No. 19-177

IN THE

Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

ARI J. SAVITZKY
KATHERINE FLORIO
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

DAVID W. BOWKER
Counsel of Record
CATHERINE M.A. CARROLL
DAVID A. STOOPLER
KEVIN M. LAMB
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.bowker@wilmerhale.com

QUESTION PRESENTED

In *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013), this Court held that the so-called Policy Requirement—which requires recipients of federal HIV/AIDS funds to espouse the government's viewpoint on prostitution—"violates the First Amendment" by "compel[ling] as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program" or "'cabin[ed]'" to affiliates that are "clearly identified" with respondents. *Id.* at 219-221. Despite this Court's decision, the government continued to apply the Policy Requirement, including to affiliates that share respondents' same name, brand, mission, and voice.

The question presented is whether the district court abused its discretion in entering a permanent injunction to enforce this Court's decision and remedy the violation of respondents' First Amendment rights by prohibiting the government from enforcing the Policy Requirement against respondents or their clearly identified affiliates, regardless of where those affiliates are incorporated.

CORPORATE DISCLOSURE STATEMENT

Respondents have no parent corporations, and no publicly held company owns 10% or more of any respondent's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES, RULES, AND REGULATIONS

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 19-77

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

INTRODUCTION

The government argues that review should be granted because the lower courts invalidated an Act of Congress on constitutional grounds. That is incorrect. This Court invalidated the forced-speech law at issue in 2013. The decisions below merely crafted a remedy to stop the government from continuing to apply that law in a manner that violates respondents' First Amendment rights. The lower courts' discretionary determinations regarding how best to ensure that respondents receive the full protection of this Court's decision do not warrant review.

In 2013, this Court struck down the so-called "Policy Requirement," a funding condition that requires public-health organizations like respondents to adopt and espouse as their own the government's viewpoint on prostitution. *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013) (*AOSI*). The Policy Requirement, the Court held, "violates the First Amendment and cannot be sustained." *Id.* at 221. In so holding, the Court rejected the government's argument that imposing the Policy Requirement on respondents' affiliates instead of respondents might cure the First Amendment problem by "'cabin[ing] [its] effects'" to the affiliates. *Id.* at 219. That proposal failed, the Court held, because the Policy Requirement "compel[s] as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program." *Id.* at 221.

That should have ended this case. Instead, the government persisted in applying the Policy Requirement, repeatedly failing to remove it from funding documents or to clearly exempt respondents or their affiliates, thereby continuing to inflict on respondents the First Amendment harm this Court identified.

Respondents accordingly sought a permanent injunction to implement this Court's decision and remedy that harm. In those remedial proceedings, the government conceded it could not apply the Policy Requirement to respondents, but maintained (as it previously argued to this Court) that it should be allowed to apply the Policy Requirement to respondents' co-branded affiliates incorporated overseas. Hewing to this Court's reasoning—and on an undisputed record demonstrating that respondents "share their names, logos, and brands with their foreign affiliates, and together … present a united front," Pet. App. 11a—the district court en-

joined the government from applying the Policy Requirement to respondents or any of their clearly identified affiliates, whether foreign or domestic. As the district court explained, this Court already held that the Policy Requirement's effects cannot be cabined to affiliates without harming respondents' First Amendment rights, and the constitutional harm to respondents from imposing the Policy Requirement on their affiliates "is the same regardless of the nature of the affiliate." Pet. App. 55a. The Second Circuit affirmed, finding no abuse of discretion in that application of this Court's holding to the facts before it.

That decision presents no issue worthy of review. The government argues that respondents' affiliates have no First Amendment rights because they are incorporated and operate outside the United States. But that is not the issue, and the lower courts did not hold otherwise. The injunction here protects *respondents*—all of which are U.S.-based organizations—by prohibiting the government from enforcing the Policy Requirement in a manner that violates *their* First Amendment rights. The government does not contend that the district court abused its discretion in crafting that injunction and identifies no important legal issue pertaining to the exercise or review of that remedial discretion. It also identifies no split on whether it may be enjoined from enforcing an unconstitutional statute against a clearly identified foreign affiliate to protect a U.S. plaintiff's First Amendment rights. The cases on which it relies do not speak to that issue and are the same ones this Court already distinguished in explaining why the Policy Requirement is unconstitutional.

Respondents have litigated this case since 2005. In that time, this Court and the lower courts have had to deliver the same message to the government seven dif-

ferent times: The statute "violates the First Amendment and cannot be sustained." 570 U.S. at 221. It is time for respondents to enjoy complete relief and this case to end. The Second Circuit's factbound determination that the district court "did not abuse its discretion in issuing its permanent injunction," Pet. App. 7a, does not implicate the constitutionality of a federal statute in any way beyond what this Court has already said. The specter that the lower courts' decisions would give foreign entities First Amendment rights to bring their own challenges to federal funding conditions is not now, and has never been, at issue here. If, in some other case, other litigants wanted to press that position, the issue on which the government seeks review might be ripe. But it is not presented in this case. The petition should be denied.

STATEMENT

A. Respondents And Their Affiliates' Global Fight Against HIV/AIDS

Respondents are U.S.-based nongovernmental organizations (NGOs) leading the global fight against HIV/AIDS. Respondent InterAction, for example, is the largest alliance of U.S.-based international-development and humanitarian NGOs. Its members include, among numerous other U.S. NGOs, Cooperative for Assistance and Relief Everywhere, Inc. (CARE USA), one of the world's largest private international humanitarian organizations, CAJA70, 1928; World Vision International, a global Christian relief, development, and advocacy organization, *see* World Vision International, Our Core Values, http://www.wvi.org/our-core-values; respondent Pathfinder International, a global nonprofit focused on reproductive health, CAJA85; and Save the Children Federation,

Inc., which works to give children everywhere a healthy start, the opportunity to learn, and protection from harm, CAJA1989. Each of these organizations engages in critical HIV/AIDS work around the world. *See, e.g.*, CAJA73-75, 89-90, 93-94, 1991.

