 U.S. at 828 ("Discrimination against speech because of its message is

presumed to be unconstitutional."); *Regan* v. *Time, Inc.*, 468 U.S. 641, 648-649 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

The First Amendment's prohibition on viewpoint discrimination is no less robust when Congress exercises its spending power. "'[I]deologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts.'" *Rosenberger*, 515 U.S. at 830. Thus, "[w]here private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." *Velazquez*, 531 U.S. at 548-549; *see also Finley*, 524 U.S. at 587 ("[E]ven in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'"). This Court has accordingly invalidated conditions on benefits that aimed to suppress the expression of disfavored views. *See, e.g.*, *Velazquez*, 531 U.S. at 548-549. And in cases where the Court has upheld funding conditions, it has emphasized the absence of any "indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." *Regan*, 461 U.S. at 548. Thus, the restriction upheld in *Rust* did "not discriminate[] against viewpoints on abortion" and "did not single out a particular idea for suppression because it was dangerous or disfavored." *Velazquez*, 531 U.S. at 541. Similarly, in upholding the funding condition in *Finley*, the Court noted that it would have "confront[ed] a different case" if the government had "leverage[d] its power to award subsidies … into a penalty on disfavored viewpoints." 524 U.S. at 587; *see also id.* ("a more pressing constitutional question would arise if Government funding re-

sulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace'").

Here, the Policy Requirement imposes an impermissible viewpoint-based restriction on speech. *See Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (a restriction is viewpoint-based if it regulates speech "because of disagreement with the message it conveys"). Recipients are free to assert views and undertake activities with which the government agrees, but may not engage in speech or conduct the government deems "inconsistent" with an opposition to prostitution. Indeed, the government admits (at 20) that the goal of the Leadership Act's entity-wide prohibition on "inconsistent" speech is to prevent grantees from "advanc[ing] an opposite position" to the government's, using private funds. *See also* Pet. Br. 22, 24, 27; Cert. Reply 5, 8. This is the definition of viewpoint discrimination aimed at disfavored views.[5]

The consequence of the Policy Requirement, if imposed, would thus be to silence NGOs with views that differ from the government's and to drive their viewpoints from the marketplace of ideas. In addition to their public-health field work, respondents regularly use private funds to engage in academic conferences and panel discussions (JA128, 169), publish books and training manuals (JA168-169), and discuss issues with

[5] To the extent the government suggests (at 13, 15-16, 37, 39) that respondents have waived this argument, that is plainly incorrect. Respondents argued in the lower courts that the Policy Requirement violates the First Amendment in part by seeking to suppress disfavored views. *See, e.g.*, Appellee C.A. Br. 38-39 (Dec. 14, 2006); Appellee C.A. Br. 4, 30, 33-34 (Sept. 8, 2010).

their member organizations (JA134-135). Under the Policy Requirement, respondents would be prohibited from participating in the ongoing public debate in these fora about how best to improve sex workers' access to health care and to deal with the public-health consequences of prostitution. The government's asserted authority, if wielded in this litigation, would even prohibit one of the amicus briefs filed in support of the government in this Court. The brief filed by the Coalition Against Trafficking in Women states (at 33) that amici "are firmly opposed to placing criminal penalties or stigma of any kind upon prostituted persons." As the court of appeals explained, that "contested public issue" is the subject of ongoing "international debate." Pet. App. 29a. The government, however, has taken the position that the Policy Requirement prohibits "advocacy for the elimination of criminal penalties against women engaged in prostitution." JA137-138; *see also* Def. Opp. to Mot. for Prelim. Inj. 13 (Dkt. No. 27). Under the Policy Requirement, recipients of Leadership Act funds thus could not take the position advanced in that amicus brief for fear of losing federal funding.

As a result, the Policy Requirement would silence those organizations that, by virtue of their public-health expertise and field work, are among the most experienced and knowledgeable about working effectively with populations that are highly vulnerable to infection, including sex workers, in the fight against HIV/AIDS. Leadership Act recipients make up a major portion of the marketplace of ideas on these public-health issues. Without their participation, the public debate will be less diverse and robust. By compelling grantees to embrace the government's orthodoxy and refrain from expressing "inconsistent" views, even in privately funded contexts, the Policy Requirement

"harm[s] not only" respondents "but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003).

The government makes no attempt to identify an interest substantial enough to justify these intrusions on free speech if imposed as a direct regulation, and they accordingly cannot be imposed indirectly through a condition on federal funding. *Supra* pp. 20-25.[6] Although the government disclaims (at 36) a view of the spending power that lacks "First Amendment limits," it reverts in the same breath (at 37) to the position that those limits are not exceeded so long as organizations "remain free to advocate for, or be neutral toward, prostitution and sex trafficking" simply by turning down federal funds. That supposed "limit[]" provides no limit at all and cannot be squared with this Court's unconstitutional-conditions precedents.

