Restrictions on the Speech of Recipients of Federal Funds Under the Leadership Act of 2003: *United States Agency for International Development v. Alliance for Open Society*

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Summary

Article 1, Section 8 of the United States Constitution provides Congress with the explicit power to collect taxes. Implicit in that power to collect revenue is also the power to spend that revenue. This clause is known as the Taxing and Spending Clause of the Constitution, and the Supreme Court has found that it grants Congress wide latitude to promote social policy that the federal government supports.

One way that Congress may exercise its spending power to encourage the implementation of policies that the federal government supports is through appropriations. One common example of Congress exercising spending power to impose its will is the National Minimum Drinking Age Act of 1984. That act conditioned the receipt of a percentage of federal highway funding on states agreeing to raise the minimum drinking age to 21. While states were not required by the act to raise the drinking age, they could not receive the funds if they did not.

Congress has wide discretion to provide subsidies to activities that it supports without incurring the constitutional obligation to also provide a subsidy to activities that it does not necessarily encourage. However, the power to spend money only on policies that Congress supports is not without limits. Congress may not place what have come to be known as "unconstitutional conditions" on the receipt of federal funds. Which conditions on the receipt of federal funds are and are not constitutional is a longstanding question with somewhat unclear answers, particularly when it comes to conditions placed upon the speech of the recipients of federal funds. To what extent may the federal government prevent recipients of federal funds from using that money to communicate a message that may not be supported by the federal government? To what extent may the federal government require fund recipients to espouse a particular point of view as a condition upon the receipt of funds? Courts have struggled with these issues time and again.

Most recently, the Supreme Court heard a case challenging the constitutionality of a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act). The relevant provision prohibited the government from making funds available to grant recipients that do not have a policy of opposing prostitution. The question facing the Court in this case was whether the Leadership Act's requirement that recipients affirmatively adopt a policy that applied to the entire organization, and not just to the federal funds received, violated the First Amendment. The Supreme Court decided that the requirement is unconstitutional and struck it down in an opinion released on June 20, 2013. The case makes it clear that, while the government has wide latitude to control the message conveyed with federal dollars within a federal program, the First Amendment prohibits the government from controlling speech outside the federal program.

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Introduction

Article 1, Section 8 of the United States Constitution provides Congress with the explicit power to collect taxes. Implicit in that power to collect revenue is also the power to spend that revenue.[1] This clause is known as the Taxing and Spending Clause of the Constitution, and the Supreme Court has found that it grants Congress wide latitude to promote social policy that the federal government supports.

One way that Congress may exercise its spending power to encourage the implementation of policies that the federal government supports is through appropriations. "Appropriations are comparable to tax exemptions and deductions which are also a matter of grace that Congress can, of course, disallow as it chooses."[2] One common example of Congress exercising spending power to impose its will is the National Minimum Drinking Age Act of 1984. That act conditioned the receipt of a percentage of federal highway funding on states agreeing to raise the minimum drinking age to 21. While states were not required by the act to raise the drinking age, they could not receive the funds if they did not, thus creating a powerful incentive for states to adopt Congress's chosen policy on the subject of the legal drinking age.[3]

Congress has wide discretion to provide subsidies to activities that it supports without incurring the constitutional obligation to also provide a subsidy to activities that it does not necessarily encourage.[4] However, the power to spend money only on policies that Congress supports is not without limits. Congress may not place what have come to be known as "unconstitutional conditions" on the receipt of federal benefits, even benefits Congress was not required to provide in the first place.[5] Which conditions on the receipt of federal funds are and are not constitutional is a longstanding question with somewhat unclear answers, particularly when it comes to conditions placed upon the speech of the recipients of federal funds.[6]

Most recently, the Supreme Court heard a case challenging the constitutionality of a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act).[7] The relevant provision prohibited the government from making funds available to grant recipients that do not have a policy of opposing prostitution.[8] The question facing the Court in this case was whether the Leadership Act's requirement that recipients affirmatively

[1] U.S. v. Butler, 297 U.S. 1 (1936). Congress may spend its revenue in one of two ways: offering deductions from taxes, and providing money directly to individuals. While this report deals with the direct expenditure of funds by the federal government, it does reference case law analyzing tax deductions. A popular example of a tax deduction is the mortgage interest deduction. To create an incentive to purchase a home, Congress allows homeowners to deduct the interest they pay on their mortgages. 26 U.S.C. §163(h). This deduction amounts to a cash subsidy for homeownership.