Respondents operate in more than 120 countries, performing lifesaving work with funding from a wide variety of sources, including the United States and foreign governments, agencies of the United Nations and the World Bank, and private foundations. CAJA26, 61, 71, 86, 293-295, 1853, 1928-1929, 1989. For example, Pathfinder has engaged in HIV/AIDS prevention, care, and counseling programs across Africa and Asia, including efforts to prevent mother-to-child transmission of HIV in Kenya, CAJA89-90, and programs to promote HIV-prevention methods among sex workers in India, CAJA93. CARE works with vulnerable populations to prevent the spread of HIV/AIDS around the world, including in Bangladesh, where it has been recognized as a best-practices leader by UNAIDS and the World Health Organization for its efforts to identify effective prevention strategies involving sex workers as peer educators. CAJA76.

Respondents carry out this work through global networks of entities that "share the same name, logo, brand, and mission." Pet. App. 4a. The structures of these networks vary. Some respondents operate through unincorporated branch offices. Others operate through legally distinct entities that are separately incorporated in the countries in which they work. And others employ a combination of branch offices and separately incorporated affiliates, depending on conditions within each country. For example, CARE operates through both branch offices and separately incorporated affiliates around the globe. CARE USA is the

founder and largest member of the global federation CARE International, which itself is separately incorporated. CAJA1928. Within CARE International are more than a dozen legally separate entities—CARE USA and its foreign affiliates—each located and incorporated in different countries. *Id.* Other respondents use similar structures. *See, e.g.*, CAJA1989 ("There are currently national Save the Children Organizations, such as [Save the Children US] and [Save the Children United Kingdom], incorporated in 30 countries around the world[.]"); CAJA1853 ("Pathfinder also uses foreign affiliates. These entities share important bonds with Pathfinder, but are legally distinct, incorporated in the countries in which they are located."). World Vision International, based in California, is likewise an international coordinating body that oversees a partnership of separately incorporated affiliates around the globe. *See* World Vision International, Our Structure, http://www.wvi.org/structure-and-funding.

The U.S. government, particularly petitioner U.S. Agency for International Development (USAID), encourages NGOs to conduct their HIV/AIDS work through networks of separately incorporated foreign affiliates rather than through branch offices. *See* CAJA1933. From 2010 through 2016, USAID emphasized this preference and shifted funding opportunities toward organizations with that structure. CAJA1859-1861. Indeed, for many grant opportunities, federal funding is available only to NGOs that are incorporated in the country where the program will be conducted. CAJA1854, 1860-1861. In addition, some foreign governments require NGOs to be incorporated in-country to perform public-health work there and bar NGOs incorporated elsewhere. CAJA1854.

Regardless of how their networks are formally organized, each respondent and its co-branded family of branches and affiliates operates in practice as a cohesive group and "appear[s] to the public as [a] unified entit[y]." Pet. App. 5a. Respondents' and their affiliates' unified appearance and identity is conveyed through use of a shared name, logo, branding, mission, and voice. For instance, CARE's affiliates, including CARE USA, are referred to simply as "CARE" or "CARE" plus the name of the country in which they operate—*e.g.*, "CARE India." CAJA1932. World Vision, Save the Children, Pathfinder, and others follow the same convention. *See, e.g.*, CAJA1855; CAJA1989, 1992. Respondents also share identical branding with their affiliates across the globe. For example, each organization presents its name (*e.g.*, "CARE" or "Save the Children") in the same font, style, and colors as its affiliates, and affiliates share the same corporate logo, such as CARE USA's circle with overlapping hands around the circumference, or Save the Children's bright red circle around a child with outstretched arms. *See, e.g.*, CAJA1863-1868, 1978-1987.

In addition to common branding, affiliates within a given network share a mission and speak with a single voice about their public-health efforts and common guiding principles. *See, e.g.*, CAJA1929 (explaining that all affiliates are bound by a common code requiring a commitment to CARE's "governance, vision, mission, programming principles, humanitarian mandate, [and] common Codes of Ethics and Conduct"); World Vision International, Vision and Values, http://www.wvi.org/vision-and-values (explaining that each affiliate must "covenant" to "uphold" core principles guiding World Vision's work to remain in the partnership).

That consistent messaging is critical to respondents because, in practice, the common identity shared with their affiliates creates "a two-way street," CAJA1855 (Pathfinder Decl.), in which actions or statements by an affiliate are imputed to the U.S. NGO and vice versa. For example, "[i]n Pathfinder's experience, any Pathfinder entity, whether separately incorporated in a foreign country or not, is viewed by the public as part of a single entity." CAJA1856; *see also* CAJA1932 (CARE affiliates "are viewed by the public as one CARE entity speaking with a single global voice[.]"); CAJA1992 (Save the Children affiliates "are viewed by the public as speaking in a single global voice aligned to their common mission"). Because of that "two-way street," speaking with a unified voice across affiliates is essential to accomplishing each federation's public-health mission, raising funds, building a reputation, recruiting personnel, and keeping employees safe. *See, e.g.*, CAJA1934 ("A common voice and approach is critical to CARE's success[.]"); CAJA1992 ("Save the Children's strength and effectiveness as a global movement is in its collective, global identity and approach."); *see also* CAJA1856-1857, 1930-1931, 1934-1935.

Respondents and their affiliates take various steps to ensure consistency in their messages. For example, Pathfinder requires foreign affiliates to vet proposed communications with Pathfinder's U.S. headquarters before taking a position on public-health issues. CAJA1857; *accord, e.g.*, CAJA1929-1930, 1944-1958 (detailing portions of CARE's governing code that regulate public messaging). In short, respondents and their branch offices and affiliates are unified organizations that look and speak as one.

B. The Policy Requirement

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act). 22 U.S.C. §§ 7601, 7603. Finding partnerships with NGOs "critical to the success" of efforts to combat HIV/AIDS, *id.* § 7621(a); *id.* § 7603(4), Congress appropriated billions of dollars to support the work of NGOs engaged in HIV/AIDS treatment and prevention. Those funds are distributed under the aegis of the President's Emergency Plan for AIDS Relief (PEPFAR).

