

## Syllabus

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**SUPREME COURT OF THE UNITED STATES**

## Syllabus

**AGENCY FOR INTERNATIONAL DEVELOPMENT  
ET AL. *v.* ALLIANCE FOR OPEN SOCIETY  
INTERNATIONAL, INC., ET AL.****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

No. 12–10. Argued April 22, 2013—Decided June 20, 2013

In the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 22 U. S. C. §7601 *et seq.*, Congress has authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to combat HIV/AIDS worldwide. The Act imposes two related conditions: (1) No funds “may be used to promote or advocate the legalization or practice of prostitution,” §7631(e); and (2) no funds may be used by an organization “that does not have a policy explicitly opposing prostitution,” §7631(f). To enforce the second condition, known as the Policy Requirement, the Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID) require funding recipients to agree in their award documents that they oppose prostitution.

Respondents, recipients of Leadership Act funds who wish to remain neutral on prostitution, sought a declaratory judgment that the Policy Requirement violates their First Amendment rights. The District Court issued a preliminary injunction, barring the Government from cutting off respondents’ Leadership Act funding during the litigation or from otherwise taking action based on their privately funded speech. The Second Circuit affirmed, concluding that the Policy Requirement, as implemented by the agencies, violated respondents’ freedom of speech.

*Held:* The Policy Requirement violates the First Amendment by compelling as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Gov-

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ernment program. Pp. 6–15.

(a) The Policy Requirement mandates that recipients of federal funds explicitly agree with the Government’s policy to oppose prostitution. The First Amendment, however, “prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 61. As a direct regulation, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition of federal funding. Pp. 6–7.

(b) The Spending Clause grants Congress broad discretion to fund private programs or activities for the “general Welfare,” Art. I, §8, cl. 1, including authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust v. Sullivan*, 500 U. S. 173, 195, n. 4. As a general matter, if a party objects to those limits, its recourse is to decline the funds. In some cases, however, a funding condition can result in an unconstitutional burden on First Amendment rights. The distinction that has emerged from this Court’s cases is between conditions that define the limits of the Government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the federal program itself.

*Rust* illustrates the distinction. In that case, the Court considered Title X of the Public Health Service Act, which authorized grants to health-care organizations offering family planning services, but prohibited federal funds from being “used in programs where abortion is a method of family planning.” 500 U. S., at 178. To enforce the provision, HHS regulations barred Title X projects from advocating abortion and required grantees to keep their Title X projects separate from their other projects. The regulations were valid, the Court explained, because they governed only the scope of the grantee’s Title X projects, leaving the grantee free to engage in abortion advocacy through programs that were independent from its Title X projects. Because the regulations did not prohibit speech “outside the scope of the federally funded program,” they did not run afoul of the First Amendment. *Id.*, at 197. Pp. 7–11.

(c) The distinction between conditions that define a federal program and those that reach outside it is not always self-evident, but the Court is confident that the Policy Requirement falls on the unconstitutional side of the line. To begin, the Leadership Act’s other funding condition, which prohibits Leadership Act funds from being used “to promote or advocate the legalization or practice of prostitution or sex trafficking,” §7631(e), ensures that federal funds will not

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be used for prohibited purposes. The Policy Requirement thus must be doing something more—and it is. By demanding that funding recipients adopt and espouse, as their own, the Government’s view on an issue of public concern, the Policy Requirement by its very nature affects “protected conduct outside the scope of the federally funded program.” *Rust, supra*, at 197. A recipient cannot avow the belief dictated by the condition when spending Leadership Act funds, and assert a contrary belief when participating in activities on its own time and dime.

The Government suggests that if funding recipients could promote or condone prostitution using private funds, “it would undermine the government’s program and confuse its message opposing prostitution.” Brief for Petitioners 37. But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government’s policy of eradicating prostitution. That condition on funding violates the First Amendment. Pp. 11–15.

651 F. 3d 218, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. KAGAN, J., took no part in the consideration or decision of the case.

Opinion of the Court

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**SUPREME COURT OF THE UNITED STATES**

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No. 12–10

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AGENCY FOR INTERNATIONAL DEVELOPMENT,  
ET AL., PETITIONERS *v.* ALLIANCE FOR OPEN  
SOCIETY INTERNATIONAL, INC., ET AL.

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

[June 20, 2013]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 117 Stat. 711, as amended, 22 U. S. C. §7601 *et seq.*, outlined a comprehensive strategy to combat the spread of HIV/AIDS around the world. As part of that strategy, Congress authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight. The Act imposes two related conditions on that funding: First, no funds made available by the Act “may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.” §7631(e). And second, no funds may be used by an organization “that does not have a policy explicitly opposing prostitution and sex trafficking.” §7631(f). This case concerns the second of these conditions, referred to as the Policy Requirement. The question is whether that funding condition violates a recipient’s First Amendment rights.

I

Congress passed the Leadership Act in 2003 after finding that HIV/AIDS had “assumed pandemic proportions, spreading from the most severely affected regions, sub-Saharan Africa and the Caribbean, to all corners of the world, and leaving an unprecedented path of death and devastation.” 22 U. S. C. §7601(1). According to congressional findings, more than 65 million people had been infected by HIV and more than 25 million had lost their lives, making HIV/AIDS the fourth highest cause of death worldwide. In sub-Saharan Africa alone, AIDS had claimed the lives of more than 19 million individuals and was projected to kill a full quarter of the population of that area over the next decade. The disease not only directly endangered those infected, but also increased the potential for social and political instability and economic devastation, posing a security issue for the entire international community. §§7601(2)–(10).

In the Leadership Act, Congress directed the President to establish a “comprehensive, integrated” strategy to combat HIV/AIDS around the world. §7611(a). The Act sets out 29 different objectives the President’s strategy should seek to fulfill, reflecting a multitude of approaches to the problem. The strategy must include, among other things, plans to increase the availability of treatment for infected individuals, prevent new infections, support the care of those affected by the disease, promote training for physicians and other health care workers, and accelerate research on HIV/AIDS prevention methods, all while providing a framework for cooperation with international organizations and partner countries to further the goals of the program. §§7611(a)(1)–(29).

The Act “make[s] the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts.” §7611(a)(12); see also §7601(15) (“Successful strategies to stem the spread of the HIV/AIDS pandemic will require . . . measures to

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address the social and behavioral causes of the problem”). The Act’s approach to reducing behavioral risks is multifaceted. The President’s strategy for addressing such risks must, for example, promote abstinence, encourage monogamy, increase the availability of condoms, promote voluntary counseling and treatment for drug users, and, as relevant here, “educat[e] men and boys about the risks of procuring sex commercially” as well as “promote alternative livelihoods, safety, and social reintegration strategies for commercial sex workers.” §7611(a)(12). Congress found that the “sex industry, the trafficking of individuals into such industry, and sexual violence” were factors in the spread of the HIV/AIDS epidemic, and determined that “it should be the policy of the United States to eradicate” prostitution and “other sexual victimization.” §7601(23).

The United States has enlisted the assistance of non-governmental organizations to help achieve the many goals of the program. Such organizations “with experience in health care and HIV/AIDS counseling,” Congress found, “have proven effective in combating the HIV/AIDS pandemic and can be a resource in . . . provid[ing] treatment and care for individuals infected with HIV/AIDS.” §7601(18). Since 2003, Congress has authorized the appropriation of billions of dollars for funding these organizations’ fight against HIV/AIDS around the world. §2151b–2(c); §7671.

Those funds, however, come with two conditions: First, no funds made available to carry out the Leadership Act “may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.” §7631(e). Second, no funds made available may “provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except . . . 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.” §7631(f). It is this second condition—the Policy Requirement—that is at issue here.

The Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID) are the federal agencies primarily responsible for overseeing implementation of the Leadership Act. To enforce the Policy Requirement, the agencies have directed that the recipient of any funding under the Act agree in the award document that it is opposed to “prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.” 45 CFR §89.1(b) (2012); USAID, Acquisition & Assistance Policy Directive 12–04, p. 6 (AAPD 12–04).

## II

Respondents are a group of domestic organizations engaged in combating HIV/AIDS overseas. In addition to substantial private funding, they receive billions annually in financial assistance from the United States, including under the Leadership Act. Their work includes programs aimed at limiting injection drug use in Uzbekistan, Tajikistan, and Kyrgyzstan, preventing mother-to-child HIV transmission in Kenya, and promoting safer sex practices in India. Respondents fear that adopting a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS. They are also concerned that the Policy Requirement may require them to censor their privately funded discussions in publications, at conferences, and in other forums about how best to prevent the spread of HIV/AIDS among prostitutes.

In 2005, respondents Alliance for Open Society International and Pathfinder International commenced this litigation, seeking a declaratory judgment that the Government’s

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implementation of the Policy Requirement violated their First Amendment rights. Respondents sought a preliminary injunction barring the Government from cutting off their funding under the Act for the duration of the litigation, from unilaterally terminating their cooperative agreements with the United States, or from otherwise taking action solely on the basis of respondents' own privately funded speech. The District Court granted such a preliminary injunction, and the Government appealed.

While the appeal was pending, HHS and USAID issued guidelines on how recipients of Leadership Act funds could retain funding while working with affiliated organizations not bound by the Policy Requirement. The guidelines permit funding recipients to work with affiliated organizations that “engage[] in activities inconsistent with the recipient’s opposition to the practices of prostitution and sex trafficking” as long as the recipients retain “objective integrity and independence from any affiliated organization.” 45 CFR §89.3; see also AAPD 12–04, at 6–7. Whether sufficient separation exists is determined by the totality of the circumstances, including “but not . . . limited to” (1) whether the organizations are legally separate; (2) whether they have separate personnel; (3) whether they keep separate accounting records; (4) the degree of separation in the organizations’ facilities; and (5) the extent to which signs and other forms of identification distinguish the organizations. 45 CFR §§89.3(b)(1)–(5); see also AAPD 12–04, at 6–7.

The Court of Appeals summarily remanded the case to the District Court to consider whether the preliminary injunction was still appropriate in light of the new guidelines. On remand, the District Court issued a new preliminary injunction along the same lines as the first, and the Government renewed its appeal.

The Court of Appeals affirmed, concluding that respondents had demonstrated a likelihood of success on the

merits of their First Amendment challenge under this Court's "unconstitutional conditions" doctrine. 651 F. 3d 218 (CA2 2011). Under this doctrine, the court reasoned, "the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." *Id.*, at 231 (citing *Perry v. Sindermann*, 408 U. S. 593, 597 (1972)). And a condition that compels recipients "to espouse the government's position" on a subject of international debate could not be squared with the First Amendment. 651 F. 3d, at 234. The court concluded that "the Policy Requirement, as implemented by the Agencies, falls well beyond what the Supreme Court . . . ha[s] upheld as permissible funding conditions." *Ibid.*

Judge Straub dissented, expressing his view that the Policy Requirement was an "entirely rational exercise of Congress's powers pursuant to the Spending Clause." *Id.*, at 240.

We granted certiorari. 568 U. S. \_\_\_\_ (2013).

### III

The Policy Requirement mandates that recipients of Leadership Act funds explicitly agree with the Government's policy to oppose prostitution and sex trafficking. It is, however, a basic First Amendment principle that "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 61 (2006) (citing *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642 (1943), and *Wooley v. Maynard*, 430 U. S. 705, 717 (1977)). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 641 (1994); see *Knox v.*

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*Service Employees*, 567 U. S. \_\_\_\_, \_\_\_\_–\_\_\_\_ (2012) (slip op., at 8–9) (“The government may not . . . compel the endorsement of ideas that it approves.”). Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.