[2] Regan v. Taxation with Representation, 461 U.S. 540 (1983).

[3] 23 U.S.C. §158.

[4] South Dakota v. Dole, 483 U.S. 203, 209 (1987) (finding that "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly").

[5] Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.")

[6] *Id*.

[7] P.L. 108-25 (2003). The Leadership Act was reauthorized in 2008. P.L. 110-293 (2008).

[8] 22 U.S.C. §7631(e).

adopt a policy that applied to the entire organization, and not just to the federal funds received, violated the First Amendment. In an opinion announced on June 20, 2013, the Court held that this provision does violate the First Amendment because it requires private actors to adopt the approved opinion of the government. The decision outlines an important limitation on the ability of Congress to place conditions upon the receipt of federal funds.

Brief Summary of the Law of Unconstitutional Conditions

The Constitution grants Congress the power to subsidize some activities and speech without subsidizing all speech, or even all viewpoints on a particular topic. There is a certain amount of discrimination inherent in the choices Congress makes to provide funds or tax deductions to one organization's activities, but not to another. As noted in footnote 1, Congress allows tax deductions for interest paid on home mortgages, but does not allow a similar deduction for those who rent their homes. Congress makes funds available to support non-commercial broadcast stations through the Corporation for Public Broadcasting, but commercial broadcast stations are ineligible to receive those funds, even though they also engage in broadcasting. In other words, Congress discriminates frequently in the types of activities it chooses to support.

Congress also has a fair amount of discretion to condition the funding it provides on the recipients of those funds performing some other task ancillary to the receipt of the funds.[9] For example, as previously discussed, in exchange for federal highway funding, states were required to raise the minimum age for the legal consumption of alcohol to 21.[10] States were free to keep their minimum drinking age lower than the age of 21, but doing so meant they would have forfeited federal dollars. Conditions on the receipt of federal funds are, therefore, not uncommon. However, when the condition on the receipt of federal funds is an agreement to espouse, or to refrain from espousing, a particular point of view that is in line with the government's favored viewpoint, questions related to whether Congress is infringing upon the First Amendment freedoms of fund recipients may arise. While the principle that Congress may choose to subsidize whatever speech or behavior it may desire may seem simple enough; in practice, the case law has been described as complicated and contentious.[11] Nonetheless, some core principles may be distilled from the case history.

One of the first instances in which the Supreme Court addressed the question of discrimination in a tax subsidy on the basis of speech was in the case of *Speiser v. Randall*.[12] The State of California had decided to deny any and all tax deductions to persons who advocated the unlawful overthrow of the United States government. In order to alleviate the administrative burdens of figuring out exactly which Californians were advocating the violent overthrow of the government, the state decided instead to require all Californian taxpayers seeking to avail themselves of tax deductions to sign a loyalty oath that affirmed that the taxpayer did not

[9] Dole, 483 U.S. at 209.

[10] *Id*.

[11] Alliance for Open Society v. United States Agency for International Development, 678 F.3d 127 (2d. Cir. 2011) *denying rehearing en banc* (J. Pooler, concurring) (citing Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1415-17 (1989)).

[12] 375 U.S. 513 (1958).

advocate the overthrow of the government by force or violence.[13] A group of honorably discharged World War II veterans declined to sign the oath and sued claiming that the requirement violated their First Amendment rights.