To win Leadership Act funding, an NGO must "demonstrate[] a capacity to undertake effective development activities." 22 U.S.C. § 2151u(a). To do so, applicants must identify all their "cost-reimbursement contracts, grants, or cooperative agreements involving similar or related programs during the past three years." USAID, ADS 303.3.9 (rev. Aug. 1, 2019), https://www.usaid.gov/sites/default/files/documents/1868/303.pdf. In many cases where work is to be performed by an affiliate, respondents apply for and receive Leadership Act funds themselves and then make subawards to the affiliates that will carry out a particular program. Such arrangements are subject to the requirement that the U.S. recipient must monitor the affiliates' compliance with federal law and all terms and conditions of the grants. 2 C.F.R. § 200.331; *see also* CAJA360-361; Pet. App. 132a.

Recipients of Leadership Act funds are prohibited from using those funds to "promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. § 7631(e). Respondents have scrupulously complied with that prohibition, which has never been challenged in this litigation. But the Leadership Act

also purports to impose an affirmative speech requirement, the "Policy Requirement," under which any "group or organization" that receives Leadership Act funds (with a few exceptions) must "have a policy explicitly opposing prostitution and sex trafficking." *Id.* § 7631(f).

In early 2004, the Department of Justice's Office of Legal Counsel expressed the view that the Policy Requirement could not "be constitutionally applied to U.S. organizations," regardless of "whether they are operating inside or outside the United States," and could "be constitutionally applied to foreign organizations … only when they are engaged in activities overseas." Opp. App. 2a, No. 12-10 (U.S. Dec. 12, 2012). Consistent with that analysis, petitioners USAID and the Department of Health and Human Services (HHS) did not enforce the Requirement against U.S. NGOs for more than a year after the Leadership Act went into effect. But in mid-2005, they reversed course and began imposing the Requirement on respondents.

As implemented by the government, the Policy Requirement not only requires an affirmative declaration of policy, but also prohibits grant recipients from "engag[ing] in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking"—even when using private funds and acting outside the scope of the federal program. 45 C.F.R. § 89.3. Neither the Act nor the regulations define the types of speech or activities that would be "inconsistent with" opposition to prostitution.

Absent the Policy Requirement, respondents would not adopt policies expressing opposition to prostitution. CAJA32, 63, 73-74, 76, 89-90, 300-301. In general, to maintain their ability to conduct effective public-health

programs in many parts of the world, respondents prefer to avoid taking stances on contentious political and cultural issues. CAJA65, 90, 1858-1859. Moreover, respondents often work directly with sex workers through programs with proven success in reducing rates of HIV infection. CAJA74-75, 92-94, 295. The Policy Requirement compels respondents to express a view they believe "stigmatizes one of the very groups whose trust they must earn to conduct effective HIV/AIDS prevention." CAJA37; *see* CAJA65-66, 74-76. The Policy Requirement thus impedes successful work by respondents in fighting HIV/AIDS. *See, e.g.*, Public Health Deans & Professors Amicus Br., No. 12-10 (U.S. Apr. 3, 2013); Secretariat of Joint United Nations Programme on HIV/AIDS Amicus Br., No. 12-10 (U.S. Apr. 3, 2013).

C. Prior Litigation

1. The lower-court decisions and the affiliate guidelines

Respondents brought this action in September 2005, shortly after USAID and HHS began enforcing the Policy Requirement against U.S. NGOs. The district court granted a preliminary injunction, holding that the Policy Requirement "compels [respondents] to speak in contravention of the First Amendment." 430 F. Supp. 2d 222, 278 (S.D.N.Y. 2006).

The government appealed. At oral argument, the government informed the court of appeals of its intent to issue new implementing regulations that it claimed would resolve respondents' First Amendment claim. 254 F. App'x 843, 845-846 (2d Cir. 2007). The new regulations purported to "clarif[y] that an independent organization affiliated with a recipient of Leadership Act

funds need not have a policy explicitly opposing prostitution" and could engage in activities inconsistent with a policy opposing prostitution, "so long as the affiliate satisfies the criteria for objective integrity and independence" from the funding recipient. CAJA21, 23. Among the factors the government would consider in evaluating whether an affiliate maintained sufficient separation were whether the entity has separate personnel and facilities and whether "signs and other forms of identification … distinguish the affiliate from the recipient." CAJA 22-24. USAID and HHS claimed that separation between the funding recipient and the affiliate was necessary to avoid any attribution of the affiliate's views to the government. CAJA21, 23.

The court of appeals remanded for consideration of the new regulations. 254 F. App'x at 846. On remand, the district court held that the affiliate guidelines did not cure the First Amendment problem of "requiring [respondents] to adopt the Government's view." 570 F. Supp. 2d 533, 545 (S.D.N.Y. 2008). The government appealed again.

While the second appeal was pending, USAID and HHS again revised the affiliate guidelines, purporting to allow greater flexibility for partnerships between affiliates that are subject to the Policy Requirement and affiliates that are not. *See* HHS, Organizational Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 75 Fed. Reg. 18,760 (Apr. 13, 2010) (codified at 45 C.F.R. pt. 89); CAJA333-350. The revised guidelines—which remain in effect today—continued to require recipients of Leadership Act funds not only to comply with the Policy Requirement, 45 C.F.R. § 89.1(b), but also to refrain from activities "inconsistent" with an opposition to prostitution and to maintain "objective … independ-

ence" from any affiliate engaged in inconsistent activities, *id.* § 89.3.

In the renewed appeal, the government contended that the new guidelines "alleviate[d] any burden on recipients who do not wish to communicate the government's message" by allowing "[a]ny organization unwilling to state its opposition to prostitution" to "remain neutral … while 'setting up a subsidiary organization'" that would comply with the Policy Requirement. U.S. Br. 57, No. 08-4917 (2d Cir. May 11, 2010). "The parent organization," the government maintained, would "not [be] compelled to speak any message at all, and [could] continue to engage in activities inconsistent with the required policy with funding from other sources." *Id.* Only the affiliate would be bound by the Policy Requirement. *Id.*

Over Judge Straub's dissent, the court of appeals rejected the government's argument, explaining that "whether the recipient is a parent or an affiliate, it is required to affirmatively speak the government's viewpoint on prostitution." 651 F.3d 218, 239 (2d Cir. 2011). The guidelines did not alter this unconstitutional "affirmative requirement." *Id.* The court of appeals denied rehearing. 678 F.3d 127 (2d Cir. 2011).