## A

The Spending Clause of the Federal Constitution grants Congress the power “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Art. I, §8, cl. 1. The Clause provides Congress broad discretion to tax and spend for the “general Welfare,” including by funding particular state or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust v. Sullivan*, 500 U. S. 173, 195, n. 4 (1991) (“Congress’ power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.”).

As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient’s exercise of its First Amendment rights. See, e.g., *United States v. American Library Assn., Inc.*, 539 U. S. 194, 212 (2003) (plurality opinion) (rejecting a claim by public libraries that conditioning funds for Internet access on the libraries’ installing filtering software violated their First Amendment rights, explaining that “[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance”); *Regan v. Taxation With Representation of Wash.*, 461 U. S. 540, 546 (1983) (dismissing “the

notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State” (internal quotation marks omitted)).

At the same time, however, we have held that the Government “‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.’” *Forum for Academic and Institutional Rights, supra*, at 59 (quoting *American Library Assn., supra*, at 210). In some cases, a funding condition can result in an unconstitutional burden on First Amendment rights. See *Forum for Academic and Institutional Rights, supra*, at 59 (the First Amendment supplies “a limit on Congress’ ability to place conditions on the receipt of funds”).

The dissent thinks that can only be true when the condition is not relevant to the objectives of the program (although it has its doubts about that), or when the condition is actually coercive, in the sense of an offer that cannot be refused. See *post*, at 2–3 (opinion of SCALIA, J.). Our precedents, however, are not so limited. In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.” *Legal Services Corporation v. Velazquez*, 531 U. S. 533, 547 (2001).

A comparison of two cases helps illustrate the distinction: In *Regan v. Taxation With Representation of Washington*, the Court upheld a requirement that nonprofit

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organizations seeking tax-exempt status under 26 U. S. C. §501(c)(3) not engage in substantial efforts to influence legislation. The tax-exempt status, we explained, “ha[d] much the same effect as a cash grant to the organization.” 461 U. S., at 544. And by limiting §501(c)(3) status to organizations that did not attempt to influence legislation, Congress had merely “chose[n] not to subsidize lobbying.” *Ibid.* In rejecting the nonprofit’s First Amendment claim, the Court highlighted—in the text of its opinion, but see *post*, at 5—the fact that the condition did not prohibit that organization from lobbying Congress altogether. By returning to a “dual structure” it had used in the past—separately incorporating as a §501(c)(3) organization and §501(c)(4) organization—the nonprofit could continue to claim §501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its §501(c)(4) capacity with separate funds. *Ibid.* Maintaining such a structure, the Court noted, was not “unduly burdensome.” *Id.*, at 545, n. 6. The condition thus did not deny the organization a government benefit “on account of its intention to lobby.” *Id.*, at 545.

In *FCC v. League of Women Voters of California*, by contrast, the Court struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds. 468 U. S. 364, 399–401 (1984). Even a station receiving only one percent of its overall budget from the Federal Government, the Court explained, was “barred absolutely from all editorializing.” *Id.*, at 400. Unlike the situation in *Regan*, the law provided no way for a station to limit its use of federal funds to noneditorializing activities, while using private funds “to make known its views on matters of public importance.” 468 U. S., at 400. The prohibition thus went beyond ensuring that federal funds not be used to subsidize “public broadcasting station editorials,” and instead leveraged the

federal funding to regulate the stations' speech outside the scope of the program. *Id.*, at 399 (internal quotation marks omitted).

Our decision in *Rust v. Sullivan* elaborated on the approach reflected in *Regan* and *League of Women Voters*. In *Rust*, we considered Title X of the Public Health Service Act, a Spending Clause program that issued grants to nonprofit health-care organizations “to assist in the establishment and operation of voluntary family planning projects [to] offer a broad range of acceptable and effective family planning methods and services.” 500 U. S., at 178 (internal quotation marks omitted). The organizations received funds from a variety of sources other than the Federal Government for a variety of purposes. The Act, however, prohibited the Title X federal funds from being “used in programs where abortion is a method of family planning.” *Ibid.* (internal quotation marks omitted). To enforce this provision, HHS regulations barred Title X projects from advocating abortion as a method of family planning, and required grantees to ensure that their Title X projects were “physically and financially separate” from their other projects that engaged in the prohibited activities. *Id.*, at 180–181 (quoting 42 CFR §59.9 (1989)). A group of Title X funding recipients brought suit, claiming the regulations imposed an unconstitutional condition on their First Amendment rights. We rejected their claim.

We explained that Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem. In Title X, Congress had defined the federal program to encourage only particular family planning methods. The challenged regulations were simply “designed to ensure that the limits of the federal program are observed,” and “that public funds [are] spent for the purposes for which they were authorized.” *Rust*, 500 U. S., at 193, 196.

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In making this determination, the Court stressed that “Title X expressly distinguishes between a Title X *grantee* and a Title X *project*.” *Id.*, at 196. The regulations governed only the scope of the grantee’s Title X projects, leaving it “unfettered in its other activities.” *Ibid.* “The Title X *grantee* can continue to . . . engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.” *Ibid.* Because the regulations did not “prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program,” they did not run afoul of the First Amendment. *Id.*, at 197.

## B

As noted, the distinction drawn in these cases—between conditions that define the federal program and those that reach outside it—is not always self-evident. As Justice Cardozo put it in a related context, “Definition more precise must abide the wisdom of the future.” *Steward Machine Co. v. Davis*, 301 U. S. 548, 591 (1937). Here, however, we are confident that the Policy Requirement falls on the unconstitutional side of the line.

To begin, it is important to recall that the Leadership Act has two conditions relevant here. The first—unchallenged in this litigation—prohibits Leadership Act funds from being used “to promote or advocate the legalization or practice of prostitution or sex trafficking.” 22 U. S. C. §7631(e). The Government concedes that §7631(e) by itself ensures that federal funds will not be used for the prohibited purposes. Brief for Petitioners 26–27.

The Policy Requirement therefore must be doing something more—and it is. The dissent views the Requirement as simply a selection criterion by which the Government identifies organizations “who believe in its ideas to carry them to fruition.” *Post*, at 1. As an initial matter, what-

ever purpose the Policy Requirement serves in selecting funding recipients, its effects go beyond selection. The Policy Requirement is an ongoing condition on recipients' speech and activities, a ground for terminating a grant after selection is complete. See AAPD 12–04, at 12. In any event, as the Government acknowledges, it is not simply seeking organizations that oppose prostitution. Reply Brief 5. Rather, it explains, “Congress has expressed its purpose ‘to eradicate’ prostitution and sex trafficking, 22 U. S. C. §7601(23), and it wants recipients *to adopt* a similar stance.” Brief for Petitioners 32 (emphasis added). This case is not about the Government’s ability to enlist the assistance of those with whom it already agrees. It is about compelling a grant recipient to adopt a particular belief as a condition of funding.

By demanding that funding recipients adopt—as their own—the Government’s view on an issue of public concern, the condition by its very nature affects “protected conduct outside the scope of the federally funded program.” *Rust*, 500 U. S., at 197. A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient. See *ibid.* (“our ‘unconstitutional conditions’ cases involve situations in which the Government has placed 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”).

The Government contends that the affiliate guidelines, established while this litigation was pending, save the program. Under those guidelines, funding recipients are

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permitted to work with affiliated organizations that do not abide by the condition, as long as the recipients retain “objective integrity and independence” from the unfettered affiliates. 45 CFR §89.3. The Government suggests the guidelines alleviate any unconstitutional burden on the respondents’ First Amendment rights by allowing them to either: (1) accept Leadership Act funding and comply with Policy Requirement, but establish affiliates to communicate contrary views on prostitution; or (2) decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds, thereby “cabin[ing] the effects” of the Policy Requirement within the scope of the federal program. Brief for Petitioners 38–39, 44–49.

Neither approach is sufficient. When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program. See *Rust, supra*, at 197–198. Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy. The guidelines themselves make that clear. See 45 CFR §89.3 (allowing funding recipients to work with affiliates whose conduct is “inconsistent with *the recipient’s opposition* to the practices of prostitution and sex trafficking” (emphasis added)).

The Government suggests that the Policy Requirement is necessary because, without it, the grant of federal funds could free a recipient’s private funds “to be used to promote prostitution or sex trafficking.” Brief for Petitioners 27 (citing *Holder v. Humanitarian Law Project*, 561 U. S.

1, \_\_\_—\_\_\_ (2010) (slip op., at 25–26)). That argument assumes that federal funding will simply supplant private funding, rather than pay for new programs or expand existing ones. The Government offers no support for that assumption as a general matter, or any reason to believe it is true here. And if the Government's argument were correct, *League of Women Voters* would have come out differently, and much of the reasoning of *Regan* and *Rust* would have been beside the point.

The Government cites but one case to support that argument, *Holder v. Humanitarian Law Project*. That case concerned the quite different context of a ban on providing material support to terrorist organizations, where the record indicated that support for those organizations' nonviolent operations was funneled to support their violent activities. 561 U. S., at \_\_\_ (slip op., at 26).

Pressing its argument further, the Government contends that "if organizations awarded federal funds to implement Leadership Act programs could at the same time promote or affirmatively condone prostitution or sex trafficking, whether using public *or private* funds, it would undermine the government's program and confuse its message opposing prostitution and sex trafficking." Brief for Petitioners 37 (emphasis added). But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government's policy of eradicating prostitution. As to that, we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: "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.

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The 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. In so doing, it violates the First Amendment and cannot be sustained. The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

KAGAN, J., took no part in the consideration or decision of this case.

SCALIA, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

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No. 12–10

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AGENCY FOR INTERNATIONAL DEVELOPMENT,  
ET AL., PETITIONERS *v.* ALLIANCE FOR OPEN  
SOCIETY INTERNATIONAL, INC., ET AL.

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

[June 20, 2013]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins,  
dissenting.

The Leadership Act provides that “any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking” may not receive funds appropriated under the Act. 22 U. S. C. §7631(f). This Policy Requirement is nothing more than a means of selecting suitable agents to implement the Government’s chosen strategy to eradicate HIV/AIDS. That is perfectly permissible under the Constitution.

The First Amendment does not mandate a viewpoint-neutral government. Government must choose between rival ideas and adopt some as its own: competition over cartels, solar energy over coal, weapon development over disarmament, and so forth. Moreover, the government may enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas. That seems to me a matter of the most common common sense. For example: One of the purposes of America’s foreign-aid programs is the fostering of good will towards this country. If the organization Hamas—reputed to have an efficient system for delivering welfare—were excluded from a program for the distribution of U. S. food assis-

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tance, no one could reasonably object. And that would remain true if Hamas were an organization of United States citizens entitled to the protection of the Constitution. So long as the unfunded organization remains free to engage in its activities (including anti-American propaganda) “without federal assistance,” *United States v. American Library Assn., Inc.*, 539 U. S. 194, 212 (2003) (plurality), refusing to make use of its assistance for an enterprise to which it is opposed does not abridge its speech. And the same is true when the rejected organization is not affirmatively opposed to, but merely unsupportive of, the object of the federal program, which appears to be the case here. (Respondents do not promote prostitution, but neither do they wish to oppose it.) A federal program to encourage healthy eating habits need not be administered by the American Gourmet Society, which has nothing against healthy food but does not insist upon it.

