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## Supreme Court Issues Significant Decision on Unconstitutional Conditions Doctrine

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In February, this column highlighted the Supreme Court's grant of certiorari in *United States Agency for International Development v. Alliance for Open Society International, Inc.*,<sup>1</sup> a case that raised the curtains on the next act of the "unconstitutional conditions" doctrine. Specifically, the case presented the question of whether the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act)<sup>2</sup> violated the First Amendment by requiring organizations that receive federal HIV and AIDS-related funding to adopt a policy explicitly opposing prostitution and sex trafficking (Policy Requirement).

The Court issued its opinion on June 20, 2013, holding that the Policy Requirement violated the First Amendment because it conditioned receipt of federal funding on an organization affirming a belief "that by its nature cannot be confined within the scope of the Government program."<sup>3</sup> Chief Justice Roberts authored the opinion on behalf of six justices. Justice Scalia filed a dissenting opinion, in which Justice Thomas joined. Justice Kagan did not participate in the case.

As an initial matter, the Court made it clear that "[w]ere it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment."<sup>4</sup> Turning to whether

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the Policy Requirement amounted to an unconstitutional condition, the Court explained that the “relevant distinction” was 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.”<sup>5</sup> Although the Court recognized the difficulty at times in drawing that distinction—“in part because the definition of a particular program can always be manipulated to subsume the challenged condition”<sup>6</sup>—it had little difficulty concluding on which side of the line the Policy Requirement fell. In its view, the Policy Requirement was unconstitutional because it “demand[ed] that funding recipients adopt—as their own—the Government’s view on an issue of public concern.”<sup>7</sup> As such, the funding condition could not fairly be characterized as limited simply to specifying the type of activities that Congress wanted to subsidize. Rather, as Chief Justice Roberts explained in a particularly forceful passage, “[b]y requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient.”<sup>8</sup>

The government nevertheless argued that regulations issued during the course of the litigation by the U.S. Agency for International Development and the Department of Health and Human Services saved the Policy Requirement from invalidation. Those regulations allowed a nongovernmental organization (NGO) to decline funding while establishing an affiliate organization that could then serve as the funding recipient by adopting the requisite policy against prostitution. The regulations, however, also required that the funding recipient maintain “objective integrity and independence” from the noncomplying affiliated organization.<sup>9</sup>

Although it had previously indicated that the government might avoid First Amendment concerns by permitting NGOs to establish affiliates able to satisfy funding conditions, the Court explained that this is so only where use of affiliates actually serves to allow an organization to exercise its First Amendment rights “outside the scope of the federal program.”<sup>10</sup> Here, because “the condition is that a funding recipient espouse a specific belief as its own,” an affiliate could not serve that purpose.<sup>11</sup> As the Court reasoned: “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.”<sup>12</sup> In other words, use of affiliates here would not address First Amendment issues because the government would still require some organization “to pledge allegiance to the Government’s policy of eradicating prostitution” in order to obtain funding.<sup>13</sup>

To be sure, the Court seemingly recognized that the government could adopt funding conditions to prevent recipients from using public funds in a manner that would undermine a government program. It also left open the possibility that, in limited circumstances, the government could adopt tailored conditions to prevent recipients from using private funds in a manner that would undermine a program. The Court concluded, however, that the Policy Requirement “goes beyond” such tailored restrictions.<sup>14</sup>

Justice Scalia argued in dissent that the Policy Requirement fell well within the majority’s definition of a permissible funding condition that merely “define[s] the limits of the government spending program.” In his view, the goal of eliminating 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.”<sup>15</sup> Moreover, according to Justice Scalia, the “real evil” in the Court’s opinion was that it opened the door to “frequent challenges to the denial of government funding for relevant ideological reasons.”<sup>16</sup> This is so, Justice Scalia explained, because “it is quite impossible” to distinguish between the rare requirement that an organization make an ideological commitment as a condition of funding (as here) and the more common situation where the government must choose between applicants on “relevant ideological grounds.”<sup>17</sup>

Ultimately, the Court’s opinion attempts to provide some clarity in a messy area of constitutional law, providing a clearer framework for distinguishing between constitutional and unconstitutional conditions. However, the dissent may prove correct that the Court soon will have to take additional cases in this area to better clarify on what side of the line various government funding actions fall.

## Endnotes

1. No. 12-10, 570 U.S. \_\_\_\_, slip op. (2013).
2. 22 U.S.C. § 7631(f).
3. *Alliance for Open Soc’y Int’l*, 570 U.S. \_\_\_\_, slip op. at 15.
4. *Id.* at 7.
5. *Id.* at 8.
6. *Id.*
7. *Id.* at 12.
8. *Id.*
9. 45 C.F.R. § 89.3.
10. *Alliance for Open Soc’y Int’l*, 570 U.S. \_\_\_\_, slip op. at 13.
11. *Id.*

12. *Id.* (emphasis in original).
13. *Id.* at 14.
14. *Id.*
15. *Id.* at 4 (Scalia, J., dissenting).
16. *Id.* at 6 (Scalia, J., dissenting).
17. *Id.*