2. This Court's 2013 decision

The government sought this Court's review, asserting that the decision below amounted to a "facial invalidation" of the Policy Requirement, U.S. Cert. Reply 5 & n.1, No. 12-10 (U.S. Dec. 21, 2012), and that the lower courts had "enjoined on constitutional grounds a provision in an Act of Congress." U.S. Cert. Pet. 11, No. 12-10 (U.S. July 2, 2012). It also argued that "further proceedings [in the district court] could not bear

on the constitutional question" of whether the Policy Requirement "violates the First Amendment." U.S. Cert. Reply 4; *see also* U.S. Cert. Pet. i (Question Presented). This Court granted certiorari.

On the merits, the government again argued that the revised affiliate guidelines resolved any First Amendment violation, advancing two independent points. First, relying on *Rust* v. *Sullivan*, 500 U.S. 173 (1991), *FCC* v. *League of Women Voters of California*, 468 U.S. 364 (1984), and *Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540 (1983), the government contended that the guidelines would "obviate any constitutional difficulty" by allowing respondents to accept Leadership Act funds and espouse the required anti-prostitution viewpoint themselves, while engaging in inconsistent activities through affiliates. CAJA1732. On this view, affiliating with a separate entity that was not subject to the Policy Requirement would ostensibly provide an outlet for respondents' free expression.

Second, and in the alternative, the government argued that the guidelines would allow respondents to "form affiliates whose sole purpose is receiving and administering federal HIV/AIDS funding." CAJA1734. Respondents could forgo Leadership Act funds for their own accounts—and thus not be bound by the Policy Requirement—while accepting those funds through affiliates that would comply with the Policy Requirement. *Id.* The government argued that by shifting the onus of compliance to their affiliates, respondents could "cabin the effects" of the Policy Requirement to those affiliates while remaining free themselves to express "contrary views on prostitution." CAJA1735; *see also* CAJA1763-1764.

In advancing these arguments, the government understood—as did this Court—that respondents operate globally and that the affiliates at issue were foreign entities. For example, the government stated at oral argument that the Policy Requirement was necessary "[p]recisely because the conduct here is carried out in foreign areas." CAJA1796; *see* CAJA1784. "[T]he foreign context matters," the government explained, because funding recipients "are identified as working with the United States government," CAJA1824, and it was therefore necessary to "secure an ex ante commitment of agreement with the government's policy" to avoid the "danger that [the recipients'] views [would] be misattributed to the United States," CAJA1796, 1826; *see also* CAJA1784.[1]

Indeed, this "foreign context" came up repeatedly. Responding to Justice Breyer's concern that compelling related entities to take two inconsistent positions "would be seen as totally hypocritical," CAJA1785, the government answered that the affiliate guidelines would prevent the perception of hypocrisy because the guidelines required sufficient separation between affiliates to ensure that one entity's speech would not be attributed to the other, CAJA1791. Justices Ginsburg and Kennedy, however, doubted whether this solution was practicable where the required separation "in this international setting" was not merely "a simple matter of corporate reorganization," but "quite an arduous" matter of creating "a new NGO" and having it "recog-

[1] Similarly, in its briefing, the government claimed that the affiliate guidelines were meant to offer "flexib[ility] to account for the challenges of operating overseas," CAJA1733, "'recognizing that circumstances in some countries may make it difficult for organizations to satisfy some of the factors demonstrating objective integrity and independence,'" CAJA1737.

nized in dozens of foreign countries." CAJA1787; *see also* CAJA1795; *accord* CAJA41, 99, 188-215, 303.

After considering those arguments, the Court struck down the Policy Requirement as unconstitutional, holding that "it violates the First Amendment and cannot be sustained." *AOSI*, 570 U.S. 205, 220 (2013).

The Court explained that, unlike the program-specific restrictions on speech in *Rust*, compelled-speech conditions like the Policy Requirement necessarily "reach outside" the federal program. *AOSI*, 570 U.S. at 217. "By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition … affects 'protected conduct outside the scope of the federally funded program.'" *Id.* at 218 (quoting *Rust*, 500 U.S. at 197). In other words, "[t]he Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program." *Id.* at 221.

The Court then considered and rejected the government's argument that the affiliate guidelines obviated the First Amendment problem. While the government had argued that those guidelines permitted respondents either to comply with the Policy Requirement themselves while speaking freely through their affiliates, or speak freely themselves while their affiliates complied with the Policy Requirement, CAJA1734-1735, the Court concluded that "[n]either approach [wa]s sufficient." *AOSI*, 570 U.S. at 219.

The Court explained that affiliate structures may be used to impose otherwise impermissible speech restrictions when those structures allow an organization whose speech is restricted "to exercise its First Amendment rights outside the scope of the federal

program." *AOSI*, 570 U.S. at 219. But "[a]ffiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own." *Id.* That is because the effects of a compelled-speech requirement, unlike a speech restriction, cannot be "'cabin[ed]'" to an affiliate. Any affiliate that is "clearly identified" with a recipient compelled to espouse the government's view can express contrary views "only at the price of evident hypocrisy." *Id.* Imposing the Policy Requirement on one entity would necessarily impinge on affiliates "clearly identified" with it because compelled speech by its nature cannot be confined within the scope of the program. *Id.*; *see id.* at 221.

D. Proceedings Below

Despite the clarity of this Court's ruling, the government continued for more than a year to issue requests for proposals (RFPs), requests for applications (RFAs), and other official PEPFAR-related communications that included the Policy Requirement as a condition of funding, in some cases without making clear that respondents were exempt from that condition pursuant to the preliminary injunction and in other cases without making clear that the Policy Requirement could no longer be applied to any U.S.-based organization. CAJA395-398; CAJA517-1379. None of the government's communications made clear that the Policy Requirement also could not be applied to U.S. NGOs' clearly identified affiliates.

Respondents repeatedly brought these issues to the government's attention, eventually raising the need for further litigation. In response to that prospect, the government issued nonbinding interim guidance in September 2014 stating that U.S.-based NGOs are not required to have a policy opposing prostitution and sex

trafficking. USAID, AAPD 14-04 (Sept. 12, 2014), https://www.usaid.gov/sites/default/files/documents/1868/AAPD14-04.pdf (CAJA351-374); HHS, Interim Guidance for Implementation of the Organizational Integrity of Entities Implementing Programs and Activities Under the Leadership Act, 79 Fed. Reg. 55,367 (Sept. 16, 2014) (CAJA375). Yet the government continued thereafter to issue RFAs and RFPs that included the Policy Requirement without the required exemptions. CAJA382-383.