The argument is that this commonsense principle will enable the government to discriminate against, and injure, points of view to which it is opposed. Of course the Constitution does not prohibit government spending that discriminates against, and injures, points of view to which the government is opposed; every government program which takes a position on a controversial issue does that. Anti-smoking programs injure cigar aficionados, programs encouraging sexual abstinence injure free-love advocates, etc. The constitutional prohibition at issue here is not a prohibition against discriminating against or injuring opposing points of view, but the First Amendment’s prohibition against the coercing of speech. I am frankly dubious that a condition for eligibility to participate in a minor federal program such as this one runs afoul of that prohibition even when the condition is irrelevant to the goals of the program. Not every disadvantage is a coercion.

But that is not the issue before us here. Here the views

SCALIA, J., dissenting

that the Government demands an applicant forswear—or that the Government insists an applicant favor—are relevant to the program in question. The program is valid only if the Government is entitled to disfavor the opposing view (here, advocacy of or toleration of prostitution). And if the program can disfavor it, so can the selection of those who are to administer the program. There is no risk that this principle will enable the Government to discriminate arbitrarily against positions it disfavors. It would not, for example, permit the Government to exclude from bidding on defense contracts anyone who refuses to abjure prostitution. But here a central part of the Government’s HIV/AIDS strategy is the suppression of prostitution, by which HIV is transmitted. It is entirely reasonable to admit to participation in the program only those who believe in that goal.

According to the Court, however, this transgresses a constitutional line between conditions that operate *inside* a spending program and those that control speech *outside* of it. I am at a loss to explain what this central pillar of the Court’s opinion—this distinction that the Court itself admits is “hardly clear” and “not always self-evident,” *ante*, at 8, 11—has to do with the First Amendment. The distinction was alluded to, to be sure, in *Rust v. Sullivan*, 500 U. S. 173 (1991), but not as (what the Court now makes it) an invariable requirement for First Amendment validity. That the pro-abortion speech prohibition was limited to “inside the program” speech was relevant in *Rust* because the program itself was not an anti-abortion program. The Government remained neutral on that controversial issue, but did not wish abortion to be promoted within its family-planning-services program. The statutory objective could not be impaired, in other words, by “outside the program” pro-abortion speech. The purpose of the limitation was to prevent Government funding from providing the *means* of pro-abortion propaganda, which

the Government did not wish (and had no constitutional obligation) to provide. The situation here is vastly different. Elimination of prostitution *is* an objective of the HIV/AIDS program, and *any* promotion of prostitution—whether made inside or outside the program—*does* harm the program.

Of course the most obvious manner in which the admission to a program of an ideological opponent can frustrate the purpose of the program is by freeing up the opponent's funds for use in its ideological opposition. To use the Hamas example again: Subsidizing that organization's provision of social services enables the money that it would otherwise use for that purpose to be used, instead, for anti-American propaganda. Perhaps that problem does not exist in this case since the respondents do not affirmatively promote prostitution. But the Court's analysis categorically rejects that justification for ideological requirements in *all* cases, demanding "record indica[tion]" that "federal funding will simply supplant private funding, rather than pay for new programs." *Ante*, at 14. This seems to me quite naive. Money is fungible. The economic reality is that when NGOs can conduct their AIDS work on the Government's dime, they can expend greater resources on policies that undercut the Leadership Act. The Government need not establish by record evidence that this will happen. To make it a valid consideration in determining participation in federal programs, it suffices that this is a real and obvious risk.

None of the cases the Court cites for its holding provide support. I have already discussed *Rust*. As for *Regan v. Taxation With Representation of Wash.*, 461 U. S. 540 (1983), that case *upheld* rather than invalidated a prohibition against lobbying as a condition of receiving 26 U. S. C. §501(c)(3) tax-exempt status. The Court's holding rested on the conclusion that "a legislature's decision not to subsidize the exercise of a fundamental right does not

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infringe the right.” 461 U. S., at 549. Today’s opinion, *ante*, at 9, stresses the fact that these nonprofits were permitted to use a separate §501(c)(4) affiliate for their lobbying—but that fact, alluded to in a footnote, *Regan*, 461 U. S., at 545, n. 6, was entirely nonessential to the Court’s holding. Indeed, that rationale prompted a separate concurrence precisely because the majority of the Court did not rely upon it. See *id.*, at 551–554 (Blackmun, J., concurring). As for *FCC v. League of Women Voters of Cal.*, 468 U. S. 364 (1984), the ban on editorializing at issue there was disallowed precisely because it did not further a relevant, permissible policy of the Federal Communications Act—and indeed was simply incompatible with the Act’s “affirmativ[e] encourage[ment]” of the “vigorous expression of controversial opinions” by licensed broadcasters. *Id.*, at 397.

The Court makes a head-fake at the unconstitutional conditions doctrine, *ante*, at 12, but that doctrine is of no help. There is no case of ours in which a condition that is relevant to a statute’s valid purpose and that is not in itself unconstitutional (*e.g.*, a religious-affiliation condition that violates the Establishment Clause) has been held to violate the doctrine.\* Moreover, as I suggested earlier, the contention that the condition here “coerces” respondents’ speech is on its face implausible. Those organizations that wish to take a different tack with respect to prostitution “are as unconstrained now as they were before the enactment of [the Leadership Act].” *National Endowment for Arts v. Finley*, 524 U. S. 569, 595 (1998) (SCALIA, J., concurring in judgment). As the Court acknowledges, “[a]s a general matter, if a party objects to a condition on the

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\*In *Legal Services Corporation v. Velazquez*, 531 U. S. 533 (2001), upon which the Court relies, the opinion specified that “in the context of this statute there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives,” *id.*, at 548.

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receipt of federal funding, its recourse is to decline the funds,” *ante*, at 7, and to draw on its own coffers.

The majority cannot credibly say that this speech condition is coercive, so it does not. It pussyfoots around the lack of coercion by invalidating the Leadership Act for “*requiring* recipients to profess a specific belief” and “*demanding* that funding recipients adopt—as their own—the Government’s view on an issue of public concern.” *Ante*, at 12 (emphasis mine). But like King Cnut’s commanding of the tides, here the Government’s “*requiring*” and “*demanding*” have no coercive effect. In the end, and in the circumstances of this case, “*compell[ing] as a condition* of federal funding the affirmation of a belief,” *ante*, at 15 (emphasis mine), is no compulsion at all. It is the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject. Section 7631(f) “*defin[es] the recipient*” only to the extent he decides that it is in his interest to be so defined. *Ante*, at 12.

\* \* \*

Ideological-commitment requirements such as the one here are quite rare; but making the choice between competing applicants on relevant ideological grounds is undoubtedly quite common. See, *e.g.*, *Finley, supra*. As far as the Constitution is concerned, it is quite impossible to distinguish between the two. If the government cannot demand a relevant ideological commitment as a condition of application, neither can it distinguish between applicants on a relevant ideological ground. And that is the real evil of today’s opinion. One can expect, in the future, frequent challenges to the denial of government funding for relevant ideological reasons.

The Court’s opinion contains stirring quotations from cases like *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624 (1943), and *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622 (1994). They serve only to distract attention

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from the elephant in the room: that the Government is not forcing *anyone* to say *anything*. What Congress has done here—requiring an ideological commitment relevant to the Government task at hand—is approved by the Constitution itself. Americans need not support the Constitution; they may be Communists or anarchists. But “[t]he Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support [the] Constitution.” U. S. Const., Art. VI, cl. 3. The Framers saw the wisdom of imposing affirmative ideological commitments prerequisite to assisting in the government’s work. And so should we.

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IN THE SUPREME COURT OF THE UNITED STATES

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AGENCY FOR INTERNATIONAL :

DEVELOPMENT, ET AL. :

Petitioners : No. 12-10

v. :

ALLIANCE FOR OPEN SOCIETY :

INTERNATIONAL, INC., ET AL. :

- - - - - x

Washington, D.C.

Monday, April 22, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

SRI SRINIVASAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioners.

DAVID W. BOWKER, ESQ., Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 12-10, Agency for International Development v. The Alliance for Open Society International.

Mr. Srinivasan.

ORAL ARGUMENT OF SRI SRINIVASAN  
ON BEHALF OF THE PETITIONERS

MR. SRINIVASAN: Thank you, Mr. Chief Justice, and may it please the Court:

Congress's comprehensive program to address the worldwide problem of HIV and AIDS includes a policy of opposing prostitution and sex trafficking because they contribute to the diseases spread. And correspondingly, Congress determined -- determined that the government should partner with and should grant limited competitive Federal funding to those organizations that agree with the policy opposing prostitution and sex trafficking, because organizations that agree with that policy are most likely to carry out the Federal program in conformity with the Federal policy priorities.

Now, no organization that carries out HIV programming is required to subscribe to the Federal

1 government's views, but if an organization wants to  
2 partner with the Federal government and get Federal  
3 funds to carry out the Federal program, well, that  
4 organization --

5 CHIEF JUSTICE ROBERTS: Well, but I guess  
6 the problem is that there are a number of different ways  
7 you could carry out the program. And let's say you have  
8 an organization that focuses on a particular -- you  
9 know, the administration of hospitals or whatever it is  
10 that's covered by the program, and they regard this  
11 issue as collateral to what they're concerned with.  
12 There -- there have to be some limitations on what type  
13 of loyalty oath you can require them to sign, isn't  
14 there?

15 MR. SRINIVASAN: Well, I think, Mr. Chief  
16 Justice, the way that Congress looked at this was to  
17 look at -- at the organizations with which the  
18 government is going to partner across the mine run of  
19 situations. And I think what one can do is look at  
20 Respondents' brief, because Respondents encompass a  
21 variety of different types of organizations.

22 But Respondents' brief itself tells you, at  
23 pages 11 to 12 and at pages 32 and 33, that there are  
24 going to be situations, in their own experience, in  
25 which these issues about prostitution and --

1 CHIEF JUSTICE ROBERTS: Well, what if  
2 they --

3 MR. SRINIVASAN: -- and sex trafficking come  
4 into issue.

5 CHIEF JUSTICE ROBERTS: All right. I  
6 appreciate that.

7 What if they're not? What if the government  
8 has, in addition to this policy, a strong policy in  
9 promoting, you know, recycling, and so they require  
10 everybody with whom they're going to do business, every  
11 grantee, to adopt a policy in favor of using renewable  
12 resources? Any problem with that?

13 MR. SRINIVASAN: Mr. Chief Justice, I think  
14 that would present a different question. Of course, you  
15 know that it presents a different question, but it would  
16 be a little bit more difficult for the -- for the  
17 following reason: That there is a germaneness component  
18 to Congress's -- the constitutionality of Congress's  
19 funding decisions in this area. And the more sweeping  
20 and the less germane the condition would be, the more  
21 it's open to constitutional attack.

22 Now, this condition is very, very germane,  
23 because as -- because as Congress found, prostitution  
24 and sex trafficking contribute to the spread of the  
25 disease. And so it makes good sense that Congress would

1 have imposed this condition.

2 And I think it's important to understand --

3 JUSTICE BREYER: Well -- well, it would on  
4 that particular point. What should we do -- as far as I  
5 can tell from the briefs, the people who work with the  
6 prostitutes to try to prevent AIDS uniformly tell us  
7 that if you go to those prostitutes and you try to get  
8 them to take steps to stop AIDS, it's very hard to do if  
9 at the same time you've announced you're against all  
10 prostitution. So what they're saying is that the  
11 condition imposed will interfere with the objective, and  
12 if there is a germaneness requirement -- and nobody says  
13 the opposite.