In this particular case, the Supreme Court did not reach the question of whether the oath violated the First Amendment because the California Supreme Court had construed the provision to apply only to speech that fell outside the First Amendment's scope. Nonetheless, the Supreme Court did make clear that "a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech" and that to deny exemptions to persons who engage in certain types of speech is tantamount to penalizing them for that speech.[14] Therefore, discriminatory denial of tax deductions could implicate the First Amendment, depending on the nature of the discrimination. Of particular concern to the Court was whether the requirement placed on the receipt of the benefit was "aimed at the suppression of dangerous ideas."[15] Where the suppression of an idea is the apparent object of a condition on the receipt of a benefit, the fact that a person could simply decline the benefit was not enough to overcome the concerns of the Court regarding the coercive nature of the requirement.

Asserting the principle that Congress may not coerce citizens to engage in or to refrain from certain speech through the tax code, a group known as Taxation with Representation (TWR) challenged Congress's denial of certain tax deductions to organizations that engage in substantial lobbying activities as a violation of the group's core First Amendment rights.[16] Important to this case are two federal, tax-exempt, non-profit structures: the 501(c)(3)[17] organization and the 501(c)(4)[18] organization. Taxpayers who donated to 501(c)(3) organizations could deduct those donations from their taxes. 501(c)(3) organizations were prohibited from engaging in substantial lobbying. Taxpayers who donated to 501(c)(4) organizations could not deduct those donations from their federal income taxes. 501(c)(4) organizations were permitted to engage in lobbying activities. TWR had been operating with a dual structure wherein its lobbying activities were accomplished via contributions to a 501(c)(4) organization and its other activities were funded through a 501(c)(3). TWR argued that the federal government was unconstitutionally discriminating against a form of fully protected speech, in this case lobbying, based solely upon its content, and that this discrimination violated the First Amendment.

The Supreme Court disagreed and found that the refusal to allow a tax deduction for lobbying activities was within Congress's power to tax and spend. In short, Congress was not discriminating against lobbying. It was merely choosing not to pay for lobbying activities. The Court pointed toward "the broad discretion as to classification possessed by a legislature in the field of taxation," and found that Congress could choose not to subsidize lobbying activities without running afoul of the First Amendment, so long as adequate alternative avenues for engaging in lobbying activities remained available.[19] The Court pointed out that TWR was not prohibited from lobbying under the statute. It was merely prohibited from lobbying with funds it

[13] *Id*. at 517.

[14] *Id*. at 519.

[15] *Id*.

[16] Regan v. Taxation with Representation, 461 U.S. 540 (1983).

[17] 26 U.S.C. §501(c)(3).

[18] 26 U.S.C. §501(c)(4).

[19] *Id*. at 549.

received pursuant to its 501(c)(3) structure. TWR was free to continue its lobbying activities under the dual tax structure described above.

The Court noted that this would be a different case if Congress had discriminated against lobbying speech in such a way as to "aim at the suppression of dangerous ideas."[20] Finding no such circumstances in Congress's general refusal to subsidize lobbying activities, with a narrow exception for certain veterans organizations, the Court held that Congress did not have to provide a tax deduction in this circumstance. As the Court explained, "the issue in these cases is not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby."[21] The Court held that it was not. This case appears to ultimately stand for the principle that as long as Congress provides other avenues for engaging in protected speech, it may constitutionally choose not to provide funds to certain classes of speech in which an organization may wish to engage.

One year later, the Supreme Court considered another case in which it appeared that the federal government was refusing to subsidize a particular class of speech and refined Congress's authority to create spending conditions yet further. In *FCC v. League of Women Voters*,[22] the Court examined whether Congress could constitutionally prohibit non-commercial broadcast stations that received federal funds through the Corporation for Public Broadcasting from engaging in editorializing. The government, relying on *Regan v. Taxation with Representation*, argued that the prohibition on editorializing was justified because Congress was simply refusing to fund the editorial activities of non-commercial broadcasters. The Court disagreed, distinguishing this case from *TWR*, because in *TWR* the organization remained free to engage in lobbying. In this case, non-commercial broadcasters were prohibited completely from editorializing if they received federal funds.[23] A non-commercial broadcaster that received only 1% of its funding from the federal government was subject to the editorializing prohibition and could not, for example, segregate its federal funds so as to prevent the use of those funds for editorializing activities, while using its private funds to editorialize. The Court conceded, however, that if Congress were to amend the statute at issue to prohibit the use of federal funds to support editorializing activities, but allow the broadcasters to engage in such speech with private funding, the statute would then be constitutional.[24] This case appears to stand for the proposition that, while Congress has wide discretion to control the ways in which federal funds may not be spent, its reach is more circumscribed should Congress also attempt to impose its spending conditions upon the use of private funds. The key to this case was that Congress prohibited all editorializing with whatever money the broadcasters may have possessed. The Court considered that to be too much of an imposition on First Amendment activity.

