

## More Breathing Room For Leadership Act Fund Recipients

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By [David Bowker](#) and [Catherine Carroll](#)

On June 20, 2013, the [U.S. Supreme Court](#) upheld an injunction against enforcement of a provision of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 (Leadership Act) that required any recipient of Leadership Act funds to adopt a policy explicitly opposing prostitution and to refrain from any speech — even privately funded — that the government deemed inconsistent with that policy. In a 6-2 opinion by Chief Justice Roberts, the court held that this condition, known as the policy requirement, violated the First Amendment.

The decision goes further than prior cases in clarifying that Congress' authority to attach conditions to federal funding does not include the power to compel recipients of those funds to profess agreement with the government's views or to restrict private speech.

### Background

Capping the government's efforts to combat the global HIV/AIDS pandemic, the Leadership Act comprised a comprehensive set of strategies to improve the treatment of HIV and AIDS around the world, to care for those affected by the diseases and to prevent the diseases' further spread.

To achieve those purposes, Congress drew on the knowledge and experience of nongovernmental organizations active in the public health and anti-poverty fields, authorizing the appropriation of billions of dollars to fund the work of NGOs engaged in HIV/AIDS treatment and prevention overseas. To qualify for Leadership Act funds, NGOs must meet rigorous requirements demonstrating successful past performance, technical merit and capacity to undertake effective development activities.

Finding that prostitution degrades women and contributes to the spread of HIV and AIDS, Congress provided in the Leadership Act that "it should be the policy of the United States to eradicate such practices." Congress accordingly imposed two related conditions on receipt of Leadership Act funding.

First, the act bars recipients from using Leadership Act funds "to promote or advocate the legalization or practice of prostitution or sex trafficking." Second, in the policy requirement at issue before the Supreme Court, the act provides that no funds may be made available to any organization "that does not have a policy explicitly opposing prostitution and sex trafficking."

To implement this requirement, the U.S. [Department of Health and Human Services](#) and the United States [Agency for International Development](#) require by regulation that each recipient of Leadership Act funds state in its award document that it is "opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children."

The regulations also prohibit recipients from "engag[ing] in activities inconsistent with ...

opposition to the practices of prostitution and sex trafficking,” even when using private funds. And although the government allows recipients of Leadership Act funds to affiliate with separate organizations engaged in activities inconsistent with an opposition to prostitution, it says they may do so only if the recipient maintains “objective integrity and independence” from the affiliate.

In 2005, U.S.-based NGOs Alliance for Open Society International and Pathfinder International filed a lawsuit challenging the policy requirement under the First Amendment. Those plaintiffs were later joined by InterAction and Global Health Council, two of the largest associations of public health and international development NGOs.

None of these NGOs supports prostitution. In their field work combating HIV/AIDS, however, these NGOs regularly seek to work with vulnerable populations including sex workers, both to provide care to those individuals and to educate them about HIV prevention.

The plaintiff NGOs feared that adopting a policy explicitly opposing prostitution could hinder those efforts. And, although they did not challenge the act’s restriction on the use of federal funds to promote the legalization of prostitution, the plaintiffs believed that the policy requirement would chill their privately funded speech in the ongoing international debate about the best policies and practices for preventing the spread of HIV among sex workers and dealing with the public health consequences of prostitution.

In 2006, the U.S. District Court for the Southern District of New York entered a preliminary injunction prohibiting enforcement of the policy requirement. The Second Circuit affirmed.

### **The Supreme Court’s Decision**

The Supreme Court affirmed the injunction, holding that the policy requirement “violates the First Amendment and cannot be sustained.” The court began with the uncontested premise that the policy requirement, if enacted as a direct regulation of speech, “would plainly violate the First Amendment” by compelling recipients of federal funding to express agreement with the government’s policy — in violation of the principle that “freedom of speech prohibits the government from telling people what they must say.”

The question in the funding context was “whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.” The answer, as given by the Chief Justice, was a resounding “no.”

In reaching that conclusion, the court’s opinion broke new ground in at least three ways. First, the court clarified that Congress’ power under the Spending Clause to impose conditions on federal funds is constrained by the First Amendment. The court reaffirmed that — at least “in some cases” — the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech.”

That remains true even though the recipient is not entitled to the benefit, and even though the usual recourse for a party who objects to a condition on federal funding is simply to forgo the

funding.

The First Amendment's relevance to speech-related funding conditions has not always been so consistent or clear. Indeed, some of the court's prior decisions expressed only lukewarm support for the notion that the First Amendment restricts funding conditions at all. In *National Endowment for the Arts v. Finley*, the court acknowledged that the First Amendment "has application in the subsidy context," but endorsed Congress' authority to "allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."