14 I mean, I've noted nobody denies what  
15 they're saying in terms of the effectiveness of their  
16 work, so -- I don't think. At least, I didn't read them  
17 all with great care; maybe you can point to somebody who  
18 does. But if everyone is telling us that this is  
19 counterproductive and the exact opposite, then can we  
20 say, well, it isn't germane.

21 MR. SRINIVASAN: Well, Justice Breyer, I  
22 don't think so, and two responses on that score.

23 First of all, everybody is not telling you  
24 that, and I'll tell you who's not telling you that in a  
25 second.

1           But the more -- but the overarching point is  
2           that this is a policy determination that Congress, of  
3           course, took into account when it fashioned the statute,  
4           and it concluded that it was important to have an  
5           opposition to prostitution and sex trafficking.

6           Now, as far as the organizations that aren't  
7           telling you that, there is an amicus brief that's filed  
8           by 46 organizations that it's in our support --

9           JUSTICE BREYER: Well, that's quite a few,  
10          yes. That's true.

11          MR. SRINIVASAN: -- that's in our support,  
12          and the lead organization is the Coalition Against  
13          Trafficking in Women, and they -- they support us. And  
14          they think that the best way -- and they -- and they  
15          argued this passionately in their brief -- they think  
16          that the best way to provide services to the target  
17          audience is under a rubric of opposition to prostitution  
18          and sex trafficking. And I would urge you to take a  
19          look at that brief, because it explains why the program  
20          should be conducted in this fashion.

21          Now, is there a debate about --

22          JUSTICE GINSBURG: Mr. Srinivasan, there  
23          isn't -- at least I'm not familiar with anything quite  
24          like this where if you're not told, if you want to run a  
25          government program, you have to speak the government's

1 speech. This doesn't require the recipient to speak to  
2 anybody at all, except to the government itself, to say,  
3 I pledge that my policy is the government's policy. So  
4 it's making somebody adopt as her own the government's  
5 policy rather than saying, I understand that I get my  
6 government money, I have to follow the government's  
7 rules about what I can say to the public.

8           Here -- and is -- is there anything else  
9 quite like this where you make a pledge to the  
10 government, but with respect to third parties doesn't  
11 apply?

12           MR. SRINIVASAN: Justice Ginsburg, if I  
13 could just fight the premise of your question just very  
14 slightly and then explain why I think this kind of  
15 requirement makes sense in this particular context.

16           The goal of this is not to persuade somebody  
17 to change their view. The goal of this is to partner  
18 with organizations that self-identify as organizations  
19 that agree with the government's policy priorities. And  
20 the reason the government has done that, and the reason  
21 why Congress could -- felt that that was a good idea is  
22 straightforward, and that is that those organizations  
23 that agree with Congress's policy priorities are going  
24 to be more likely to be reliable and effective partners  
25 in carrying out the government's program.

1                   And one way to think about it is to envision  
2 this: You have a circumstance in which you're down to  
3 your last few dollars of a discretionary Federal funding  
4 and you're looking at two different organizations that  
5 are competing for that money. One of them comes to you  
6 and says, we agree with your policy of an opposition to  
7 prostitution and sex trafficking, and the other one  
8 says, we're not going to tell you whether we agree;  
9 we're going to remain studiously neutral. But we'll  
10 tell you that we'll conduct our affairs in a manner  
11 that's not inconsistent with your policy priorities.

12                   I think it makes all the sense in the world  
13 for Congress to decide that the government should  
14 preferably partner with the former organization rather  
15 than the latter, because they're going to be more  
16 reliable and more effective at carrying out the  
17 government's program.

18                   And there's another aspect of this that I  
19 think that is important to highlight, and that is that  
20 we're not just talking about circumstances in which the  
21 conduct is -- is arguably going to be neutral, so that  
22 there's going to be no position taken. There's also  
23 going to be occasions in which the organizations that  
24 are providing services are going to have the opportunity  
25 to affirmatively embrace the government's policy in

1 opposition to prostitution and sex trafficking.

2 JUSTICE ALITO: I'm not aware of any case in  
3 which this Court has held that it is permissible for  
4 Congress to condition Federal funding on the recipient's  
5 expression of agreement with ideas with which the  
6 recipient disagrees. I'm not aware of any case in which  
7 that kind of compelled speech has been permitted.

8 And I would be interested in -- and it seems  
9 to me like quite a -- a dangerous proposition. I would  
10 be interested in whatever limitations you think there  
11 might be on that rule, which seems to be the general  
12 rule that you're advocating. Other than the requirement  
13 of germaneness, is there anything else.

14 MR. SRINIVASAN: There -- there is  
15 germaneness, Justice Alito, and I can point to a couple  
16 of other limiting principles that have been noted in  
17 this Court's decisions and I think that are satisfied  
18 here.

19 One is that Finley talked about, and I think  
20 it captures some other decisions in this -- this  
21 respect, disallowing the government from leveraging its  
22 control over funding conditions in a manner that  
23 services a speech-suppressive objective. And so you  
24 have to be careful, and I think this maps --

25 JUSTICE SCALIA: Say it again. I didn't

1 understand the point.

2 MR. SRINIVASAN: It -- it -- the government  
3 is limited from leveraging its control over funding  
4 conditions so that it can achieve a speech --  
5 speech-suppressive objective.

6 And I think what the Court was getting at is  
7 that you want to be careful that the speech condition,  
8 the speech-related condition, is tightly tethered to the  
9 programmatic objective and not allow the government  
10 to -- to have the program seep into other areas where it  
11 doesn't have to go.

12 JUSTICE ALITO: Well, let me give you this  
13 example, which is mentioned in one of the amicus briefs.  
14 The government provides lots of funding to universities  
15 to -- in various forms, either directly or through  
16 student loans, in the form of tax exemptions, so  
17 anything that would be germane to the general purpose of  
18 higher education presumably could be attached as a  
19 condition to those funds. Would that be correct?

20 MR. SRINIVASAN: With -- with certain  
21 limitations. I mean, I think germaneness is a -- is a  
22 criterion.

23 JUSTICE ALITO: With what -- with what  
24 limitations?

25 MR. SRINIVASAN: Well, I think --

1                   JUSTICE ALITO: The government could have a  
2 whole list of things, of principles that it thinks  
3 should be incorporated into higher education, and it  
4 could require a university as a condition of receiving  
5 these -- this money, let's say directed through student  
6 loans, to express agreement with all of these  
7 propositions. Would that be true.

8                   MR. SRINIVASAN: Well, I'm not sure, Justice  
9 Alito, and of course it's going to be hard for me to  
10 decide that we are not going to defend something. But  
11 let me just give you a limiting idea that's out there,  
12 which is that I think there is an important distinction  
13 between circumstances in which the government is  
14 partnering with an organization to carry out a  
15 government program, and circumstances in which the  
16 government is extending a Federal subsidy to an  
17 individual organization as kind of an across-the-board  
18 entitlement.

19                   So in the generally applicable  
20 across-the-board --

21                   JUSTICE SCALIA: What do you mean by  
22 partnering? How does this partnering differ, partnering  
23 differ from just giving them the money to do the job?

24                   MR. SRINIVASAN: Well, I don't know that it  
25 the differs from giving the money to do the job. I

1 guess what I'm saying is there are going to be  
2 circumstances, for example, like in Speiser, where the  
3 financial question doesn't have to do with the  
4 expenditure of the money by the recipient in a manner  
5 that's commensurate with congressional goals.

6 In that context you're giving a generally  
7 applicable entitlement, and you're not so worried about  
8 how the money is being spent because that person is not  
9 partnering with the government in carrying out a Federal  
10 program. Here the organizations are partnering with the  
11 government in carrying out the Federal program, because  
12 it's the Federal HIV program that's --

13 JUSTICE SCALIA: I don't know what you --  
14 what do you mean by partnering? You're saying they are  
15 given money to carry out a particular program. Is that  
16 all --

17 MR. SRINIVASAN: Yes.

18 JUSTICE SCALIA: Is that all you mean by  
19 partnering?

20 MR. SRINIVASAN: They are given money to  
21 carry out --

22 JUSTICE SCALIA: To carry out a particular  
23 program.

24 MR. SRINIVASAN: But in concert with Federal  
25 policy priorities. So it's not just -- it's not just a

1 naked grant of money. If you had an entitlement,  
2 Justice Scalia, for example, let's just consider your  
3 classic entitlement --

4 JUSTICE SCALIA: I understand. It is a  
5 naked grant of money to implement a particular program.

6 MR. SRINIVASAN: To implement a particular  
7 program and --

8 JUSTICE SCALIA: And you call that  
9 "partnering with the Federal government."

10 MR. SRINIVASAN: I do.

11 JUSTICE SCALIA: Terrible verb, anyway.

12 MR. SRINIVASAN: Okay. My apologies for  
13 that, for associating with the organization recipient in  
14 carrying out a Federal program.

15 JUSTICE GINSBURG: Mr. Srinivasan, on this,  
16 it does seem to me unusual, as Justice Alito brought  
17 out, requiring somebody to say "I believe this" or "I  
18 agree with the government on that." The Rust v.  
19 Sullivan, which is one of the precedents on which you  
20 rely, made it a point that the doctor was not required  
21 to represent as his own views, not required to represent  
22 an opinion that he doesn't hold.

23 He has to adhere to the government's program  
24 in his dealings with the public, but he doesn't have to  
25 say "I agree with the government."

1 MR. SRINIVASAN: Yes. That's true, Justice  
2 Ginsburg. But here's why --

3 JUSTICE GINSBURG: Is that just an  
4 irrelevant consideration in Rust, that no one -- no one  
5 was being obliged to say I believe something that they  
6 don't believe.

7 MR. SRINIVASAN: Well, here's why I think it  
8 makes sense in this context. It is distinct in that  
9 respect, but here's why I think it makes sense in this  
10 specific context. What Congress wanted to do is secure  
11 an ex ante commitment from the organizations with which  
12 the government works to assure that they agreed with the  
13 government's policy priorities. Now, where these  
14 programs are carried out is in the main in foreign  
15 territory, in distant lands, and in that context I think  
16 Congress would have understood that monitoring of  
17 conduct can be particularly challenging.

18 And that monitoring is made all the more  
19 challenging because these issues can come into play  
20 through a myriad of interactions between the  
21 organizations that are working with the government and  
22 local communities and local officials.

23 JUSTICE BREYER: I see that, and I see you  
24 have two sides to the policy question. And then it  
25 seems to me that the case that Justice Ginsburg was

1 speaking of is pretty relevant. Why? Well, that case,  
2 Regan and League of Women Voters, all seem quite  
3 comparable. They are trying to balance the -- the  
4 desire of the government to further a policy objective  
5 with the undesirability of the government invading what  
6 would otherwise be a constitutional protected right to  
7 speech.

8                   And the way they have done it is quite  
9 technical and narrow, but it may be applicable. In  
10 both, what they said was: Don't worry about your  
11 protected speech as much as you are because there is  
12 another way you can do it here. You go through a -- an  
13 independent structured organization. And where that  
14 wasn't present, namely the League of Women Voters, the  
15 Court struck it down.