Moreover, even after issuing its new guidance, the government continued to apply the Policy Requirement to respondents' clearly identified affiliates incorporated outside the United States. The September 2014 guidance stated that the Policy Requirement "remains applicable" to "foreign affiliates" of U.S. NGOs, "unless exempted by the [Leadership] Act or implementing regulations." CAJA375; *see* CAJA372-374. And the guidance reiterated that separation and "objective … independence" between a funding recipient subject to the Policy Requirement and any affiliate expressing inconsistent views was necessary to prevent the public from "attribut[ing]" the affiliate's views "to the recipient organization and thus to the Government." CAJA373; *see supra* pp. 11-12, 12-13.

As a result of the 2014 guidelines, respondents cannot issue subawards to their own clearly identified foreign affiliates without imposing the Policy Requirement on them. In subaward situations, respondents themselves must monitor their affiliates' "compliance with Federal statutes, regulations, and the terms and conditions of the subaward," including the Policy Requirement. 2 C.F.R. § 200.331; *supra* p. 9. Respondents' failure to enforce the Policy Requirement against their affiliates would "be grounds for unilateral termi-

nation of the award by USAID." CAJA360-361; Pet. App. 132a. In addition, because every affiliate that accepts Leadership Act funds must maintain "objective … independence" from organizations engaged in contrary speech, the U.S. respondent cannot engage in "activities" the government would deem "inconsistent" with the required anti-prostitution message without jeopardizing its USAID funding. 45 C.F.R. § 89.3.

Given these continuing burdens on respondents and violations of their rights, respondents sought a permanent injunction barring the government from issuing communications that contain the Policy Requirement with no exemption for respondents and their affiliates or applying the Policy Requirement to respondents' "foreign affiliates that are 'clearly identified' with" respondents by, among other things, their "share[d] … name, brand, and mission." CAJA376-378. The district court received letter briefing and exhibits, held a hearing, and requested supplementary submissions and declarations. *See* CAJA376-2063.

In January 2015, the district court granted a permanent injunction, ordering the government to revise its communications and barring the government from applying the Policy Requirement to respondents or their clearly identified affiliates, including those incorporated abroad. Pet. App. 46a-60a. The district court relied on this Court's holding that the effects of the Policy Requirement cannot be "'cabin[ed]'" to an affiliate and that imposing the Policy Requirement on a "'clearly identified'" affiliate would force respondents to "face 'the price of evident hypocrisy' by taking a stance differing from" their affiliates. Pet. App. 53a-54a (quoting *AOSI*, 570 U.S. at 219). The district court then explained that the affiliate's place of incorporation is irrelevant to that analysis: "[W]hether the affiliate is

foreign … has no bearing on whether the domestic NGO's rights would be violated by expressing contrary positions on the same matter through its different organizational components." Pet. App. 54a. As the court explained:

> The [foreign or domestic] nature of the affiliate is not relevant because it is not any right held by the affiliate that the Supreme Court's decision protects. Rather, it is the *domestic NGO's* constitutional right that the Court found is violated when the Government forces it to choose between forced speech and paying "the price of evident hypocrisy." That constitutional violation is the same regardless of the nature of the affiliate.

Pet. App. 54a-55a (citation omitted).

The government appealed, and for approximately two years, respondents agreed to a series of stays of the permanent injunction and the appeal to facilitate negotiation of what respondents hoped would be a comprehensive settlement to protect their First Amendment rights and bring an end to this matter. But in January 2017, with an agreement close at hand, the government broke off negotiations and moved for reconsideration or clarification of the injunction. The district court denied the motion. Pet. App. 61a-71a.

The court of appeals affirmed the permanent injunction. Describing the issue on appeal as "narrow," Pet. App. 3a, the court concluded that respondents' foreign affiliates are not only "clearly identified" with respondents, but belong to the same "homogenous" organizations and are thus "often indistinguishable" from respondents, Pet. App. 8a-9a. And, the court explained, this Court had "made clear" that respondents them-

selves are harmed when a "clearly identified" affiliate is forced to profess the government's views as its own, and "that forcing an entity's affiliate to speak the Government's message unconstitutionally impairs that entity's own ability to speak." Pet. App. 8a.

The court rejected the suggestion that this reasoning turned on where an affiliate might be incorporated. It was immaterial that foreign organizations lack First Amendment rights of their own because the injunction remedies a violation of "the First Amendment rights of the *domestic plaintiffs*." Pet. App. 10a. And although the foreign context had been "on full display" before this Court in 2013, it was "immaterial" to this Court's analysis that an affiliate might be foreign-incorporated: That analysis "speaks only of the harm to [respondents] due to their affiliation, not about the nature of the affiliated entity." Pet. App. 8a n.3. Finally, the court distinguished circuit precedent upholding funding conditions that imposed speech restrictions on foreign organizations, explaining that those cases had not involved clearly identified affiliates and had not considered forced-speech conditions that "compelled" NGOs to "make contradictory statements regarding their core objectives." Pet. App. 12a. The court accordingly held that the district court "did not abuse its discretion" in crafting the permanent injunction. *Id.*[2]

Judge Straub dissented again, arguing that foreign organizations have no First Amendment rights and that the case is controlled not by this Court's prior de-

[2] The court of appeals also rejected the government's arguments that the injunction was procedurally improper or insufficiently clear, noting that given the "unusually full record in this case," the government should have no difficulty "in determining the entities to which the injunction applies." Pet. App. 13a-14a.

cision, but by decisions upholding speech restrictions on foreign funding recipients. Pet. App. 14a-45a.

The court of appeals denied the government's petition for rehearing, with no noted dissents except Judge Straub. Pet. App. 72a-73a. With respondents' consent, the court stayed the mandate pending the filing and disposition of a petition for certiorari, leaving in place the stay of the permanent injunction. Pet. App. 74a.

