No. 12-10

IN THE

Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,

Petitioners,

v.

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

Respondents.

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

BRIEF FOR *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF RESPONDENTS

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200

STEVEN A. ENGEL
Counsel of Record
ERIC C. KIRSCH
DECHERT LLP
1900 K Street NW
Washington, DC 20006
(202) 261-3300
steven.engel@dechert.com

Counsel for Amicus Curiae

April 3, 2013

246812

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

CONSTITUTION, STATUTES AND RULES

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. Cato has an interest in this case because the law at issue significantly burdens political speech and activity, the constitutional protection of which lies at the very heart of the First Amendment.

SUMMARY OF ARGUMENT

This Court has consistently held that Congress may not condition the receipt of federal funds or other public benefits on the relinquishment of First Amendment rights. There is no dispute that when Congress chooses to fund a program, it may impose limitations to ensure that federal funds are used only for that program. There is likewise no dispute that when Congress funds private parties to deliver a message for the government, it may ensure that its message is delivered accurately. This Court, however, has repeatedly held that Congress may not impose conditions on funding that prevent a person

1. No counsel for any party has authored this brief in whole or in part. No person other than *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have consented to the filing of this brief.

from exercising First Amendment rights outside the program being funded.

In this case, Petitioners seek to rely on Congress's powers under the Spending Clause to expand the scope of the conditions that Congress may impose. They argue that *South Dakota v. Dole*, 483 U.S. 203 (1987), applied a deferential standard of review to conditions imposed under the Spending Clause. Yet *Dole* addressed the structural limits on federal intrusion into the prerogatives of the States. It did not involve the First Amendment at all. While Congress's ability to impose funding conditions on the States is not unlimited, it is patently broader than the government's authority to bargain with citizens for waivers of their First Amendment rights. Were Petitioners' position accepted, it would eviscerate the unconstitutional conditions doctrine, which the Court has long recognized to prevent conditioning federal benefits on the waiver of such fundamental rights.

Congress imposed an unconstitutional condition on receiving funding under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act") when it required organizations receiving Leadership Act funding to adopt "a policy explicitly opposing prostitution," what the parties to this case term the "Policy Requirement." *See* 22 U.S.C. § 7631(f). The Policy Requirement does not purport to limit how an organization uses federal funds, and it does not ask the recipient to speak for the federal government. By its terms, the Policy Requirement operates on an organization-wide basis, even if the organization conducts programs not funded under the Leadership Act, even if the organization does not engage in activities that deal with prostitutes or prostitution at all, and even though

funding recipients are independently barred from using any federal funds to promote prostitution. The Policy Requirement thus exceeds the scope of speech-burdening conditions that Congress may place on funding recipients. The decision of the Court of Appeals should be affirmed.

ARGUMENT

I. Congress Has Limited Authority To Burden First Amendment Rights as a Condition of Receiving Funding

A fundamental First Amendment principle is that the government may not achieve indirectly what it is forbidden to do directly. *Elrod v. Burns*, 427 U.S. 347, 359 (1976); *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Thus, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see Rumsfeld v. Forum For Academic & Inst. Rights, Inc.*, 547 U.S. 47, 59 (2006) ("'[T]he 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.'"(quoting *United States v. Am. Library Ass'n*, 539 U.S. 194, 210 (2003)) (additional citations omitted)). "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry*, 408 U.S. at 597.

The Court has recognized that these limitations do not prevent Congress from deciding which private programs it wishes to fund under the Spending Clause. Congress

may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). Congress is "entitled to define the limits of that program" and may impose conditions ensuring that program funds are not used for an unauthorized purpose. *Id.* at 194.

Congress's ability to control the use of federal funds may prevent those funds from being used for speech at cross purposes with Congress's intent. Thus, *Rust* held that Congress could prohibit recipients of family planning funds from counseling abortion because "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." 500 U.S. at 196. In reaching this conclusion, the Court noted that:

> The regulations govern the scope of the Title X *project*'s activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and 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.