II. THE POLICY REQUIREMENT CANNOT BE UPHELD UNDER THE GOVERNMENT-SPEECH DOCTRINE

A. The Policy Requirement Is Not "Government Speech" And Respondents Are Not Government Speakers

Although the government may dictate the content of speech when the government itself "is the speaker or … enlists private entities to convey [the government's] own message," *Rosenberger*, 515 U.S. 833, it cannot control the content of private speech that is not made

[6] As discussed below, the Policy Requirement is not necessary to the effectiveness of the Leadership Act or to the integrity of the government's own opposition to prostitution. *See infra* Part II.B.

by or on behalf of the government, *see, e.g.*, *Velazquez*, 531 U.S. at 542. That is the case here.

The Policy Requirement is not government speech. Rather, it dictates the content of speech recipients must adopt and express as their own view as a condition of receiving government funding. 22 U.S.C. § 7631(f). The government thus concedes (at 22) that the Policy Requirement requires a grantee to "agree in the award document that *it* opposes prostitution." (Emphasis added); *see also id.* 20 (Policy Requirement ensures that recipients themselves are not "indifferen[t] toward" prostitution); *id.* 22 (Policy Requirement "secure[s] a commitment by the recipient that *it* will adhere to the government's policy … in *its* conduct and … *its* expression (emphases added)); *id.* 27 (Policy Requirement "ensure[s] that funding recipients" themselves "adhere to" the government's viewpoint).

Nor does the Policy Requirement represent governmental speech "convey[ed]" or "transmit[ted]" by private speakers acting on the government's behalf. *Rosenberger*, 515 U.S. at 833. Respondents have not received public funds to deliver the government's anti-prostitution message. They receive public funds to implement HIV/AIDS-related programs to prevent and combat a deadly disease. *See supra* pp. 4-6. Thus, the government concedes (at 22) that the Policy Requirement "does not … require [recipients] to actively disseminate [an anti-prostitution] policy to foreign nationals." *See also id.* 22 (Policy Requirement "does not in itself require a recipient to affirmatively volunteer to others … an opposition to prostitution and sex trafficking"); *id.* 43 n.6 (recipients "are not required by Section 7631(f) to affirmatively express an opinion about prostitution and sex trafficking"); *id.* 44 (recipients are not required to "publicize their policy to third parties").

Rather, as the government acknowledges (at 44 n.6), the Policy Requirement requires recipients to adopt their own policy opposing prostitution and to express that policy "*to HHS and USAID*" as a condition of receiving federal funding. It does not "enlist[] private entities to convey" any message to any audience on behalf of the government. *Rosenberger*, 515 U.S. at 833.[7]

B. The Policy Requirement Is Not A Legitimate And Appropriate Means Of Protecting Any Government Message

Having conceded that the Policy Requirement itself is not government speech, the government proceeds (at 27-28) on the novel theory that this Court's government-speech doctrine nonetheless permits it to demand that all funding recipients commit themselves to the government's preferred ideology, even when the recipients have not been enlisted to convey any anti-prostitution message, so that the government may "advance [its] goal [of opposing prostitution] with consistency, force, and scope." That assertion does not justify the Policy Requirement's sweeping restriction of free speech.

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[7] The D.C. Circuit upheld the Policy Requirement on the assumption that "'the government's own message is being delivered'" and that grantees "must communicate the message the government chooses to fund." *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758, 762, 764 (D.C. Cir. 2007); *see also id.* at 763 n.5 ("[V]iewpoint discrimination raises no First Amendment concerns when the government is speaking."). As the government now concedes (*e.g.*, at 22, 27), that assumption was incorrect. *See supra* pp. 34-36.

1. Imposing an ideological purity test is not a "legitimate and appropriate" means of protecting the integrity of any government policy

As one of dozens of findings underlying the Leadership Act's comprehensive strategy, Congress stated that "it should be the policy of the United States to eradicate" prostitution. 22 U.S.C. § 7601(23). The government asserts (at 27) that "some recipients" of Leadership Act funds—but "only some"—will "actively convey that message by implementing federally funded projects aimed at reducing the commercial sex trade." The government does not identify any such messaging projects. *Cf.* CAJA377 (signing statement) ("'We care more about results than words.'"). Even assuming such projects exist, however, the Policy Requirement is not a permissible means of ensuring their efficacy or the integrity of the government's policy.