And in *United States v. American Library Association*, the court indicated that the Spending Clause analysis of *South Dakota v. Dole* supplied the appropriate framework for assessing the constitutionality of a funding condition; the First Amendment was not fully implicated where a funding decision simply refused to subsidize protected speech and where a party who did not wish to comply with the condition could simply decline the funds.

Relying on this precedent, the government argued in the Supreme Court that a speech-related funding condition like the policy requirement violates the First Amendment only if it is untethered to the objective of the federal program or has the effect of "coercing" a grantee to refrain from proscribed speech or suppressing dangerous ideas. The chief justice, however, read the court's precedents as "not so limited."

Rather, even where a funding condition is not coercive, the First Amendment precludes Congress from "leverage[ing] the federal funding to regulate the [recipient's] speech outside the scope of the program." Congress also cannot use funding conditions to extract from private parties professions of belief in a particular idea or policy. Only Justices Scalia and Thomas, in dissent, accepted the government's position.

Second, in explicating the distinction between permissible and impermissible funding conditions, the court embraced the line drawn in *Rust v. Sullivan* between conditions that apply to a grantee and conditions that apply to the federally funded project. *Rust* upheld a funding condition that precluded recipients of federal family-planning funds from advocating abortion as a method of family planning.

The court reasoned that the condition governed the scope and conduct of the federal program while leaving the funding recipient "unfettered in its other activities." And it emphasized that the funding condition did not prohibit the recipient from engaging in protected conduct outside the scope of the federally funded program and did not require the recipient to express as its own a viewpoint it did not hold.

Later cases read *Rust* as lending broad support to funding conditions that embody a congressional choice to subsidize some categories of protected speech and not others or that enlist private speakers to convey a message on behalf of the government. Here, the government seized on that view of *Rust* in contending that Congress had simply chosen to promote and fund a message of opposition to prostitution.

The court rejected that argument, however, and in doing so, it adopted as law what had previously been only the negative implication of *Rust*: Speech-related funding conditions that define the scope of the federal program are permissible, but “those that reach outside it” are not.

Accordingly, the “relevant distinction” in determining which funding conditions impose an unconstitutional burden on First Amendment rights “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.”

Third, in explaining why the policy requirement fell on the wrong side of that line, the court held for the first time that a funding condition that requires grantees to “adopt — as their own — the Government’s view on an issue of public concern” is a condition that “by its very nature affects ‘protected conduct outside the scope of the federally funded program’” and is therefore unconstitutional.

The policy requirement did not simply define the limits of a federally funded program and did not simply prevent recipients from using private funds in a way that would undermine the federal program. Rather, it “requires [recipients] to pledge allegiance to the Government’s policy of eradicating prostitution.”

No less than a direct regulation of speech, the policy requirement thus violated the principle 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 action their faith therein.”

Moreover, this violation could not be remedied by regulations permitting Leadership Act recipients to affiliate with separate organizations that are not subject to the policy requirement. Although the court has found similar affiliate regimes to alleviate the First Amendment burden in cases where funding recipients could exercise their First Amendment rights outside the federal program, affiliates “cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own.” Either the affiliate will be so distinct from the recipient that it “does not afford a means for the recipient to express its beliefs,” or the affiliate is so clearly identified with the recipient that “the recipient can express those beliefs only at the price of evident hypocrisy.”

## **Implications and Open Questions**

The court’s decision precludes the government from requiring U.S.-based NGOs to comply with the policy requirement as a condition of receiving Leadership Act funds. The immediate effect accordingly will be to permit those NGOs to continue to partner with the U.S. government in the fight against HIV and AIDS without having to profess a view they do not hold or simply do not wish to express. Any similar requirement also may not be imposed on NGOs or government contractors in other contexts.

More broadly, the court’s opinion reinvigorates the application of the “unconstitutional conditions” doctrine in the context of federal spending. Precisely how that doctrine will apply to

other funding conditions, however, will remain to be seen.

As the court acknowledged, the distinction “between conditions that define the federal program and those that reach outside it” is “not always self-evident.” A requirement that a qualified recipient affirm its belief in a particular viewpoint as a condition of funding is squarely invalid under this decision; the opinion leaves open, however, whether this holding reaches funding conditions that serve as criteria for selecting recipients in the first place.

Similarly, the court distinguished the policy requirement from a condition that “prevent[s] recipients from using federal funds in a way that would undermine the federal program.” Like the flurry of hypothetical funding conditions the justices posed at oral argument, the court’s opinion leaves these questions for another day, invoking Justice Cardozo’s reflection: “Definition more precise must abide the wisdom of the future.”

--By David W. Bowker and Catherine M.A. Carroll, [WilmerHale LLP](#)

[David Bowker](#) and [Catherine Carroll](#) are partners in the firm's Washington, D.C., office.

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