16                   Now if that's the right framework, then here  
17 I don't see how you could have an independently  
18 structured organization for the reason that a group that  
19 said I am -- I am opposed completely to prostitution,  
20 publicly, to get the money, and then set up a structure  
21 that said the opposite, would be seen as totally  
22 hypocritical. They wouldn't be able to get their  
23 message across.

24                   They wouldn't be able to express in any way  
25 what it is they think about the administration of AIDS

1 in the context -- anti-AIDS in the context of  
2 prostitution.

3 That's a long question, but you see where --  
4 where I've ended up.

5 MR. SRINIVASAN: I think I do.

6 JUSTICE BREYER: At the moment, for purposes  
7 of the question. So why isn't this case more like  
8 League of Women Voters and less like the other two?

9 MR. SRINIVASAN: For the following reasons,  
10 Justice Breyer: There is an alternative affiliated  
11 organizational vehicle in this case as well, and I think  
12 that's constitutionally significant. Now, I'm not going  
13 to quibble with Your Honor's point about how the  
14 organization that's the funding recipient has made this  
15 policy agreement and that that can have ripple effects,  
16 but here's why that matters.

17 The point of having an alternate vehicle is  
18 not that it remedies a constitutional problem that  
19 already exists. The point of it is to get to this  
20 leveraging purpose that I was talking about earlier, and  
21 it's to show that what the government is doing is  
22 keeping the condition within its appropriate confines,  
23 and it's not allowing that condition to spread beyond  
24 that into other realms. And that purpose is fully  
25 served by the organizational affiliate alternative here.

1 And I think it's important --

2 JUSTICE GINSBURG: But, Mr. Srinivasan,  
3 there is a difference in this international setting.  
4 Most of those separate affiliates was in Taxation  
5 Without Representation and it was the cure for the Legal  
6 of Women Voters. But here, as the D.C. district court  
7 said in its opinion, which was in your favor: Oh, all  
8 you have to do is spin off a subsidiary that gets the  
9 government money; it's just a simple matter of corporate  
10 reorganization.

11 But you know that getting an NGO, a new NGO,  
12 recognized in dozens of foreign countries is no simple  
13 thing to accomplish. I mean, to take a concrete  
14 example, look what happened about a year and a half ago  
15 in Egypt when the U.S. NGO's were indicted for  
16 criminal -- for not complying with the permit  
17 requirements of the country.

18 So it's one thing to set up a 501(c)(3) and  
19 501(c)(4) operating in the United States, each does its  
20 thing. But to require an NGO to then in the countries  
21 where it's operating get the necessary permits is quite  
22 an arduous thing.

23 MR. SRINIVASAN: Well, Justice Ginsburg, I  
24 guess it depends on which direction it runs as a  
25 principal point. I mean, of course, the recipient

1 organization that's been conducting the program to date  
2 can continue to conduct the program and the affiliate  
3 that's set up could be the alternate channel. And so  
4 you could run in the opposite direction and I think you  
5 wouldn't run into that problem.

6 But I would like to address on this score an  
7 important point, which is that I think Respondents have  
8 suggested that there is a material distinction between,  
9 Justice Breyer, the circumstances in Rust and the  
10 circumstances in this case, because Rust involves  
11 separate programs within a legal entity, and this case  
12 involves separate organizations.

13 And I think the point the Respondents are  
14 trying to make is that there is a distinction because at  
15 least there one legal entity could have multiple  
16 programs, some of which are subject to the condition and  
17 some of which are not, whereas here there is a  
18 difference because this condition applies to an entire  
19 organization. But I think that's a false premise.

20 JUSTICE BREYER: I wasn't exempting that  
21 one.

22 MR. SRINIVASAN: Okay.

23 JUSTICE BREYER: The main difference it  
24 seemed to me is, assuming all of that away, is that here  
25 the separate structure does not fulfill the

1 constitutional need simply because the basic condition  
2 has to do with express speech. Because when A says "I  
3 believe in X" and then they set up a separate  
4 structure -- and every one knows they have set it up; I  
5 mean, that's the point of it -- and the structure says,  
6 "just kidding," nobody believes them from day one.

7           And so you can't do it and if the government  
8 has its way and has awarded the thing properly,  
9 according to your criteria, the part that won't be  
10 believed is the "just kidding" part. And so the  
11 structure, separate structure, just doesn't work in  
12 terms of communicating their belief. And I don't think  
13 that's true in Rust, and I don't think it's true in  
14 Regan, and I do think it's true in FCC v. League of  
15 Women Voters.

16           MR. SRINIVASAN: I guess I'd -- I'd make two  
17 points, Justice Breyer.

18           One is, as I was suggesting earlier, the  
19 purpose of having this alternate channel is not to  
20 remedy a constitutional violation that otherwise would  
21 exist. I mean, of course, we start from the premise  
22 that it's okay to require this condition at the front  
23 end. It's not that it's unconstitutional, and the way  
24 to compensate for that is to create this affiliate  
25 alternative.

1                   We think the condition's okay ab initio.  
2   What the alternate vehicle does is to address this other  
3   problem, that it shows that the condition is  
4   appropriately tailored.  It's not reaching beyond its  
5   appropriate confines, because it's allowing --

6                   JUSTICE BREYER:  Boy, if -- if the  
7   structure -- the separate structure is not really part  
8   of a constitutional analysis, then the government could  
9   say, why not?  It's easy to find policy reasons, and  
10  really find very, very decent and thoughtful people who  
11  agree with the policy reason, you know?  There -- there  
12  are people on both sides of these questions, and they  
13  come in and they say, okay, we're giving money for an  
14  anti-abortion purpose or a pro-abortion purpose, you  
15  know --

16                  MR. SRINIVASAN:  Well --

17                  JUSTICE BREYER:  -- and -- and suddenly  
18  people can't say anything in these areas in face of such  
19  a condition.

20                  MR. SRINIVASAN:  Well, as part of the -- as  
21  part of the constitutional analysis, I guess it's just  
22  addressing a different part of the constitutional  
23  analysis than -- than what Your -- Your Honor is  
24  addressing.

25                  I guess the other points that I'd make are

1 twofold. One is that I think there is something to the  
2 notion that if the organizations are sufficiently  
3 separate, then -- as they have to be to comply with the  
4 regulations -- then it does work that one organization  
5 can say that we have a particular policy, and the  
6 organization -- another organization -- another  
7 organization can say that we have a different policy,  
8 precisely because of the premise that they're  
9 sufficiently distinct.

10 So I'm not seeing the same degree of  
11 cognitive dissonance you are --

12 JUSTICE SOTOMAYOR: But that's --

13 MR. SRINIVASAN: -- and the other point I'd  
14 make --

15 JUSTICE SOTOMAYOR: I'm sorry.

16 Finish answering him and then I'll --

17 MR. SRINIVASAN: Thank you, Justice  
18 Sotomayor.

19 The other point I'd make is this, that the  
20 speech-related objections that Respondents levy are  
21 twofold. One is, they complain about the threshold  
22 condition. But the second is -- and this is -- may --  
23 manifests at pages 11 to 12 and 32 and 33 of their  
24 brief -- is that they want to engage in activities that  
25 involve affirmative speech.

1           They want to be able to participate in the  
2 dialogue about prostitution and sex trafficking and  
3 whether they should be legalized. And with respect to  
4 that aspect of what Respondents are complaining --  
5 complaining about, I think the alternate affiliated  
6 organization opportunity is a perfect remedy, in the  
7 same way that it was in Rust, and in the same way that  
8 it -- that it was in Regan.

9           JUSTICE SOTOMAYOR: The problem that I have  
10 with that answer is that it doesn't cure the  
11 organization's need to stay true to its own beliefs.  
12 Because if -- and I think this is what Justice Breyer is  
13 trying to get to -- if it truly an independent  
14 organization speaking, then that's that organization's  
15 belief; it's not an alternative under Rust to the needs  
16 of that organization to have its own personal views.

17           And -- and so I have that problem, which is  
18 how is it an alternative for that organization to be  
19 able to have its views?

20           Let me posit a hypothetical that I'm  
21 actually very troubled by. Let's assume a city  
22 government is undertaking a campaign to prevent teen  
23 pregnancy and its associated problems, and it wants to  
24 promote the use of contraceptives that protect from  
25 contracting, you know, diseases, things like that.

1                   And some of its programs involve the  
2 distribution of contraceptives, but others involve  
3 parenting classes for teenage mothers and offering them  
4 free daycare. And a church seeks funds for the daycare  
5 part and the parenting part.

6                   Can the city now say because we have this  
7 really important need to avoid sexually transmitted  
8 diseases, anyone who seeks our funds also have to say  
9 they believe in the use of contraceptives?

10                   MR. SRINIVASAN: Justice Sotomayor --

11                   JUSTICE SOTOMAYOR: The church there would  
12 say, we don't believe and why should we say we believe.

13                   MR. SRINIVASAN: I -- I'd certainly  
14 understand why a church would be reluctant to do that.

15                   I mean, I guess, you know, one way to look  
16 at it is that the city I think would have to think very  
17 long and hard about whether that's a -- a desirable  
18 policy objective, precisely because some of the  
19 organizations with which it wants to work are going to  
20 have difficulty abiding by it. And so there's going to  
21 have to be a front end determination as a matter of  
22 policy about whether that's an appropriate thing to  
23 pursue.

24                   But if the city, as Congress did in this  
25 case, thought that it was an appropriate thing to do,

1 then I think I would -- I think I would defend that --  
2 apart from, you know, free exercise issues of other  
3 things that aren't in play here -- I think I would  
4 defend it as long as it's sufficiently germane, and as  
5 long as it's in furtherance of the policy objectives  
6 that Congress or by, in your hypothetical, the city --

7 JUSTICE ALITO: But why don't I give you  
8 another example that's along the same lines. The  
9 Federal government provides lots of funds to entities  
10 and individuals who are involved in the provision of  
11 health care. So let's suppose Congress says that we  
12 think that the issue of guns is very germane to public  
13 health, and therefore, we will not allow anybody to  
14 receive any of these funds directly or indirectly unless  
15 that entity or person proclaims agreement with whatever  
16 we happen to think at the moment about guns.

17 So they must either say we believe that guns  
18 should be strictly limited -- access to them should be  
19 strictly limited for public health purposes or that guns  
20 should be freely available because we think that  
21 promotes public health.

22 That would be permissible, wouldn't it?

23 MR. SRINIVASAN: I don't know that it would,  
24 Justice Alito, on that --

25 JUSTICE ALITO: Well, why would it not?

1 MR. SRINIVASAN: -- because -- because I  
2 think, first of all, it would depend on whether there --  
3 there is the requisite germaneness. It would depend on  
4 whether in fact the organizations are working with --  
5 I'm trying to avoid using the word "partnering with" --  
6 but are working with the -- the government in carrying  
7 out the program. It would depend on those kinds of  
8 considerations.

9 And whether -- another point to be made here  
10 is that a limitation that's been recognized in this  
11 Court's cases is that at the end of the day, the  
12 government -- the government can't be seeking to  
13 suppress speech, or to suppress disfavored viewpoints,  
14 even in the context of subsidization.

15 And you'd have to ask the question whether  
16 that scheme is designed to do that. Now, if -- if it  
17 crossed all those thresholds, then I think yes, I would  
18 defend that as well, but I do think that it presents  
19 different and more difficult questions.