The government relies (*e.g.*, at 21-22) on *Rosenberger*, where this Court explained that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." 515 U.S. at 833. But *Rosenberger* nowhere suggested that "legitimate and appropriate steps" could include a viewpoint-based restriction that compels all grantees to adopt the government's viewpoint while at the same time prohibiting grantees—even in the context of privately funded programs—from engaging in speech or activities the government deems inconsistent with that viewpoint. The Court simply cited its discussion in *Rust* of the government's power to "insist[] that public funds be spent for the purposes for which they were authorized." *Rust*, 500 U.S. at 196; *see Rosenberger*,

515 U.S. at 833 (citing *Rust*, 500 U.S. at 196-200). As discussed above, the power recognized in *Rust* does not entail the broader power to compel grantees to adopt a particular view as their own or to control the speech of grantees undertaken with private funds outside the four corners of the federally funded program. *Supra* pp. 23-24, 27, 29-31; *Rust*, 500 U.S. at 196-200; *League of Women Voters*, 468 U.S. at 399-401. And it certainly does not permit the government to "suppress[] … ideas thought inimical to the Government's own interest." *Velazquez*, 531 U.S. at 549.

The government appears to believe that it may restrict the private speech of respondents and other grantees that have not been enlisted to convey any governmental message merely by asserting that it wishes to avoid undermining a message conveyed (if at all) by other organizations pursuing other programs in which respondents have no involvement. The Court has never upheld a restriction on private speech on such a rationale. In *Rust*, the government was permitted to control the content of speech only within the federal program, and only because recipients of the federal funds remained free to express their own views and pursue abortion-related activities when they were "not acting under the auspices of the Title X project." 500 U.S. at 198.[8]

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[8] Citing *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010), the government contends (at 27) that federal funding "could free nonfederal monies to be used to promote prostitution or sex trafficking." But *Humanitarian Law Project*—which addressed the unrelated question whether citizens have a constitutional right to "provide material support" (in the form of supportive speech) to terrorist organizations—held that whether organizations "meaningfully segregate support of their legitimate activities" from sup-

Moreover, requiring grantees to adopt a policy opposing prostitution cannot possibly be expected to "advance [the government's] goal with consistency, force, and scope," Pet. Br. 27-28, where, as here, most grantees have nothing to do with anti-prostitution programs or messages. Respondents have been enlisted by the government to fight the spread of HIV/AIDS, not to oppose or eradicate prostitution. Respondents have never sought or played any role in any messaging campaign to eradicate or oppose prostitution. Under these circumstances, it is neither legitimate nor appropriate for the government to seek to control respondents' speech. If Congress were permitted to require every recipient of government funds to pledge its agreement with the government's viewpoint on subjects outside the scope of their federally funded program, the government's power to regulate and control private speech would be dangerously expanded.

This Court's decisions in the government-employment context are instructive. Although the speech rights of government employees are diminished somewhat by virtue of their employment, this Court has held even in that context that a government employer's goal of ensuring employee efficacy or loyalty does not justify the imposition of viewpoint restrictions without regard to an employee's particular duties. In *Rutan*, for example, the Court held that the govern-

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port for impermissible activities "is an empirical question." *Humanitarian Law Project*, 130 S. Ct. at 2724. The government has cited no evidence that, without the Policy Requirement, respondents would inappropriately divert public funds to any prohibited purpose. If the mere fungibility of money sufficed to permit broad regulation of *private* speech of federally funded entities, then *League of Women Voters* would have been differently decided.

ment's interest in securing "employees who will loyally implement its policies" can justify screening for political views only in the case of very senior jobs that entail political duties. 497 U.S. at 74. That interest could otherwise be met by "discharging, demoting, or transferring" poor-performing staff. *Id.* The fact that some employees might legitimately be required to share the hiring authority's political affiliation in light of their particular duties has never sufficed to allow the government to require all employees to share that affiliation. Instead, the Court has examined the responsibilities of each employee to assess if the position could be conditioned on party affiliation. *See, e.g.*, *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 719-720, 726 (1996) (screening contractors for party affiliation is unconstitutional where employer cannot "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved"); *see also Rutan*, 497 U.S. at 79; *Elrod*, 427 U.S. at 368; *cf. Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 680 (1996).[9]

Moreover, this Court has rejected outright the proposition that the government can advance its goals by conditioning public employment on the taking of oaths that restrict the freedom of speech, regardless of

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[9] The government relies (at 20) on *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), but that decision dealt with the distinct question whether the Fourth Amendment prohibited the U.S. Customs Service from requiring a drug test before certain classes of employees could be promoted or transferred to jobs involving drug interdiction efforts and other national security responsibilities. Even in that case, the Court held that the weight of the government's interest must be assessed with respect to the employees' particular duties. *Id.* at 678.

the employee's position or duties. Employment cannot "be conditioned on an oath that one … will not engage[] in protected speech activities such as … criticizing institutions of government; discussing political doctrine that approves the overthrow of certain forms of government; and supporting candidates for political office." *Cole* v. *Richardson*, 405 U.S. 676, 680 (1972). This limitation on the government's authority to restrict the rights of its employees applies *a fortiori* in a case involving recipients of federal funding.[10]