Following *FCC v. League of Women Voters*, a few rules governing the constitutional exercise of the spending power appeared evident. First, Congress was entitled to subsidize the activities it supported, including speech activities, without being required to subsidize all activities. Congress must also allow those who might benefit from congressional largesse the freedom to express their opinions outside the bounds of the congressional subsidy. However, Congress could not prohibit speech that fund recipients might wish to engage in with non-federal dollars. Along with these

[20] *Id*. at 550.

[21] *Id*. at 551.

[22] 468 U.S. 364 (1984).

[23] *Id*. at 400.

[24] *Id*.

principles, when designing future funding conditions, Congress was also prohibited from attempting outright to suppress dangerous ideas, because such laws, regardless of their style as a prohibition or spending prerogative, would always raise constitutional concerns.

In *Rust v. Sullivan*,[25] grant recipients challenged the administration of Title X of the Public Health Service Act. Title X was intended to provide federal funding to subsidize health care for women prior to the conception of a child that included counseling, preconceptive care, education, general reproductive health care, and preventive family planning.[26] However, the regulations made clear that no federal money was to be spent to provide counseling for abortion, nor were any participants in the Title X program permitted to provide patients with a referral to an abortion provider, even when the patient may have requested such a referral. Title X programs could not advocate or lobby for abortion rights.[27] Title X programs were also required to be kept physically and financially separate from other programs in which a grantee might be engaging in. The grantees that received Title X funds were permitted to advocate for abortions outside of the auspices of their Title X programs, however.

Title X participants sued, claiming that these restrictions violated their First Amendment rights and interfered with the doctor-patient relationship. They argued that the restrictions were viewpoint discriminatory because they prohibited all discussion of abortion as a lawful option and compelled the clinic doctor or employee to espouse views that s/he might not hold (e.g., that abortion was not supported as an appropriate method of family planning). Unlike *TWR*, where they were permitted to lobby so long as they did not use tax-subsidized funds to do so, the plaintiffs here argued that speech about abortion was being discriminated against invidiously by Congress because Title X program participants were being forced to communicate the message of the government about abortion.

The Supreme Court disagreed. The Court reasoned that Congress is entitled to subsidize the public policy message it chooses to fund without funding other opinions on the same topic. Congress was within its constitutional rights to control the message that it preferred to encourage family planning methods other than abortion with funding conditions. The Court wrote, "this is not a case of the Government suppressing a dangerous idea, but of a prohibition on a project grantee or its employees engaging in activity that was outside of the project's scope."[28] Congress was not denying a benefit based upon the grantees' support for abortion, but was instead preventing the use of federal funds for purposes outside the intended use of the program those funds were intended to support. Important for the Court's analysis in this case was the fact that the restrictions on speech only applied to the administration and employees of the Title X program itself.[29] The grantee, on the other hand, was free to receive funds for a variety of programs from a variety of sources and these other activities were not subject to the Title X speech restriction. As a result, Title X did not suffer from the same fatal flaw as the funding restriction in *FCC v. League of Women Voters*. The government had not placed a speech restriction on the *recipient* of the funds, as it had in *League of Women Voters*. Instead, the government had only restricted the types of activities for which federal funds pursuant to the Title X program could be used. Outside of that program, the organizations and doctors were free to

[25] 500 U.S. 173 (1991).

[26] 42 C.F.R. §59.2 (1989).

[27] *Rust*, 500 U.S. at 180-181.

[28] *Id*. at 194.