20 I would like to --

21 JUSTICE KENNEDY: One -- one thing before  
22 your time is up. I have the same concerns that Justice  
23 Ginsburg expressed about the difficulty of simply  
24 creating structures in -- in foreign countries. If --  
25 and I've looked through all of your cases. What's your

1 closest case, your best case for the fact that you  
2 should get extra deference because this is the foreign  
3 affairs field?

4 I mean, I think of U.S. v. Curtis Wright.  
5 Anything more specific than that?

6 MR. SRINIVASAN: I don't know that I have a  
7 particular case other than the doctrine generally,  
8 Justice Kennedy. But I do think that the foreign  
9 location of this is significant vis-à-vis the concern  
10 that I think many of you have raised about why have an  
11 affirmative condition that requires espousal of a  
12 policy.

13 Precisely because the conduct here is  
14 carried out in foreign areas, and precisely because it  
15 can involve myriad interactions with local officials and  
16 local policymakers, as Respondents admittedly want to  
17 do, on these sensitive questions, it makes sense in this  
18 context -- particular sense in this context to secure an  
19 ex ante commitment of agreement with the government's  
20 policy, because that will have a self-policing aspect to  
21 it.

22 It will be more designed to secure conduct  
23 in those areas that, in conformity with Federal policy,  
24 in a realm in which that conduct is particularly --  
25 particularly difficult to monitor.

1 I'd like to reserve the balance of my time  
2 for rebuttal, if I might.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Bowker?

5 ORAL ARGUMENT OF DAVID W. BOWKER

6 ON BEHALF OF THE RESPONDENTS

7 MR. BOWKER: Mr. Chief Justice, and may it  
8 please the Court:

9 Respondents do not dispute that the Spending  
10 Clause gives the government significant authority to  
11 fund the programs of its choosing and to control speech  
12 and conduct within those programs.

13 The problem with the policy requirement is  
14 that it aims at grantees, requiring that they profess a  
15 personal belief, and refrain from certain private speech  
16 outside the context of the government program.

17 In *Rust v. Sullivan*, the Court held that the  
18 government could ban abortion-related speech in the  
19 government's own family planning program, but the  
20 grantees there were left unfettered in their personal  
21 beliefs and in their private speech outside the program.

22 CHIEF JUSTICE ROBERTS: I don't see why this  
23 is a -- you talk about banning their speech. The  
24 government is just picking out who is an appropriate  
25 partner to -- to assist in this project. It wants to go

1 and find people who, like them, are opposed to  
2 prostitution. And all they want to do is make sure that  
3 you're opposed to prostitution.

4 It's like any other sort of condition. You  
5 know, we want to make sure that you haven't been  
6 convicted of tax fraud over the last 10 years, so sign a  
7 certification that you -- you haven't.

8 Yes, it's related to speech, but the whole  
9 program is about that. Why would they want to sign up  
10 with somebody who didn't share the objectives of the  
11 program?

12 MR. BOWKER: Well, I think the policy  
13 requirement here has been applied a little differently  
14 than Mr. Chief Justice suggests.

15 It -- it is applied in a way that is a  
16 funding condition, not part of the selection criteria.  
17 When the government goes out to select its partners in  
18 this case, it -- it goes out with requests for  
19 applications, and those requests for applications  
20 pertain to the particular program at issue. And they  
21 are very detailed about what precisely is required for  
22 that program, including --

23 CHIEF JUSTICE ROBERTS: So it would be a  
24 different case, in your -- your view, as if -- when they  
25 have those criteria, they have one of them is, oh, by

1 the way, you must agree with the objective of the  
2 program, which is to eliminate to the extent possible  
3 prostitution and sex trafficking?

4 MR. BOWKER: No. I don't -- I don't think  
5 that's right. I -- I think the government absolutely  
6 can pick partners who are dedicated to the particular  
7 program for which they are applying, but there are  
8 constitutionally permissible ways to do that.

9 One of the ways to do that is to look at  
10 technical capacity, past performance, references: What  
11 have you done before that shows you're able to do this  
12 particular program?

13 JUSTICE SCALIA: Well, it isn't just able to  
14 do. Are -- are you saying that they -- they just can't  
15 make it a -- a prior condition, but they can select  
16 applicants on the basis of which ones they know agree  
17 with the government's objectives?

18 You -- you have two equally qualified --  
19 technically, two equally qualified applicants, and the  
20 government intentionally picks the one whose views on --  
21 on prostitution are -- are similar to the government's.  
22 Is -- is that bad?

23 MR. BOWKER: Yes. And -- and the reason  
24 it's bad is because the government there is focused on  
25 viewpoint and not on ability to perform the program.

1 The problem -- the problem with focusing --

2 JUSTICE KENNEDY: But let -- let me -- let  
3 me ask you this: Suppose that you're a Congressman or a  
4 Congresswomen and you are a constitutional expert and  
5 you take your oath to uphold the Constitution very  
6 seriously. A funding bill comes before you. You're the  
7 chairman of the committee, and you decide that you're  
8 going to fund A rather than B because you like their  
9 speech much better. Is that a violation of the  
10 Constitution?

11 MR. BOWKER: Well --

12 JUSTICE KENNEDY: Because you like their  
13 policies much better?

14 MR. BOWKER: The -- the Congress can  
15 certainly fund a particular program and not fund others.  
16 And we have no -- we have no argument with that. The  
17 spending condition -- the Spending Clause definitely  
18 comes with that ancillary power. And in fact that's  
19 what the Congress did here. It said, We want to -- We  
20 want to fund a fight against HIV/AIDS. We don't want to  
21 support that disease. And we want to oppose  
22 prostitution. We don't want to support that practice.  
23 What it cannot do, then, is take its  
24 viewpoint and impose its viewpoint on the grantee and  
25 make it a -- make it a condition.

1 JUSTICE KENNEDY: Well, I'm -- I'm not quite  
2 sure I -- I see the difference. That the -- a  
3 conscientious Congressperson cannot -- can, in your  
4 view, say, I'm going to prefer organization A over  
5 organization B because I like their policies better --

6 MR. BOWKER: Well, I don't --

7 JUSTICE KENNEDY: -- across the board, with  
8 reference to drugs, with reference to guns, with  
9 reference to public health.

10 MR. BOWKER: If -- if Congress is looking at  
11 the viewpoint of an organization and deciding whether to  
12 fund it based on its viewpoint, I think that's  
13 problematic. And the reason I think it's problematic is  
14 because this Court has said to deny a subsidy or a  
15 benefit on the basis of the exercise of one's First  
16 Amendment rights, including holding one's own views, to  
17 deny a subsidy on that ground --

18 JUSTICE SCALIA: Well, my goodness. They  
19 can't --

20 MR. BOWKER: -- is problematic.

21 JUSTICE SCALIA: -- they can't fund the Boy  
22 Scouts of America because they like the programs that  
23 the BSA has? They -- they have to treat them  
24 equivalently with the Muslim Brotherhood? Is that  
25 really what you're suggesting?

1 MR. BOWKER: Not at all. I think --

2 JUSTICE SCALIA: Well, then you can take  
3 into account the -- the principles and the -- and the  
4 policies of -- of the organization that you're giving  
5 funding to.

6 MR. BOWKER: Well, this Court has never said  
7 that the Congress can make a decision based on viewpoint  
8 alone.

9 JUSTICE BREYER: But there's no way to  
10 separate -- with an organization in the field that does  
11 things, there is no way, I don't think, to separate what  
12 they do from what they say.

13 Congress has two opposite views on this in  
14 front of it.

15 MR. BOWKER: Sure.

16 JUSTICE BREYER: One is the view that the  
17 way to fight AIDS is consistent with and is furthered by  
18 longer term efforts to abolish trafficking in women,  
19 okay, prostitution. All right.

20 The other view is the better way to do it is  
21 to go into the active sex worker area and -- and not  
22 express views on the merits of what they are doing.  
23 Okay?

24 So they have two opposite views, and -- and,  
25 moreover, the groups that do this act on those views.

1 So why can't they say, we prefer view A or B, whichever  
2 it is, because that's what our program is about?

3 MR. BOWKER: Congress can -- can certainly  
4 decide what programs to fund and what programs not to  
5 fund. But when Congress makes that decision, Congress  
6 then can't take the next step to say the only people who  
7 can get funds under this particular program are people  
8 who agree with us and who will refrain from saying  
9 anything inconsistent in their private speech.

10 JUSTICE SCALIA: But you -- you go further  
11 than that. In answer to my question, you -- you go  
12 further than that, and you say, Moreover, even without  
13 making it a condition precedent to getting the money,  
14 Congress can -- the government cannot intentionally  
15 select those people that it thinks are in accord with  
16 its views. Right? Isn't that what you said?

17 MR. BOWKER: The Court has never said that's  
18 okay, and it's our -- and it's our --

19 JUSTICE SCALIA: I'm not asking what the  
20 Court said; I'm asking what you're saying.

21 MR. BOWKER: It's our position that it is  
22 constitutionally problematic to make funding decisions  
23 based on the viewpoint of grantees.

24 JUSTICE SCALIA: Problematic or -- or  
25 unconstitutional?

1 MR. BOWKER: Unconstitutional as applied  
2 here.

3 JUSTICE SCALIA: Okay.

4 MR. BOWKER: However -- however, we are not  
5 saying that there is no circumstance in which the  
6 government's interest wouldn't be compelling enough to  
7 override the First Amendment right.

8 Now, in our situation --

9 CHIEF JUSTICE ROBERTS: So just say the  
10 government wants to have an ad campaign to discourage  
11 people from smoking and they are looking for ad agencies  
12 to -- to help them with it. And an ad agency comes in  
13 and says, Look, we are the best ad agency there is; we  
14 know exactly how to get to the markets; we know what's  
15 persuasive and all of that. And yet -- and then the ad  
16 agency says, you know, come work at our agency if you  
17 smoke; we think smoking is okay; we have smoking breaks;  
18 we do all this." The government can't take that into  
19 account?

20 MR. BOWKER: I think the rules are different  
21 when the government hires a spokesperson. When the  
22 government hires a spokesperson, the government has the  
23 right under the -- under its ancillary power under the  
24 Spending Clause to control what that spokesperson says  
25 for the government.

1 CHIEF JUSTICE ROBERTS: Well, isn't that  
2 part of what's going on here? One of the things we want  
3 to do is eradicate prostitution and sex trafficking, and  
4 we want you to get that message out, and the one thing  
5 we're sure of is if you're not in -- if you're in favor  
6 or you're not opposed to it because you have other  
7 objectives, you're not going to help get the message out  
8 at all.

9 MR. BOWKER: Well, the -- the government  
10 does say that. The government says, What we need to  
11 prevent is the situation where the -- the government  
12 spokesperson says one thing with public funds, turns  
13 right around and says the opposite with private funds.

14 And what we say is this is an as-applied  
15 challenge. We have -- the government concedes my  
16 clients have not been enlisted as government  
17 spokespersons and they are not responsible for conveying  
18 any viewpoint or any message.

19 And I'd like to talk for a moment about what  
20 my clients really do. In the field, my clients provide  
21 services in the fight against HIV/AIDS, things such as  
22 preventing mother-to-child transmission of HIV in  
23 Tanzania, caring for orphans of AIDS victims in Kenya,  
24 and providing HIV/AIDS support services in places like  
25 Vietnam. And -- and this is a JA88 and 89, where you

1 can see the list of things that my clients do. None of  
2 those things relate to an opposition to prostitution and  
3 none of those things relates to messaging.