The government contends (*e.g.*, at 31, 32) that it may limit federal funding to like-minded organizations that share the government's views "so that they will be reliable partners and emissaries" that will not "transmit the message in a way that distances themselves from it or even indicates their own lack of agreement with it." This argument ignores that recipients of Leadership Act funds, by the government's admission, do not act as "emissaries" at all and do not transmit any message on behalf of the government. *Supra* pp. 34-36. The government's "Just Say No" hypothetical (at 32) is thus off-point. The government may direct an actor to declare "Just Say No To Drugs" because the actor in that situation has been enlisted as a government spokesperson to convey a specific message, and "when

[10] As this Court has explained, the "unconstitutional conditions precedents span a spectrum from government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to … recipients of small government subsidies" like those in *League of Women Voters*, "who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing." *Umbehr*, 518 U.S. at 680.

the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, 515 U.S. at 833. Here, however, as the government concedes, respondents have not been enlisted for any such purpose.[11]

The government's other hypotheticals are similarly inapposite. The government would be well within its authority to adopt a policy calling for the eradication of apartheid, just as it has authority to call for the eradication of prostitution. *Cf.* Pet. Br. 32-33. The government could also prohibit its partners from using federal funds to support apartheid, *Rust*, 500 U.S. at 196-200, and it could enlist private organizations to transmit the government's message of opposition to state-sanctioned racial segregation, *Rosenberger*, 515 U.S. at 833. But the government could not "place[] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in" protected speech inconsistent with the government's views "outside the scope of the federally funded program." *Rust*, 500 U.S. at 197. Nor would such a condition be legitimate or appropriate. The government has ample tools to evaluate an organization's effectiveness in carrying out the goals of a federal program without demanding an expression of orthodoxy. *See infra* p. 45. Among those tools, the government could require an organization to meet performance standards or confirm its compliance with laws prohibiting racial discrimination. *Cf.* Pet. Br. 22. That is different from impermissibly requiring an organization to affirm a subjective belief in the value or correct-

[11] As the district court noted, this case presents an as-applied challenge to the Policy Requirement. Pet. App. 137a-138a.

ness of those laws when the organization is not speaking on behalf of the government.

2. The Policy Requirement is unnecessary to advance the government's policy of eradicating prostitution

The government's novel application of the government-speech doctrine should be rejected for the additional reason that the record refutes any suggestion that the government's policy would be impeded if it could not suppress private speech or compel private actors to adopt its message as their own.

The government contends that Congress's goal would be undermined by allowing any recipient of Leadership Act funds—even those that do not disseminate any government message—to disagree with the government's opposition to prostitution or even to maintain a stance of neutrality or indifference on the subject. *E.g.*, Pet. Br. 20, 22, 23, 27. The terms of the Leadership Act and its implementation history both belie this assertion.

In 2004, Congress exempted some of the largest and most important public-health organizations in the world from the Policy Requirement's restrictions. *See* 22 U.S.C. § 7631(f) (exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organizations, the International AIDS Vaccine Initiative (IAVI), and all United Nations agencies). In fiscal year 2012, these recipients collectively received more than 20 percent of all federal funding made available under the Leadership Act. *See* Henry J. Kaiser Family Foundation, *Budget Tracker* ll. 5, 11, 32, 42, http://www.kff.org/globalhealth/upload/8045_FY2013.pdf (2013). Yet they may accept those federal funds while continuing to take public positions at odds with the an-

ti-prostitution policy—which some of them have in fact done. *See* Pet. App. 33a. Thus, it is simply incorrect that Congress believed its purported anti-prostitution message could be effectively delivered only if all its partners were compelled to agree with it.

The government responds (at 31) that three of the four organizations are international bodies composed in part of sovereign states and that "Congress appropriately could decide not to attempt unilaterally to require those organizations to adopt policies opposing prostitution or sex trafficking." Of course, on the government's theory, these international bodies have a "choice" to forgo federal funds, just as respondents do. Yet the government does not explain why its anti-prostitution "message" is weighty enough to justify imposing that "choice" (or, in the government's words (at 31), "unilateral[] … require[ment]") on U.S.-based organizations in disregard of their First Amendment rights, but not on foreign entities that have no such rights. Moreover, the fourth exempt organization, IAVI, is not a sovereign state, but an NGO that conducts field work similar to some of respondents'. *See supra* p. 10.

Even with regard to non-exempt organizations, there is no evidence the Policy Requirement has been necessary to the success of any government policy. The government chose not to enforce the Policy Requirement against U.S.-based NGOs for more than a year after its enactment, based on OLC's advice that it would be unconstitutional to do so. *Supra* p. 13; Opp. App. 1a-2a. Since OLC's change of position in 2005, the Policy Requirement has remained unenforced against respondents (since 2006, in the case of Pathfinder and AOSI, and 2008, in the case of InterAction and GHC) due to the preliminary injunction entered by the district court. Yet nothing in the record suggests that the

government's goals have been "undermined" or its policies "distorted" during this period. To the contrary, the government and respondents have achieved extraordinary success in the fight against HIV/AIDS and its root causes.