REASONS FOR DENYING THE PETITION

I. THE QUESTION ON WHICH THE GOVERNMENT SEEKS REVIEW IS NOT PRESENTED

The government seeks review on the premise that the court of appeals "invalidat[ed] [the Policy Requirement] on constitutional grounds" and asks this Court to consider whether "the First Amendment forbids Congress from enforcing a condition on federal funds accepted by foreign recipients operating overseas because a separate, affiliated entity in the United States objects to that condition." Pet. 14-15; *see* Pet. i. The court of appeals did no such thing, and no such question is presented.

This Court already resolved the only constitutional claim in this case when it held that the Policy Requirement "violates the First Amendment" by "compel[ling] as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program." *AOSI*, 570 U.S. at 221. The decisions below addressed only the scope of relief that was appropriate, in the wake of the government's failure to comply with this Court's decision, to cure the First Amendment harm to respondents—including relief for the continuing harm to them that occurs, as this Court held, when the Policy Require-

ment is imposed on their "clearly identified" affiliates. *Id.* at 219.

Although it previously obtained this Court's review by casting respondents' claim as a facial challenge to the Policy Requirement, *see supra* p. 13, the government attempts to reframe this Court's prior decision invalidating the Policy Requirement as a mere carve-out from enforcement for U.S. organizations and characterizes the permanent injunction below as a new and distinct "invalidation" of the statute. Pet. 15. That skewed presentation of this case disregards the remedial posture and seeks review of an issue that was not litigated or decided below—namely, whether foreign recipients of Leadership Act funds can "defy congressionally imposed conditions on those funds" by affiliating with a U.S. organization to "borrow[]" its rights. Pet. 14-15; *see also* Pet. 18. Contrary to the government's representations, the decisions below do not newly invalidate the Policy Requirement with respect to foreign entities; they do not create or protect First Amendment rights for foreign entities; and they do not allow respondents' rights to be "borrowed" by, "shared" with, or "exported" to foreign entities. Pet. 14. The lower courts did not address any of those issues because only U.S. NGOs are parties to this case and the courts' inquiry into the proper remedy for respondents' claim was directed exclusively at the harm to the U.S. respondents from the violation this Court already found. Indeed, the government fails to explain how respondents would even have standing to assert the rights of foreign NGOs that it claims are at issue.

Similarly—although this case involves well-established U.S. NGOs like CARE and World Vision that, together with their foreign affiliates, have been steadfast partners in the decades-long global fight

against HIV/AIDS—the government invokes the theoretical specter that foreign entities "could readily find" U.S.-based front organizations for the purpose of subverting congressional mandates. Pet. 27. But if a foreign NGO ever tried to assert the constitutional rights of a U.S. front, or brought suit to enjoin a compelled-speech funding condition based on the NGO's affiliation with a U.S. organization, that would be a different case. It would not be controlled by this Court's decision in *AOSI* or by the decision below, which had no occasion to consider such a claim. The decision below was tailored to redress harm to U.S.-based respondents from a First Amendment violation this Court already found in light of the factual record in this case. Accordingly, the petition should be denied because the question it asks the Court to resolve is not presented by this case.

II. THE QUESTION THAT IS PRESENTED DOES NOT WARRANT REVIEW

The only issue actually presented is whether the district court abused its discretion in crafting relief for the claim on which respondents prevailed in this Court in 2013. That issue does not warrant review. The government does not dispute that a permanent injunction was warranted. It does not contend that the lower courts incorrectly articulated or applied the standard for injunctive relief. It does not even acknowledge the abuse-of-discretion standard, much less identify any certworthy error in the court of appeals' application of that standard. And as explained below, the court of appeals' factbound application of the legal principles and reasoning of this Court's prior decision to the record here does not warrant review.

A. The Decision Below Reflects A Discretionary And Factbound Application Of Settled Principles To Remedy A Violation This Court Already Found

The legal principle underlying the lower courts' remedial determinations was that imposing the Policy Requirement on respondents' clearly identified affiliates harms respondents' own First Amendment rights. That is not a new legal issue that requires this Court's review. The Court already articulated that principle in *AOSI*.

As discussed, in *AOSI*, this Court held that—unlike the speech restrictions it had previously upheld in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), and *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983)—the Policy Requirement compels speech that cannot be confined within the bounds of the federal program even when an affiliate rather than the respondent is the one compelled to speak. 570 U.S. at 218-219. As the Court explained, "by demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, that condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'" *Id.* at 218. Having taken the government's anti-prostitution pledge, an organization is no longer free to "turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime." *Id.*

The Court likewise rejected the government's argument that the Policy Requirement's effects on protected speech outside the federal program could be "'cabin[ed]'" by imposing the Policy Requirement on affiliates instead of respondents. 570 U.S. at 219.

Where the affiliate is "clearly identified" with the respondent, the effect will be the same: The government's view will be attributed to the organization as a whole, so that even affiliated entities that are not formally bound still are not free to express a view contrary to the government's except "at the price of evident hypocrisy." *Id.* at 220.

Rather than engage with that dispositive point, the government claims "the Court's affiliate discussion is beside the point" "[n]ow that respondents are not 'bound'" by the Policy Requirement. Pet. 22. This Court's discussion, however, considered not only the implications of compelling respondents to speak the government's message but also the implications of allowing respondents to set up affiliates that would be subject to the Policy Requirement while respondents remained unbound. *See* 570 U.S. at 219. "Neither approach is sufficient" to avoid First Amendment harm, the Court held. *Id.* Either the affiliate would need to be "distinct" from the respondent, in which case the respondent cannot "express *its* belief" through the affiliate, or "[i]f the affiliate is more clearly identified with the" respondent, then imposing the Policy Requirement on the affiliate would be functionally the same as imposing it on the respondent, which could not disavow its affiliate's statement of organizational policy without "evident hypocrisy." *Id.* As the lower courts correctly understood, none of that reasoning depended on an affiliate's place of incorporation. *Supra* pp. 19-20, 20-21. Indeed, this Court's analysis was based on a record replete with references to the fact that respondents' affiliates are overseas. *See supra* pp. 15-16.