4 JUSTICE SOTOMAYOR: Excuse me. That's my  
5 problem, which is I'm trying to tease out what your  
6 position is. Okay? I -- I have an understanding of  
7 you're saying: You can't compel me to say I don't like  
8 something. And -- and that's like a oath of loyalty.  
9 That -- that's understandable.

10 But if the government said the following  
11 more clearly -- this is an oddly phrased policy, okay,  
12 because it seems to be requiring this oath. But if it  
13 simply said, "If you're an organization that wants our  
14 funds, you have to say that you're not going to promote  
15 actively the contrary policy," would that be okay?  
16 "You're not going to go out there and do things to  
17 promote the legalization of prostitution because that's  
18 going to undermined our message." Those are two  
19 different positions, so tell me where you draw the line.

20 MR. BOWKER: Certainly, that would be okay  
21 within the four corners of the government program. The  
22 government controls speech and conduct within its  
23 program. It can tell us what not to say within the  
24 program. And that's Rust.

25 JUSTICE SOTOMAYOR: Yes, that's Rust.

1 MR. BOWKER: And that's Rust. And what --

2 JUSTICE SOTOMAYOR: This is a step further.

3 MR. BOWKER: And what Rust says, and I -- I  
4 think we fall back on Rust, which we think is just on  
5 all fours with where we are here, and that is what the  
6 government cannot do -- and I think this answers your  
7 question -- is outside the government program the  
8 government cannot control private speech. And it was  
9 critical in that case -- Justice Rehnquist, at pages 196  
10 and 197, said, "The doctors there and the public health  
11 organizations there are free to engage in their own  
12 private speech and their own activities, and they are  
13 not required to endorse any viewpoint they don't, in  
14 fact, hold." And here --

15 CHIEF JUSTICE ROBERTS: But that is saying  
16 this is what's happening in Rust, okay? And Rust is  
17 okay. That's very different from saying it has to be  
18 that way and if it's any other way it's no good. It  
19 seems to me that you're just taking the limitation on  
20 the facts in Rust and saying that is an absolute  
21 requirement, which is a misreading of the case.

22 MR. BOWKER: Rust does not say that, to be  
23 clear. But the reasoning of Rust, and the majority's  
24 reasoning there, makes quite clear that the reason the  
25 Court was comfortable there is that the recipient was

1 not the target of the control. The control was around  
2 the program and the recipient was free outside the  
3 program.

4 And -- and Respondents here have respected  
5 that line. There is no question that for the past 10  
6 years, even though the policy requirement has not been  
7 enforced -- initially because the Department of Justice  
8 concluded that it is unconstitutional, and then  
9 subsequently because the district court enjoined it --  
10 it has not been enforced for the last decade,  
11 essentially.

12 JUSTICE SOTOMAYOR: So --

13 MR. BOWKER: And there's no evidence of harm  
14 at all here, so there's none of this undercutting the  
15 program that the government is alleging here. Sorry,  
16 Justice.

17 JUSTICE SOTOMAYOR: No, no, no. I cut you  
18 off. But -- but I guess what I'm -- I keep going  
19 back -- you keep going back and forth on this it -- it's  
20 not okay to tell me to take an oath of loyalty. But  
21 would it be okay for you to step outside the doors of  
22 this program and pass out literature that promotes the  
23 legalization of prostitution?

24 Am I making my question clear?

25 MR. BOWKER: Yes.

1 JUSTICE SOTOMAYOR: Which is how do you --  
2 how do you answer the question of why does the  
3 Constitution bar the government from saying, look, if  
4 you're going to work with me, you can't go out there and  
5 promote a -- actively promote --

6 MR. BOWKER: Right.

7 JUSTICE SOTOMAYOR: -- a different message?

8 MR. BOWKER: That's not the case here, but  
9 taking that case --

10 JUSTICE SOTOMAYOR: Well --

11 MR. BOWKER: Taking that case, I think the  
12 government can't do that. I think the government cannot  
13 gag an organization's private speech outside the  
14 program.

15 Now, even the government says there has to  
16 be some germaneness between what they are doing in the  
17 program and what our requirement is. So I do think it  
18 would be a tougher case for us and a stronger case for  
19 the government if my clients were engaged in a program  
20 that opposed prostitution -- we're not, but if we  
21 were -- and then we went right outside and said the  
22 opposite with our private funds, I think they would have  
23 an easier time showing that there is some compelling  
24 interest that overrides the First Amendment interest.

25 Now, I think it would depend on the facts,

1 and those are not the facts here.

2 JUSTICE BREYER: Only because -- see, it's  
3 not -- it's not, in my opinion, not a viewpoint matter  
4 if they're going to fund a -- a group that wants to end  
5 discrimination against women around the world because  
6 they think all kinds of good things will flow from that.  
7 The government wants to fund it. Of course such a group  
8 has a viewpoint; that's why they're in the business.

9 So the word isn't viewpoint. And you  
10 started to say something about that there is more than  
11 that here, it has to do with the express nature. And  
12 then, in answering Justice Sotomayor, you went a little  
13 bit further on that. And what are the form of words, if  
14 you were me and if I were to decide in your favor, what  
15 form of words would you dictate to describe where it is  
16 in your opinion that the First Amendment cuts in with a  
17 preventative restriction? How do you describe it? I --  
18 I don't think you can in terms of viewpoint.

19 MR. BOWKER: I don't think you can in terms  
20 of viewpoint either, Justice Breyer. I do think that  
21 the key, the key that this Court outlined in Rust is the  
22 government's authority to control its program. And if  
23 there is a threat to its program and the government  
24 needs to take some action in order to protect its  
25 program, prevent the message from being garbled or

1 distorted, whatever the language is, then the  
2 government's case is strongest.

3           Here, that is not at all what is happening.  
4 As I described, our programs are not opposition to  
5 prostitution programs. Our programs are HIV testing.  
6 These are mother-to-child transmission situations where  
7 we're trying to stop the disease from spreading.

8           JUSTICE SCALIA: Let me -- can I -- can I be  
9 sure --

10           MR. BOWKER: Yes.

11           JUSTICE SCALIA: -- I understand what you've  
12 just conceded in -- in your response to Justice Breyer.  
13 The government could require as a condition to come into  
14 this program and become a partner with the United  
15 States, that the recipient not have the viewpoint of  
16 favoring prostitution.

17           MR. BOWKER: No.

18           JUSTICE SCALIA: Well, you said it's not a  
19 viewpoint thing.

20           MR. BOWKER: No. The government cannot  
21 target viewpoint, and for us, that's -- that's a  
22 bright-line rule.

23           JUSTICE SCALIA: I thought that's what you  
24 just said to Justice Breyer.

25           JUSTICE BREYER: I did too, because I -- I

1 didn't see the reason. I thought that was -- I can  
2 think of dozens and dozens of programs all over the  
3 world that the government supports in some way or  
4 another, and of course the people in those programs have  
5 a certain viewpoint, and of course, they don't hold the  
6 opposite viewpoint.

7           Otherwise, they wouldn't be in the program.  
8 So -- so that's why I didn't find that useful. But now,  
9 I don't think you can have it both ways between  
10 answering these questions.

11           JUSTICE SCALIA: Him or me? You have to  
12 choose.

13           (Laughter.)

14           MR. BOWKER: Mr. Chief Justice, I need your  
15 help on --

16           CHIEF JUSTICE ROBERTS: You can always  
17 choose me, too.

18           MR. BOWKER: Well, our position here is that  
19 viewpoint is not the basis on which a decision can be  
20 made. That is our position. We think the government  
21 has a multitude of permissible grounds on which to make  
22 these types of decisions, and they do it every day in  
23 every other program where they don't have this odd  
24 policy requirement. They do it every day.

25           CHIEF JUSTICE ROBERTS: Your approach, it

1 seems to me, is just dealing with the breadth of the  
2 program. If the program here solely concerned  
3 prostitution and sex trafficking and not other areas  
4 where you say, look, we do a great job in these other  
5 areas, we just don't get involved in that area. But if  
6 the sole program was on prostitution and sex  
7 trafficking, you -- you wouldn't have a leg to stand on,  
8 would you?

9 MR. BOWKER: We absolutely would have a leg  
10 to stand on, and let me just explain --

11 CHIEF JUSTICE ROBERTS: So you're an  
12 organization --

13 MR. BOWKER: -- what I attempted to concede  
14 before, and that is, if -- if the government -- in that  
15 narrow case where the government is hiring a  
16 spokesperson, which is what they've focused on, saying  
17 one thing with public funds and turning right around and  
18 saying another with private funds, there is no case that  
19 says they can gag the private speech of that  
20 spokesperson.

21 But what we're saying is it is certainly  
22 possible that they would have a stronger case in that  
23 particular circumstance; however, this is an as-applied  
24 challenge, my clients are not spokespersons, they  
25 concede that. My clients are not delivering a message

1 or any particular viewpoint on behalf of the government  
2 and they concede that.

3 JUSTICE KENNEDY: Let me -- let me just  
4 ask -- ask this one more time. It seems -- because it  
5 seems to me that when you get into the details of your  
6 answer, you indicate, oh, well, the government has lots  
7 of other criteria it could use, which seems to me just  
8 an invitation to disguise what the government's real  
9 motive is.

10 Suppose the government's interested in  
11 preventing and stopping the spread of malaria. And  
12 there's an organization that's marvelous at delivering  
13 the proper message for this, but they criticize the  
14 United States often. So they choose an organization  
15 that's not quite as good but is quiet on these other  
16 issues.

17 Is that permissible for the Congress to do?

18 MR. BOWKER: No, I don't think it is. To  
19 the extent the -- the criteria used by the Congress are  
20 merely pretext to --

21 JUSTICE KENNEDY: Well, this isn't -- no.  
22 My concern was that your position was pretext. Here the  
23 Congress is right upfront.

24 MR. BOWKER: And says this is the reason.

25 JUSTICE KENNEDY: And they say the reason

1 we're not giving to organization A is because it's  
2 always critical of the United States; even though its  
3 technical skills are better, we prefer organization B.  
4 Congress cannot do that?

5 MR. BOWKER: Congress cannot do that.

6 JUSTICE KENNEDY: And your best case for  
7 that proposition is what?

8 MR. BOWKER: Well, even the government  
9 concedes that -- that they can't do that. What they say  
10 is that in -- it must be germane. That's their limiting  
11 principle.

12 JUSTICE KENNEDY: Well, I'm -- I'm not sure  
13 they should if they're going to -- if they're going to  
14 be able to establish the principle that allows them to  
15 prevail in this case and that's why I'm asking.

16 MR. BOWKER: I -- I don't think that that's  
17 permissible, because all that is, is penalizing a  
18 particular viewpoint and withholding a subsidy or  
19 benefit based on viewpoint.

20 CHIEF JUSTICE ROBERTS: I just want to make  
21 sure I -- the government has a program to develop water  
22 resources. And let's say it's in South Africa before  
23 the abolition of apartheid. And there's a pro-apartheid  
24 group and an anti-apartheid group, and you're saying the  
25 government can only decide which one is better at

1 digging wells, and it can't say we're going to prefer  
2 the anti-apartheid group.

3 MR. BOWKER: Well, that -- I don't think it  
4 can make that decision based on viewpoint. However --

5 CHIEF JUSTICE ROBERTS: Viewpoint on  
6 apartheid. It can't say, so, the other one shows we've  
7 got a better record, we dig the wells quicker.