The government has numerous means available to it to ensure the effectiveness of its programs without violating the First Amendment rights of its partners. The government may establish (and has established) rigorous selection criteria requiring funding applicants to demonstrate a proven track record of success in combating HIV/AIDS. *Supra* pp. 7-8; *see also* JA173-174. As it does in any other government program, the government can supervise grantees' performance and audit their work to assess their achievement of the government's preferred goals and benchmarks. *See, e.g.*, CAJA439, 451, 469, 480. The government cannot, however, impose a funding condition that compels the grantee to adopt the government's viewpoint as its own and prohibits the grantee from taking any "inconsistent" view even with private funds.

III. THE AFFILIATE REGIME DOES NOT CURE THE POLICY REQUIREMENT'S CONSTITUTIONAL DEFECTS

The government finally contends (at 46) that the "affiliation guidelines" promulgated in 2010 "obviate any constitutional difficulty" in the Policy Requirement. That argument also fails.[12]

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[12] Respondents' argument before this Court is not that the 2010 Guidelines are unconstitutional, but rather that they fail to remedy the constitutional injuries inflicted by the Policy Requirement. Although respondents did challenge the Guidelines themselves below, the lower courts did not reach those arguments.

A. The Possibility That An Affiliate May Remain Silent Or Express Another View Does Not Cure The Policy Requirement's Unconstitutional Compulsion Of Speech

This Court has upheld funding conditions restricting speech when the recipient could engage in the restricted expression through an alternative channel. *See Rust*, 500 U.S. at 198-199; *Regan*, 461 U.S. at 544; *see also Velazquez*, 531 U.S. at 546-547 (invalidating condition where "there [wa]s no alternative channel for expression of the advocacy Congress s[ought] to restrict"); *League of Women Voters*, 468 U.S. at 400 (condition banning all editorializing was unconstitutional, but hypothetical statute allowing a recipient to "use [its] facilities to editorialize with nonfederal funds" would have been valid). The availability of an alternative channel for expression provides no remedy, however, when the funding condition not only restricts speech, but also compels the recipient to adopt and express a view it does not hold or wishes not to express. As the court of appeals explained, "[t]he curative function of an 'adequate alternative channel' is to alleviate the burden of a constraint on speech by providing an *outlet* that allows an organization to engage—through the use of an affiliate—in the privately funded expression that otherwise would have been impermissibly prohibited." Pet. App. 35a. "It simply does not make sense" to conceive of the affiliate guidelines as "affording an outlet to engage in privately funded *silence*" or "an outlet to do nothing at all." Pet. App. 36a.

Accordingly, when a person is compelled to speak, it is no answer that he or she may retain an agent to remain silent. Citing *Rust*, the government contends (at 47) that this reasoning "misunderstands the First Amendment value of affiliate structures." But *Rust* did

not involve an affirmative compulsion of speech. It involved a restriction on speech that could be ameliorated by permitting the recipient to engage in the restricted speech through an affiliate. Here, by contrast, if a Leadership Act recipient is compelled to adopt and express a policy opposing prostitution, the existence of an affiliate cannot alter or retract the recipient's compelled statement. Nor is it an answer that the agent can express a contrary view, for that also does nothing to undo the speech that has been compelled.[13]

B. The Possibility That An Affiliate May Engage In Speech "Inconsistent" With An Opposition To Prostitution Does Not Cure The Policy Requirement's Organization-Wide, Viewpoint-Based Restriction Of Speech

The affiliate guidelines are inadequate to cure the Policy Requirement's violation of the First Amendment for the additional reason that recipients of Leadership Act funds remain subject to an entity-wide, viewpoint-based restriction on their private speech. In upholding the funding condition in *Rust*, the Court distinguished between the "Title X *grantee*" and the "Title X *project*," emphasizing that the grantee remained free to speak its views through "programs that [we]re separate and independent from the project that receives Ti-

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[13] *Riley* does not support the government's assertion (at 33) that there is no meaningful distinction between compelled speech and compelled silence. *See supra* p. 28. As explained, that distinction is highly relevant to the question whether the 2010 Guidelines can save the Policy Requirement. Compelled silence can be alleviated by providing an alternative channel for speech; compelled speech cannot be alleviated by creating an alternative outlet for silence.

tle X funds." 500 U.S. at 196. This structure left the grantee as an organization "unfettered in its other activities." *Id.* In contrast, the Policy Requirement imposes an entity-wide restriction on a recipient's speech, including its private speech undertaken outside the context of any Leadership Act project. Although the 2010 Guidelines permit a separate affiliate to engage in speech the government deems "inconsistent" with an opposition to prostitution, the recipient of federal funding itself still may not do so, even when engaging in privately funded speech.