The government accordingly conceded below that "when two organizations are closely linked, in some circumstances the speech of one can been seen as the

speech of both." U.S. Reply 9, No. 15-974 (2d Cir. Nov. 17, 2017). And it acknowledged that "part of the reason" for this Court's holding regarding clearly identified affiliates was that "one organization cannot credibly disavow the speech of another if the two are closely associated." *Id.*[3] Those accepted legal principles, recognized in this Court's prior decision, were sufficient on the undisputed facts here for the court of appeals to conclude that the district court "did not abuse its discretion in issuing its permanent injunction," Pet. App. 7a. On that record, the court of appeals found that the legally separate entities at issue "are not just affiliates" but part of the same "homogenous" organizations that "share their names, logos, and brands" with respondents and "present a unified front." Pet. App. 11a. "This sameness," the court determined, "*creates* the risk of evident hypocrisy" that led the Court to find a violation of *respondents*' First Amendment rights in *AOSI*. *Id.*

The government offers no compelling reason to second-guess that application of law to fact. The record is undisputed that respondents are bona fide U.S. organizations with hard-earned reputations based on their track records of successful global-health work; that they operate through clearly identified affiliates in part because of petitioners' funding preferences and the requirements of foreign law; and that they do so under

[3] Indeed, the whole point of the government's requirement that funding recipients maintain "objective … independence" from affiliates engaged in activities inconsistent with the recipient's opposition to prostitution, HHS has said, is because the government fears that a "reasonable observer would attribute [those] activities to the funding recipient" and thus to the government. HHS, Organizational Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 75 Fed. Reg. 18,760, 18,762 (Apr. 13, 2010); *see* CAJA373.

a unified and carefully managed common public identity and voice that makes the speech of one appear to any reasonable observer as the speech of all. *Supra* pp. 4-8. The Second Circuit so found, and the government does not seek review of those findings here.[4]

The government also does not contend that the harm to respondents' speech rights that occurs when the Policy Requirement is imposed on their clearly identified affiliates is somehow different or less serious if those affiliates are foreign instead of domestic. As the lower courts observed, this Court's reasoning leaves no room for such a distinction—it turned on "the harm to [respondents] due to their affiliation," not on "the nature of the affiliated entity." Pet. App. 8a n.3; *see also* Pet. App. 54a-55a.

Indeed, as a practical matter, the manner in which Leadership Act funds are disbursed to respondents' affiliates ensures that the harm this Court identified will routinely occur. In many cases, the prime recipient of Leadership Act funds is the U.S. respondent, which then makes a subgrant to the legally separate affiliate

---

[4] The government does question whether any evident hypocrisy exists in this case and whether respondents would really be harmed if their clearly identified affiliates were compelled to adopt a policy opposing prostitution. Pet. 23-24, 28. Those arguments, which the government never made below, are foreclosed by the uncontroverted record and by *AOSI*. *See* 570 U.S. 218-219. They also defy common sense: Imposing the Policy Requirement on clearly identified affiliates deprives respondents of their right to express a different view (or no view at all) because the affiliate and respondent are, as the court of appeals found, "often indistinguishable." Pet. App. 9a. The government's own affiliate regulations require strict separation purportedly to prevent contrary speech by an affiliate from being imputed not only to the recipient of Leadership Act funds but also to the government. *Supra* n.3.

that will carry out the funded project. In that circumstance, the U.S. respondent becomes responsible for ensuring that the affiliate complies with all terms of the grant. *Supra* p. 9. In the case of a foreign affiliate, absent the injunction, that means the U.S. respondent must impose the Policy Requirement on its own affiliate, monitor the affiliate's compliance, and make sure that the affiliate maintains not only legal but public separation from any entities engaged in contrary speech—including the U.S. respondent itself, which is an impossible condition unless the U.S. respondent itself refrains from speech inconsistent with the government's viewpoint. *See* 2 C.F.R. § 200.331(d); 45 C.F.R. § 89.3; *supra* pp. 9, 12-13, 18-19. The U.S. respondent's own federal grants could be terminated for failing to enforce the Policy Requirement on its co-branded foreign affiliates or for contradicting its affiliates' anti-prostitution pledge. CAJA369-370; Pet. App. 132a.

Thus, under the government's view, respondents' legally separate but clearly identified affiliates cannot become subrecipients to conduct respondents' in-country services and programs unless the affiliates comply with the Policy Requirement, and respondents must refrain from speech activities "inconsistent" with that compliance. In that paradigmatic situation, respondents face precisely the same choice they did in *AOSI*: forgo the funds or accept the funds subject to the Policy Requirement and the price of evident hypocrisy.[5] The lower courts' implementation of this Court's

[5] While respondents also operate through unincorporated branch offices overseas that share respondents' exemption from the Policy Requirement even under the government's view, these harms are unavoidable in cases where foreign governments require NGOs to be locally incorporated.

decision on the basis of these facts does not warrant review.

B. There Is No Circuit Split Or Conflict With This Court's Precedent

The government concedes "the absence of a square circuit conflict" on the question it frames for review, which is not presented. Pet. 25. There is also no conflict on the question that is actually presented—whether the district court abused its discretion in permanently enjoining the enforcement of an unconstitutional statute against respondents' clearly identified affiliates to remedy the violation of respondents' First Amendment rights.

The government relies primarily on the same decisions it cited when this case was last before the Court—*Rust*, *Reagan*, and *FCC* v. *League of Women Voters of California*, 468 U.S. 364 (1984). The government contends that the decision below conflicts with the principle, established by this Court in those cases, that "a funding condition does not violate the First Amendment if an entity complying with that condition can establish a separate affiliate that allows it to speak freely." But as this Court has already explained, those cases did not involve compelled speech that cannot be confined within the federal program. *AOSI*, 570 U.S. at 217-220. "[T]he distinction drawn in these cases," the Court explained, is "between conditions that define the federal program and those that reach outside it." *Id.* The speech restrictions at issue in *Rust* and *Regan* "governed only the scope of the [federally funded] program" and left funding recipients free to engage in the restricted speech "'outside the scope of the federally funded program,'" including through separate affiliates. *Id.* at 217. (The funding condition in *League of Women*

Voters failed because it allowed no alternative outlet and thus regulated speech "outside the scope of the program." *Id.* at 216.) But a funding condition that compels speech, the Court held, is fundamentally different. Compelling a funding recipient to adopt the government's viewpoint as its own "by its very nature affects 'protected conduct outside the scope of the federally funded program'" and "cannot be confined within the scope of the Government program." *Id.* at 218, 221.