8 MR. BOWKER: I mean, the -- the reason that  
9 that case is so much tougher than this one is because in  
10 this one, they're not attempting to select organizations  
11 that will do the best job by using the policy  
12 requirement. The policy requirement is being used after  
13 the organization has been selected to say, now that  
14 you've been selected, we want you to toe the line. We  
15 want you to profess your belief in our viewpoint and not  
16 to say anything with your private funds outside the  
17 program.

18 So it is so far beyond this -- this weighing  
19 in a selection situation.

20 CHIEF JUSTICE ROBERTS: It goes to the  
21 effectiveness of the program. It's related to it. The  
22 United States doesn't want the company or the  
23 organization that goes into a village and says we're  
24 going to bring -- you know, this is from the United  
25 States, we're bringing you fresh water and it's a

1 pro-apartheid group.

2 That does undermine what they are trying to  
3 do, just as in this case to have the organization  
4 providing the services that your organization provides  
5 be identified as as an organization that doesn't want to  
6 abolish prostitution.

7 MR. BOWKER: Yes, I understand.

8 I -- I think the government could -- if it  
9 could make the case that an organization will be unable  
10 to do this effectively because of what it has said in  
11 the past, or what it has done in the past, or how -- how  
12 the population associates -- what the population  
13 associates with that organization.

14 But here -- here -- and the government even  
15 concedes -- there would -- there has to be some -- I  
16 think the word was, it has to be tightly tethered to the  
17 programmatic objective. Now, we think that's -- that's  
18 way too easy to fulfill; that should not be the  
19 standard. But that's what they say the limiting  
20 principle is, is germaneness, tightly tethered.

21 In -- in your example, I think that probably  
22 doesn't even meet their limiting principle. But in our  
23 case -- in our case, there is no tethering at all. We  
24 are out testing for the disease by extracting blood and  
25 running tests. We're out caring for orphans. We are

1 out improving public health services that NGOs deliver,  
2 and they're saying now you have to profess your belief  
3 in our particular viewpoint.

4 JUSTICE SCALIA: It doesn't say, "profess  
5 belief." I was going to ask you about that. That's not  
6 what the statute says. It just says they have to have a  
7 policy.

8 MR. BOWKER: Well --

9 JUSTICE SCALIA: A policy. Which means I  
10 suppose they have to tell their employees don't do  
11 anything to -- to foster prostitution. But they don't  
12 have to get up -- get up and announce publicly, we  
13 oppose prostitution, do they?

14 MS. GOLDENBERG: Well, as it's been applied  
15 to us, it's more than just have a policy. It's have a  
16 policy and then tell us you agree with our policy, and  
17 we want to make sure that you believe it so we know that  
18 you will do a good job in the program.

19 So the purpose here is to police --

20 JUSTICE SCALIA: They can get all that  
21 without making you profess it, unless -- unless you  
22 consider the only profession to be the assurance to the  
23 -- to your partner, the United States government, that  
24 you -- that you in fact oppose prostitution.

25 MR. BOWKER: Well, that's -- that's

1 precisely it, Justice Scalia, is we are required to  
2 profess our allegiance to the government.

3 JUSTICE SCALIA: To tell the government.

4 That's -- that's the only profession you're  
5 talking about.

6 MR. BOWKER: That's the profession that  
7 we're required to --

8 JUSTICE SCALIA: Oh. Okay.

9 MR. BOWKER: -- that's the pledge. As -- as  
10 the author of -- of the provision called it, it was the  
11 pledge. That's the pledge to the government.

12 Now --

13 JUSTICE BREYER: And then they're doing  
14 that, they say, because we're part of the belief as a  
15 matter of policy that the best way to go about this,  
16 whether you think so or not, is to restrict the grants  
17 to those people who will oppose the long-term extension  
18 of prostitution expressly.

19 Now, that's their view of how to get rid of  
20 AIDS, you say. Might disagree with it, but there are  
21 plenty of people who think the opposite. So they're  
22 saying we're not doing it for any reason other than to  
23 further our policy.

24 MR. BOWKER: The government no doubt has a  
25 good reason for putting it there. The problem is the

1 First Amendment, and where does that -- where does that  
2 end? What is the limiting principle? If all that's  
3 required here is germaneness and then you give a dollar  
4 and you own the viewpoint and you own the private  
5 speech, where does that end?

6           What that means is -- on the government's  
7 theory, the government can give you -- can give anyone  
8 in the country a dollar in Medicare funds and say, okay,  
9 now that you've taken a dollar of our money, we want you  
10 to profess your agreement with the Affordable Care Act,  
11 and we want you to never say anything inconsistent with  
12 that in your private speech.

13           That is -- that is wildly inconsistent with  
14 the First Amendment. That's exactly what's happening  
15 here. The only difference is the subject of  
16 prostitution. That's what makes it less palatable.

17           But for us --

18           JUSTICE GINSBURG: Are you -- what -- are  
19 you saying that you can -- within the government  
20 program, within the government program, the government  
21 can specify whatever it wants, including this -- this  
22 policy, but it can't then say and the organization  
23 outside the program is also bound by this profession?

24           MR. BOWKER: Within the program, they can  
25 tell us, if we are speaking for them, what to say,

1 and -- on their behalf, not ours. And they can tell us  
2 what not to say, which is Rust. They cannot command  
3 fealty to their viewpoint and they certainly cannot  
4 control our private speech outside the program.

5 Now, to be clear, I just want to address one  
6 last thing before my time runs. To be clear,  
7 Respondents here do not promote prostitution nor do they  
8 approve of it. They merely want to be free in their own  
9 private programs to operate those programs as they see  
10 fit, consistent with public health objectives, and they  
11 want to be able to participate in the policy  
12 conferences.

13 They want to be able to publish papers, and  
14 they want to be able to be a part of the discussion in  
15 the marketplace of ideas right here in the United  
16 States, not in the -- in the nether reaches of the  
17 world -- right here in the United States.

18 They would like to be free to engage in this  
19 important discussion and to be unfettered by a policy  
20 requirement that demands fealty to the government's  
21 viewpoint.

22 Now, the First Amendment gives Respondents  
23 that right, and -- and that's why we are here.

24 So unless the Court has further questions --

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1                   Mr. Srinivasan, you have 4 minutes  
2 remaining.

3                   REBUTTAL ARGUMENT OF SRI SRINIVASAN

4                   ON BEHALF OF THE PETITIONERS

5                   MR. SRINIVASAN: Thank you, Mr. Chief  
6 Justice.

7                   Just a -- a few points in rebuttal.

8                   First, by -- by way of characterizing this  
9 requirement, I think there has been a suggestion made  
10 that what we are trying to do is impose a viewpoint on  
11 organizations. This is not a matter of imposing a  
12 viewpoint on somebody. It's a matter of picking  
13 organizations with which to work who self-identify as  
14 having views that are commensurate with the government's  
15 views, so that they will be reliable in carrying out the  
16 government's program.

17                   Now, Justice Kennedy, you'd asked about  
18 why -- whether the foreign context of the case--

19                   JUSTICE ALITO: I don't want to interrupt  
20 your rebuttal, but I don't see the difference between  
21 those two, those two things that you just tried to  
22 distinguish.

23                   MR. SRINIVASAN: Because it goes to the  
24 limitation that the Court has imposed in its decisions  
25 about leveraging funding so as to suppress viewpoints.

1 That's not what's going on here. This is not a case in  
2 which funding is being leveraged to suppress a  
3 viewpoint. It's a case in which we are trying to get an  
4 ex ante determination of whether the organizations that  
5 are going to carry out the Federal program agree with  
6 our policies.

7 If they do, they can participate --

8 JUSTICE ALITO: Well, suppose you have an  
9 organization that previously has expressed support for  
10 the legalization of -- of prostitution. Then when you  
11 tell them, well, if that's your policy you can't get our  
12 money, they say, well, we need your money, so we're  
13 going to have to say uncle and now we are opposed to the  
14 legalization of prostitution. That then -- that isn't  
15 trying to change people's viewpoint?

16 MR. SRINIVASAN: I don't think --

17 JUSTICE ALITO: -- to change the viewpoint  
18 that they are expressing?

19 MR. SRINIVASAN: It's not -- Justice Alito,  
20 with all respect, I don't think it's trying to change  
21 their viewpoint. I think if they decide later on that  
22 they would affirm to us that they agree with the policy  
23 at that point in time, well, we may -- we may take that  
24 observation and engage them.

25 But I don't think that effort is to try to

1 change their viewpoint. It's to try to get them to  
2 self -- self-identify that they are going to be reliable  
3 in carrying out the government program.

4 Justice Kennedy, you'd asked the question  
5 about whether the foreign context matters, and I talked  
6 about why it matters in the sense that monitoring can be  
7 challenging in this context. It also matters in another  
8 sense that I should add, which is that when the  
9 organizations are doing this work in those areas, they  
10 are identified as working with the United States  
11 government.

12 There is a statutory provision at 291(a) of  
13 the petition appendix, which is 22 U.S.C. 7611(h), and  
14 that requires the global AIDS coordinator to develop a  
15 message that enhances awareness by program recipients  
16 that the program is an effort on behalf of the citizens  
17 of the United States.

18 So there is a real perception out there that  
19 when the organization is carrying out its functions,  
20 it's doing so at the behest of the United States  
21 citizens. And part of what Congress wanted to do was to  
22 avoid a misimpression about why -- about what the United  
23 States' policy priorities are.

24 And one way to do that is to assure that the  
25 organizations with which the United States works share

1 the United States' policy commitment against  
2 prostitution and sex trafficking.

3 JUSTICE SOTOMAYOR: I would have less  
4 problem accepting your message if there weren't four  
5 major organizations who were exempted from the policy  
6 requirement and -- medical science -- vaccinators are  
7 exempted.

8 There seems to be a bit of selection on the  
9 part of the government in terms of who it wants to work  
10 with. It would seem to me that if you really wanted to  
11 protect the U.S., you wouldn't exempt anybody from this.

12 MR. SRINIVASAN: Justice Sotomayor, Congress  
13 is not required to -- to pursue every objective no  
14 matter what the cost may be. The Court confronted a  
15 similar situation in *Regan*. That case involved an  
16 exemption for veterans. The Court applied a rationality  
17 standard and said -- said that was fine. And there's  
18 certainly a rationale here.

19 JUSTICE GINSBURG: Mr. Srinivasan, that was  
20 one, veterans. Everybody else was subject to the  
21 lobbying restriction. Here it's 20 percent of the funds  
22 go to the organizations that are free from this pledge.

23 MR. SRINIVASAN: Justice Ginsburg, I think  
24 the exemption for these organizations makes good sense  
25 if you consider the character of the organizations.

1 Three of the four are -- have members that are sovereign  
2 entities. And so one can understand --

3 CHIEF JUSTICE ROBERTS: Mr. Srinivasan --

4 MR. SRINIVASAN: Can I just finish this  
5 thought?

6 One can understand why Congress would have  
7 wanted to tread with sensitivity when -- when we are  
8 dealing with foreign countries, especially foreign  
9 countries that have different views about prostitution.

10 And there's less of a danger -- and this is  
11 the final point -- there's less of a danger in that  
12 context that those entities' views are going to be  
13 misattributed to the United States precisely because  
14 they are foreign countries.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel,  
16 counsel.

17 The case is submitted.

18 (Whereupon, at 12:00 p.m., the case in the  
19 above-entitled matter was submitted.)

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