Moreover, to satisfy the 2010 Guidelines, an affiliate must remain so separate from the Leadership Act grantee as to prevent any meaningful control of the affiliate's speech by the grantee. "It hardly answers one person's objection to a restriction on his speech that another person, *outside his control*, may speak for him." *Regan*, 461 U.S. at 553 (Blackmun, J., concurring) (emphasis added); *see also Citizens United* v. *FEC*, 130 S. Ct. 876, 897 (2010) (because "[a] PAC is a separate association from the corporation," the PAC's exemption from the corporate expenditure ban "d[id] not allow corporations to speak," and "the option to form PACs d[id] not alleviate the First Amendment problems with" the expenditure ban). This Court accordingly recognized in *League of Women Voters* that, for an affiliate regime to be adequate, the grantee must be "free[] to make known *its* views on matters of public importance through its nonfederally funded, editorializing affiliate." 468 U.S. at 400 (emphasis added); *see id.* (noting that in *Regan*, the charitable organization could conduct "*its* lobbying efforts" through a separate affiliate (emphasis added)).

In *Rust*, the alternative channel was adequate because the grantee could control the content of speech

within its privately funded programs. All that was required there was separation within a single organization between publicly funded and privately funded activities or programs. Here, by contrast, the Policy Requirement by its terms applies to the entire "group or organization," and any affiliate therefore cannot be part of the same organization. The 2010 Guidelines accordingly indicate that an affiliate should be a "legally separate entity" and have separate facilities and "separate personnel"—the latter of which the government has interpreted to include "low-level employees, mid-level managers, and high-level corporate officials." Appellant C.A. Br. 49 (Jan. 15, 2009).[14] These restrictions hinder the ability of a grantee to convey *its* message through an affiliate or to have any control over the content of the affiliate's speech. Indeed, USAID has already investigated CARE, one of respondent InterAction's members, for entering into privately funded partnerships with foreign organizations deemed insufficiently opposed to prostitution. *See* JA151-152. Were a grantee to direct its own affiliate to express views deemed inconsistent with an opposition to prostitution—for example, by publishing a paper discussing whether the criminalization of prostitution contributes to the spread of HIV/AIDS—the grantee might similarly be accused of violating the Policy Requirement. Under these circumstances, permitting the affiliate to

[14] Although the Guidelines provide that the presence or absence of these factors will not be determinative, sharing facilities or personnel—as would be required for the Leadership Act grantee to have any control over the speech expressed by the affiliate—would weigh against a finding that the affiliate satisfies the Guidelines. Pet. App. 298a, 309a-310a.

express its views does not provide an alternative channel for the recipient's own communication.

The government argues (at 48-49) that respondents could "cabin" the effects of the Policy Requirement by creating affiliates with the limited purpose of receiving and spending Leadership Act funds and complying with the Policy Requirement. The government surmises that, by establishing such special-purpose affiliates, respondents themselves would not be subject to the Policy Requirement and would therefore suffer no First Amendment violation. That is incorrect. As an initial matter, the government's eligibility criteria all but foreclose this route. Regulations require organizations like respondents that seek Leadership Act funds through USAID to demonstrate "technical merits," "cost effectiveness," and "past performance," and to have been in existence for 18 months and receive at least 20 percent of their funding from sources other than the U.S. government. *See supra* pp. 7-8 & n.1. A newly created affiliate could not satisfy these requirements, and even if it could, such an entity with no experience, expertise, or track record (and a brand new staff) would find it difficult if not impossible to compete effectively for Leadership Act funding, much less effectively operate the government program.

Apart from these obstacles, the government's proposed "special-purpose affiliate" regime would not solve the constitutional problem. First, whether the funding recipients are respondents themselves or their newly formed affiliates, the recipients would still be compelled to adopt and express the government's viewpoint on an organization-wide basis and refrain from any speech inconsistent with that viewpoint, even with their private funds. The constitutional violation would merely be shifted to a new organization, not

cured. *See* Pet. App. 35a. Second, even under the government's "special-purpose affiliate" proposal, respondents' own speech would still be penalized. By declining to espouse the government's anti-prostitution policy themselves, respondents would lose the opportunity to receive Leadership Act funds. The possibility that their separate affiliates might receive those funds does not remedy the fact that respondents would have been denied a benefit based on their protected speech.