[29] *Id*. at 196.

espouse any abortion-related opinion they might choose. As in *TWR*, Congress had simply chosen not to fund it.

Following *Rust* came two significant cases wherein the law of unconstitutional conditions was further refined. First, in *Legal Services Corporation v. Vasquez*,[30] the Supreme Court struck down a restriction on the use of federal funds by lawyers employed by the Legal Services Corporation (LSC) to challenge existing welfare laws. In *Rust*, the government had used restrictions on the use of federal funds to subsidize and control the government's own message. In this case, however, the government was attempting to use restrictions on the use of federal funds to hinder private speech. In the Court's analysis, lawyers for the LSC were not speaking for the federal government or administering the federal government's message. They were representing the views and interests of their clients. The restrictions placed on LSC attorneys would have interfered with the attorney-client relationship by preventing potentially valid challenges to the welfare laws. The Court found that such restrictions unquestionably raised First Amendment questions. Because the LSC funded private expression, and not the message of the government, the Court found that Congress could not limit the types of cases that LSC attorneys could bring on behalf of their clients because such restrictions violated the First Amendment.[31]

The second case outlining some limits to Congress's ability to condition its spending was *Rosenberger v. Rector and Visitors of Univ. of Va*.[32] In this case, plaintiffs challenged a University regulation that provided funds to student publications, but refused to provide funding to student publications with religious affiliations. The university claimed that it was choosing not to subsidize religious activity. The Court found the university's restriction to be unconstitutional. Where the government creates a quasi-public forum, as it had in this case by making funds generally available to all university student publications, the government could not then discriminate against students seeking to use that forum on the basis of content.

Taken together these cases seem to indicate that where Congress has appropriated funds to support the government's own message, Congress has wide latitude to condition the receipt of those funds on the espousal of the government's approved message, unless that condition invidiously discriminates against the espousal of dangerous ideas. In conditioning the use of federal funds on making sure the funds are only used to support Congress's approved message, ample opportunity for the recipients of those funds to exercise their protected constitutional rights outside of the federal program in which they are participating must be preserved. However, where Congress has provided funds for private speech or created a public or quasi-public forum, the ability to restrict speech funded by that money on the basis of content is narrower.

The Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (Leadership Act), 22 U.S.C. 7601 *et seq*. The Leadership Act was intended to address Congress's finding that HIV/AIDS, Malaria, and Tuberculosis posed grave health threats around

[30] 531 U.S. 533 (2001).

[31] *Id*. at 543.

[32] 515 U.S. 819 (1995).

the world. Congress found that the United States had the capacity to enhance the effectiveness of the fight against these various diseases on a number of fronts including providing financial resources to various aid groups, providing needed vaccines and medical treatments, promoting research, and promoting lifestyles that would diminish the chances of spreading these diseases.

Particularly in relation to HIV/AIDS, Congress found that it should be the policy of the United States to promote abstinence, marriage, and monogamy as methods of diminishing the spread of HIV/AIDS, as well as promotion of the use of condoms. In addition to advocating the promotion of monogamous lifestyles, Congress also found that "prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices."[33] The findings went on to describe the sex industry, and sex trafficking, as an additional cause of the spread of HIV/AIDS and that eliminating or reducing prostitution and sex trafficking would reduce the spread of the virus in keeping with the goals of the act.

To that end, when Congress provided funds in the Leadership Act to private entities to assist in the fight against HIV/AIDS, Congress conditioned the receipt of those funds in two important ways. First, Congress made clear that no funds received pursuant to the Leadership Act may be used to "promote or advocate the legalization or practice of prostitution or sex trafficking."[34] Second, and more controversially, Congress also forbid any funds from being disbursed to any group or organization that did not have a policy explicitly opposing prostitution and sex trafficking.[35] In other words, unless an organization adopted a policy explicitly opposing prostitution and sex trafficking, it could not receive funds under the Leadership Act, not even if the group remained silent as to prostitution and sex trafficking.