The government refuses to acknowledge that critical distinction. It insists (at 19) that the decision below conflicts with the principle of *Regan* and *Rust* that a speech restriction can be imposed on one affiliate without undermining the First Amendment rights of the other. But as *AOSI* held, the same is not true of a compelled-speech requirement. The decision below merely gives effect to this Court's holding—fully consistent with the government's cases—that a compelled-speech requirement cannot be "cabin[ed] … within the scope of the federal program." 570 U.S. at 219 (quotation marks omitted). The government effectively seeks to relitigate that aspect of *AOSI*.

As to circuit conflicts, none of the three circuit cases the government cites even addresses the question presented here. And only one, *DKT Memorial Fund Ltd.* v. *USAID*, 887 F.2d 275 (D.C. Cir. 1989), arose outside the Second Circuit. The government cites *DKT* for the uncontested proposition that "aliens beyond the territorial jurisdiction of the United States are generally unable to claim the protections of the First Amendment." Pet. 16 (quoting 887 F.2d at 284). *DKT* involved a challenge to the so-called "Mexico City Policy" (also referred to as the "global gag rule"), which restricts foreign NGOs from promoting abortion as a condition of receiving federal funding. Because it involved

a speech restriction, not a compelled-speech requirement, *DKT* is inapposite for the same reasons as *Regan* and *Rust*. The other two cases—Second Circuit decisions that obviously cannot be the basis of a circuit split with the decision below—also involved the Mexico City Policy's restrictions on speech and did not consider the effects on a U.S. organization's rights when a compelled-speech requirement is applied to its clearly identified affiliates. *See Planned Parenthood Fed'n of Am., Inc.* v. *USAID*, 915 F.2d 59 (2d Cir. 1990); *Center for Reproductive Law & Policy* v. *Bush*, 304 F.3d 183 (2d Cir. 2002). As the court of appeals here explained, "[t]he policies in those cases did not compel speech, did not involve closely identified organizations, and, unlike this case, did not burden the free speech rights of domestic organizations." Pet. App. 12a. That the government nevertheless continues to present those cases as "analogous" to this one, Pet. 25, confirms that the government has mischaracterized the question presented.

C. Whether The District Court Abused Its Discretion Has No Importance Beyond The Facts Of This Case

The government does not contend that reviewing the scope of the remedial order here would have implications for injunctions entered in other cases. And it cites no other case or context in which any remotely similar fact pattern has arisen—likely because the government rarely imposes naked compelled-speech conditions like the Policy Requirement. Instead, the government's only other argument for review (at 26-28) is that the injunction in this case is important to the administration of the PEPFAR program. It is not, and the government provides no support for its assertion

that enforcing the Policy Requirement in a manner that violates respondents' First Amendment rights is somehow "critical to enforcing the Leadership Act as Congress designed it." Pet. 27. The importance of the Policy Requirement to PEPFAR is just another argument the government already made in *AOSI* for violating respondents' rights in the first place. CAJA1711-1719.

The government claims that the Second Circuit's decision "will affect a substantial amount of federal funding," stating that "30% of new PEPFAR funding in 2018 was granted directly to foreign recipients." Pet. 27. That argument ignores that the challenged aspect of the permanent injunction applies only to entities that are respondents' clearly identified affiliates, which account for only a portion of that 30%.

Indeed, the government challenges the permanent injunction only at the margin. InterAction represents the largest alliance of international NGOs and partners based in the United States, and out of its more than 220 members and partners, respondents are aware of fewer than ten that operate through the kinds of separately incorporated foreign affiliates at issue. The benefit of the injunction is extremely important to those NGOs—including CARE, World Vision, Save the Children, and Pathfinder—because, absent the injunction, they would not be able to make subgrants to or work with co-branded affiliates without subjecting the affiliate, and thus effectively themselves, to the Policy Requirement. *Supra* pp. 9, 12-13, 18-19. But the suggestion that the "narrow" issue here is significant to PEPFAR's overall administration is mistaken. Pet. App. 3a.[6]

---

[6] Respondents have provided petitioners with detailed information identifying their clearly identified foreign affiliates to remove any doubt as to the limited universe of affected U.S. NGOs.

The government posits that foreign NGOs will now "readily find" U.S. entities to affiliate with to avoid the Policy Requirement, Pet. 27, but that speculation is baseless. Respondents are aware of no instance in which this has happened, and the government cites none. Moreover, that possibility is extremely remote given the stringent eligibility requirements for Leadership Act funds. Only NGOs that have a proven track record in international development can obtain funding, *supra* p. 9—making the government's hypothetical shell game highly unlikely.

The government also cites the Leadership Act's public-health goals. But the unrebutted record demonstrates that the Policy Requirement impedes, rather than advances, those goals. *See* CAJA34-37, 65-66, 76-77, 302-303. In 14 years of litigation, the government has offered no evidence that the Policy Requirement does anything for public health, and it fails to explain how infringing on respondents' First Amendment rights would do so.

Finally, the government claims that the injunction threatens to "create significant disruptions" to the administration of PEPFAR. Pet. 27. But the government offers no support for that assertion except to argue that it should not have to change how it administers the program. Pet. 27-28. The government overlooks that its obligation to revise agency regulations and issue new guidance and grant documents resulted from this Court's holding that the Policy Requirement "violates the First Amendment and cannot be sustained." 570 U.S. at 220. The injunction does no more than remedy that violation and might have been unnecessary altogether had the government simply complied with this Court's decision in the first place. Although the government refuses to acknowledge that respond-

ents are harmed when their clearly identified affiliates are forced to "affirm[] … a belief that by its nature cannot be confined within the scope of the Government program," *id.* at 221—an affirmation that respondents themselves must refrain from contradicting and enforce for any subgrantees—this Court has already spoken on that issue. The implementation of a remedy that both lower courts found appropriate in the exercise of their sound discretion to cure that harm does not merit review. It is time for the injunction to take effect and for this 14-year-old case to end.

CONCLUSION

The petition should be denied.

Respectfully submitted.

ARI J. SAVITZKY
KATHERINE FLORIO
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

DAVID W. BOWKER
Counsel of Record
CATHERINE M.A. CARROLL
DAVID A. STOOPLER
KEVIN M. LAMB
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.bowker@wilmerhale.com

NOVEMBER 2019