Finally, the government notes (at 45-46) that the affiliate regime upheld in *Regan* and the hypothetical regime discussed with approval in *League of Women Voters* each recognized speech by a separate entity as an adequate alternative channel. Neither of those cases, however, involved a viewpoint-based restriction that precluded the funding recipient from expressing a particular opinion through any medium. Although the 501(c)(3) organization in *Regan* could not engage in lobbying, it remained free to communicate its preferred point of view through any medium other than lobbying. The Court explained, however, that "[t]he case would be different" if "the statute w[ere] intended to suppress any ideas or … had that effect." 461 U.S. at 548. Similarly, under the regime hypothesized in *League of Women Voters*, publicly funded broadcast-television stations would have to channel on-air editorializing through an affiliate, *see* 468 U.S. at 400-401, but they could express any view through "any medium other than subsidized public broadcasting," *id.* at 408 (Rehnquist, J., dissenting); *see also Velazquez*, 531 U.S. at 549 (alternative channel cannot cure First Amendment violation when the funding condition is "aimed at the suppression of ideas thought inimical to the Government's own interest"). Here, the Policy Requirement prohibits the recipient of Leadership Act funds

from expressing a particular viewpoint through any medium, using any funds. The affiliate regime under the 2010 Guidelines cannot compensate for the severity of this restriction.

C. The Affiliate Guidelines Are Too Burdensome And Vague To Provide An Adequate Alternative Channel For Protected Speech

In cases where this Court has upheld a funding restriction on speech by relying on the grantee's freedom to speak through an affiliate, the Court has emphasized the ease with which that alternative channel could be invoked. In *Regan*, the organization could continue to lobby if it simply "return[ed] to the dual structure it used in the past" by maintaining a "separately incorporated" affiliate and "keep[ing] records adequate to show that tax deductible contributions are not used to pay for lobbying." 461 U.S. at 544 & n.6. The Court found that those rules were not "unduly burdensome." *Id.* at 544 n.6. In *Rust*, the federally funded entity could engage in abortion advocacy through "programs that are separate and independent from the project that receives Title X funds" without establishing a separate affiliate. 500 U.S. at 196; *see also League of Women Voters*, 468 U.S. at 400 (permissible affiliate regime would allow station to use its own facilities to editorialize).

Here, by contrast, the 2010 Guidelines impose burdens that are so severe as to be practically prohibitive. These burdens begin with the task of establishing new, separate legal entities in foreign countries.[15] Although

[15] The Guidelines purport to make "legal separation" only one of five non-exclusive factors to be considered in evaluating compli-

creating and incorporating a new entity in the United States may not be unduly burdensome (though it is expensive and time-consuming), many of the foreign countries in which respondents operate have imposed significant barriers to entry by foreign NGOs. Establishing or introducing a new affiliate in these countries bears little resemblance to the process of, say, setting up a new 501(c)(4) arm for a nonprofit in the United States. *Cf. Regan*, 461 U.S. at 544 n.6. Most of the countries in which respondents operate require foreign NGOs to register with the government—a process that typically "entails hiring local attorneys, paying registration fees, filling out forms, hiring consultants, traveling to the country, … waiting for months before starting programs," and engaging in "complex negotiations with multiple ministries." JA129, 141. In India, for example, establishing a new affiliate would require clearance from the Indian Intelligence Bureau, the Ministry of Foreign Affairs, and other government authorities. JA201. Respondents and their members have experienced extensive delays and outright denials in their attempts to obtain registrations in foreign countries. JA106. In Bangladesh, for example, establishing an affiliate "takes months or years of application and seeking government approval, including consideration of the activities that the organization will carry out, examination of the proposed board, and other procedures." JA207. And in Mozambique, the U.S. Department of State found that registering foreign NGOs "involved

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ance with the separation requirement. *See* Pet. App. 298a, 309a-310a. The government, however, has not explained how a grantee could operate a Guidelines-compliant affiliate without legal separation, given that the Policy Requirement applies organization-wide. *See supra* p. 9.

significant discretion on the part of government officials" and regularly took months. JA211.

Under the 2010 Guidelines, respondents would have to complete that process in multiple countries, each with differing legal regimes and requirements. For example, if an NGO accepts a Leadership Act grant to fund a new HIV/AIDS program in Angola, all of its programs worldwide would become subject to the Policy Requirement. If that NGO wished to free its activities outside Angola from the restrictions of the Policy Requirement, it would have to set up new affiliates in every country in which it operates and transfer all of its existing operations in those countries to the new affiliates. *See* JA106, 141, 157. That task could not be completed without the assent of every country in which the NGO operates, and that assent would not always be forthcoming. The idea of the same NGO operating through two separate entities in the same country could elicit suspicion from local authorities, who may believe the affiliates will be used for unlawful purposes, such as to "evade tax or customs requirements, or to engage in advocacy or political activities." JA109, 198, 203, 213. Such authorities are unlikely to view an administrative regulation promulgated by a U.S. agency as a compelling reason to permit a new and duplicative foreign entity to operate within their borders. And if, say, the Tanzanian government refused to permit the NGO that receives Leadership Act funds in Angola to establish a new affiliate in Tanzania, the NGO would be forced to choose between acceding to the Policy Requirement's restrictions in Tanzania, without any alternative channel for protected speech, or terminating its Tanzanian operations altogether.