First Amendment Challenges to the Leadership Act

Background

Some organizations that wished to receive funds pursuant to the Leadership Act objected to the act's requirement that they affirmatively adopt a policy opposing prostitution. The organizations argued that they were being required to adopt and espouse the government's message on a topic that was tangential to the purpose of the act. In their view, the requirement to affirmatively speak, as opposed to simply remaining silent on the issue of prostitution and sex trafficking, was a violation of their First Amendment rights and an unconstitutional condition on the receipt of federal funds under the Leadership Act. As a result, this provision had been the subject of two circuit courts of appeal cases analyzing its constitutionality and administration, which appeared to reach opposite conclusions.

In the first case, the U.S. Court of Appeals for the District of Columbia upheld the provision against a First Amendment challenge.[36] The D.C. Circuit panel found that the federal government, through the distribution of Leadership Act funds, was essentially using private actors to deliver the government's message. Under *Rust v. Sullivan*, Congress has wide latitude to take measures

[33] 22 U.S.C. §7601.

[34] 22 U.S.C. §7631(e).

[35] 22 U.S.C. §7631(f).

[36] DKT International, Inc. v. United States Agency for International Development, 477 F.3d 758 (D.C. Cir. 2007).

ensuring that the agents of the government's message adhered to the government's chosen script. In this case, according to the D.C. Circuit, Congress had provided funds to combat the spread of HIV/AIDS. In Congress's estimation, one of the sources of the spread of this disease was the proliferation of prostitution and sex trafficking abroad. As a result, part of the message Congress wished to convey in its government-funded fight against the spread of the disease was an opposition to prostitution and sex trafficking. The court determined that part of Congress's prerogative in restricting the use of the federal funds was the selection of the agents for the delivery of the government's message.[37] Under this reasoning, it appears that the D.C. Circuit believed that the government was entitled to choose vehicles for its message that explicitly agreed with its message, and could do so without running afoul of the First Amendment.

In the second case, the Second Circuit Court of Appeals found that the provision likely did violate the First Amendment, and furthermore found that the guidelines issued by the United States Agency for International Development (USAID)[38] were not sufficient to overcome the provision's constitutional deficiencies. As a result, the appeals court upheld a preliminary injunction against the provision's enforcement. The majority of the panel agreed with the plaintiffs that the funding conditions at issue in the Leadership Act fell "well beyond what the Supreme Court and [Second Circuit] have upheld as permissible."[39] It distinguished the Leadership Act's requirement for the adoption of the policy from previous cases because it did not merely restrict expression, it pushed "considerably further and mandate[d] that recipients affirmatively *say* something."[40] In the eyes of the majority of the Second Circuit panel, this requirement for affirmative adoption of the government's viewpoint was compelled speech and therefore warranted heightened scrutiny. Applying a heightened scrutiny standard to the provision, a majority of the Second Circuit panel found the policy requirement to be unconstitutional.

In part to resolve this apparent circuit split, the Supreme Court agreed to hear the appeal from the Second Circuit's decision.

Supreme Court Decision: *Agency for International Development v. Alliance for Open Society*

After the Second Circuit declined to rehear the case *en banc*, the Supreme Court granted certiorari, and struck down the policy requirement as a violation of the First Amendment, but under different reasoning from the Second Circuit panel.[41] The Court did not hold, as the Second Circuit did, that the policy requirement must be subjected to heightened scrutiny because it required affirmative speech on the part of grant recipients. Indeed, the Court appeared to make no distinction between compelled and prohibited speech for First Amendment purposes. Instead, the majority applied the existing precedent found in *Regan*, *League of Women Voters*, and *Rust* to

[37] *Id*. at 761.

[38] HHS Guidance, 72 Fed. Reg. 41076 (July 26, 2007); HHS, Organizational Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 75 Fed. Reg. 18,760 (April 13, 2010).

[39] Alliance for Open Society International v. United States Agency for International Development, 651 F.3d 218, 233 (2d Cir. 2011).