Even assuming grantees could establish new affiliates in all of the relevant countries, further difficulties

abound. The 2010 Guidelines indicate that affiliates should have "separate personnel." Pet. App. 298a. But recruiting, hiring, and supervising duplicate staff would be prohibitively costly, wasteful, time-consuming, and difficult. JA176-177. Most organizations typically have a single country representative and senior staff to lead the organization's programs in a given country; the Guidelines would require two. JA180. And finding new staff for new field offices would be a significant challenge: Many countries limit the number of foreign staff that NGOs may employ and impose onerous work-permit and visa requirements on foreign NGO employees. JA209. Often, as in Mozambique, the NGO must demonstrate that no local applicant has the necessary qualifications. JA212-213. This process can take months. An International Red Cross study found that 77 percent of humanitarian NGOs reported significant difficulties obtaining work permits and visas. JA196; *see also* JA181.

The 2010 Guidelines also indicate that affiliates should maintain separate facilities. Pet. App. 298a. Doing so would require organizations to obtain new office space and import duplicative equipment, including computers, servers, and generators, at great cost. *See* JA186-188. Even opening separate bank accounts can be difficult. In India, for example, foreign NGOs are allowed only a single bank account that receives funds from abroad. Even minor changes require government permission; for instance, it can take up to a year to add a single local employee as a signatory to an existing account. JA185.

Moreover, even assuming an NGO could establish a working affiliate that would not be subject to the Policy Requirement, that affiliate would lack the track record and credibility to compete effectively for projects and

non-Leadership Act funding. *See* JA106-107, 141, 158, 172-174. This problem is exacerbated by the Guidelines' requirement that the affiliate must maintain separate identification from the grantee, Pet. App. 298a, which prevents the affiliate from relying on the reputation and brand the main organization has established through its work. Moreover, the cost of complying with the Guidelines will increase the organization's overhead and decrease the amount of funds available for actual work in fighting HIV/AIDS. Higher administrative costs in turn deter private donors and harm fundraising. *See* JA177-178, 199-200. None of the affiliate regimes this Court has previously addressed required organizations to overcome such onerous barriers to engage in protected expression. *See supra* p. 52.[16]

Apart from these practical burdens, the affiliate guidelines are too vague to provide an adequate alternative channel for protected speech. Respondents do not now ask this Court to invalidate the 2010 Guidelines as unconstitutionally vague, although they are.[17] Rather, the point is that grantees can never be sure whether they are sufficiently "separate" from any activities of an affiliate that the government would deem "inconsistent" with a policy opposing prostitution to

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[16] In *DKT*, which was decided before any affiliate guidelines were promulgated, the D.C. Circuit relied on the government's representation that nothing in the final regulations would prevent a subsidiary from qualifying for Leadership Act funding, leaving a parent organization free to avoid the Policy Requirement. *See* 477 F.3d at 763 & n.4. As shown, the reality of the Guidelines is far different from what the *DKT* court assumed.

[17] Respondents raised this point in the lower courts and reserve the right to press it in the event of a remand.

avoid being penalized for their affiliate's speech. *See, e.g.*, JA127-128. Grantees will accordingly be forced to comply with the most demanding interpretation of the affiliation requirements to avoid losing federal funding.

For example, the 2010 Guidelines provide that a grantee will be deemed to have "objective integrity and independence" from an affiliate if it is, "to the extent practicable in the circumstances, separate from the affiliated organization." Pet. App. 297a-298a. Whether sufficient separation exists, in turn, is to be determined by the government "on a case-by-case basis," "based on the totality of the facts." Pet. App. 298a. No single factor or set of factors is to be "determinative"; indeed, no single set of factors exists. Pet. App. 298a. Although the Guidelines include a list of factors to be considered, the government's assessment of grantees' compliance "shall … not be limited to" those five factors. Pet. App. 298a. Accordingly, no grantee can determine with any certainty that an affiliate will be found sufficiently "separate" to comply with the Guidelines. Grantees are thus forced "to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked" and to "restrict[] their conduct to that which is unquestionably safe." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (citation omitted).[18]

[18] That concern is amplified by the penalties the government may impose if it deems grantees in violation of the Policy Requirement. For example, USAID may punish violations of the Policy Requirement by terminating an award, seeking a refund of money already disbursed, or debarring the grantee from receiving USAID grants. *See* 22 C.F.R. §§ 226.62(a)(3), 226.73; 2 C.F.R. §§ 780.10, 780.20, 180.800.

The 2010 Guidelines thus require grantees to undertake the difficult and possibly futile endeavor of trying to create affiliates in a host of foreign countries, with no assurance that those affiliates will be free to engage in speech "inconsistent" with the government's viewpoint. In light of these burdens, the affiliate regime fails to provide an adequate alternative channel for the constitutionally protected speech that the Policy Requirement forbids.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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