[40] *Id*. (emphasis in original)

[41] USAID v. Alliance for Open Society, Int'l., 2013 U.S. LEXIS 605 (U.S., Jan. 11, 2013); No. 12-10, slip op. (2013) available at http://www2.bloomberglaw.com/public/desktop/document/Agency_for_Intl_Dev_v_Alliance_for_Open_Socy_Intl_Inc_No_1210_201.

hold that the policy requirement violated the First Amendment because "the condition by its very nature affects 'protected conduct outside the scope of the federally funded program" in contravention of the holding in *Rust*.[42]

The majority began its opinion, written by Chief Justice Roberts, by outlining the funding conditions for HIV/AIDS outreach in the Leadership Act. Particularly, the Court noted that there are two conditions on the receipt of federal funds under the act: the first prohibited spending any federal dollars to promote prostitution or sex trafficking, and the second required the adoption of the policy opposing prostitution. The Court pointed out that if the requirement that private persons adopt a policy opposing prostitution was directly enforced, rather than a condition on the receipt of federal funds, the requirement would be unconstitutional. However, Congress has more leeway under the Spending Clause to place restrictions, including speech restrictions, on the receipt of federal funds, and the Court reviewed the Leadership Act with that leeway in mind.

To frame its opinion, the majority first distilled the relevant cases regarding unconstitutional conditions on the receipt of federal funds including *Regan*, *League of Women Voters*, and *Rust*. The Court pointed out that each decision turned primarily on whether the restriction at issue was cabined to control only the use of federal dollars within a federal program. If the restriction prohibited the use of funds for the delivery of a message within the scope of a federally funded program, each case upheld the restriction as constitutional. In cases in which the government had overreached, the overreach occurred when Congress attempted to regulate speech accomplished with private funds outside the federal program at issue.

The Court called the distinction drawn in these cases the difference "between conditions that define the federal program and those that reach outside it" and noted that the line between the two is not always clear but it is crossed when the government seeks "to leverage funding to regulate speech outside the contours of the program itself."[43] Turning to the Leadership Act, the majority pointed out that the government conceded that preventing the expenditure of federal funds for the promotion of prostitution, which the act does, ensures that no federal dollars would be used for any prohibited purposes. That provision, which was not challenged in this case, effectively prohibits the use of federal money to promote prostitution or sex trafficking within the federal program created by the Leadership Act. If the restriction on the expenditure of federal funds prevents the use of funds for purposes in contravention to the act, according to the Court, the added requirement for the adoption of the anti-prostitution policy "must be doing something more—and it is."[44] Essentially, the Court found, that the policy requirement forces funding recipients to adopt the government's view as their own on an issue of public concern. "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," and that the government cannot do.[45]

The Court went on to hold that the guidelines issued by USAID allowing funding recipients to affiliate with organizations that did not have the required policies were insufficient to save the act from being struck down. The Court explained that it has allowed speech by affiliates of funding recipients to be sufficient where an organization bound by a funding condition was thereby

[42] Agency for International Development v. Alliance for Open Society, Int'l., No. 12-10 slip op., at 12 (2013).

[43] *Id*. at 11.

[44] *Id*.

[45] *Id*. at 12.

allowed to express its beliefs outside of the scope of the federal program. The Court held that "[a]ffiliates cannot serve that purpose when the condition is that a funding recipient espouses a specific belief as its own."[46] Either the funding recipient is left without any avenue for expressing its true beliefs, or the recipient is forced into evident hypocrisy by espousing the government's policy in one affiliate and its own beliefs in another. In the Court's view, this is a result the First Amendment does not support.

Under this decision, it is now clear that speech conditions on the receipt of federal funding are permissible insofar as they define the scope and permissible uses of funding within a federal program, and prevent undermining federal intent in appropriating and distributing the funds. The government runs afoul of this general rule when it attempts to restrict speech outside the federal program or to define the recipient of the funds rather than the program being funded. The Court found that the policy requirement at issue in the Leadership Act committed both of these errors by requiring fund recipients "to pledge allegiance to the Government's policy of eradicating prostitution."[47] For that reason, it violated the First Amendment.

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[46] *Id*. at 13.

[47] *Id*. at 14.

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