Id. (emphasis in original). Thus, *Rust* merely validated restrictions ensuring that government funds were not spent on a type of family planning that Congress had chosen not to fund.

The same principle also can apply to categories of speech, such as lobbying. In *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), the Court upheld the denial of tax deductions under Section 501(c)(3) of the Internal Revenue Code to organizations engaged in "substantial lobbying." Noting that "[b]oth tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system[,]" the Court observed that "Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that non-profit organizations undertake to promote the public welfare." *Id.* at 544. Because Taxation With Representation could use a dual-entity corporate structure, with a separate 501(c)(4) tax-exempt entity free to conduct any lobbying activity, the restriction on lobbying by the 501(c)(3) entity merely ensured that tax-deductible contributions were not used to subsidize lobbying activity that Congress did not wish to subsidize. *Id.* at 544-45.

Similarly, in *United States v. American Library Association*, 539 U.S. 194 (2003), the Court held that Congress could require libraries to block Internet access to obscene or pornographic materials as a condition of receiving federal funds for Internet access. A plurality of the Court opined that this restriction did not impose an unconstitutional condition because Congress could choose to subsidize filtered Internet access, so as to ensure that federal funds provided access to materials of "requisite and appropriate quality for educational and information purposes." *Id.* at 212 (plurality opinion).

In contrast, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court struck down a condition that

went beyond merely restricting the use of congressionally appropriated funds, and instead "barred [a grantee] from using even wholly private funds to finance its editorial activity." *Id.* at 400. Because there was no way for the stations to segregate federally funded programs from purely private activity, the funding condition improperly extended beyond merely ensuring the proper use of federal funds. *Id.*

In addition, the Court has recognized that Congress may ensure that "'[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.'" *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (*quoting Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)). Where a program merely funds speech, however, and not a government message, this principle does not apply. Thus, in *Velazquez*, the Court struck down restrictions on funding for the Legal Services Corporation that sought to prohibit its lawyers from making arguments challenging the validity of laws. The Court held that Congress's decision to fund speech in the form of legal representation did not give it the right to control the lawyers' message.

Consistent with the incorporation of the First Amendment, the Court has consistently applied these principles to state and local government conditions as well. For example, in *Speiser*, the Court invalidated a California law that conditioned the receipt of tax benefits on executing a loyalty oath. The Court distinguished earlier cases upholding loyalty oaths for public employees because those cases

> concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public.

Speiser, 357 U.S. at 527. In contrast, the California statute served no such purpose, and merely sought to suppress a type of speech that the legislature had deemed undesirable.

Perry and *Elrod* also involved efforts to discourage the exercise of First Amendment rights, rather than to ensure that government funds were used for their intended purpose. In *Perry*, the Court held that a public college violated a non-tenured professor's free speech rights if, as alleged, it refused to renew his contract after he criticized the college's administration. *Perry*, 408 U.S. at 597–98. The Court held that the professor had stated a First Amendment claim because reprisals for exercises of speech rights are not a legitimate basis for refusing to renew such an employment contract. *Id.* Similarly, in *Elrod*, five justices agreed that non-policymaking employees who are satisfactorily performing their jobs cannot be discharged solely because of their political beliefs. *Elrod*, 427 U.S. at 373 (plurality op.); *id.* at 375 (Stewart, J. concurring).

These cases make clear that Congress may decide what programs it wants to fund, what programs it does not want to fund, and how those programs should be

carried out. It cannot, however, impose conditions that go beyond the scope of the federal funds. The fact that a person may voluntarily choose not to accept federal funding is not enough to save the restriction from First Amendment scrutiny.

Amicus American Center for Law and Justice attempts to distinguish this line of cases by distinguishing between "generally available public benefits" and the "imposition of eligibility criteria in a discretionary program affecting a small, voluntary pool of applicants." Br. 7–8. Yet the text of the First Amendment admits of no such distinction, and no such principle can be derived from the Court's holdings. All government largesse—from tax breaks to subsidies to the creation of government jobs—ultimately can be described as "discretionary" and "voluntary." No matter whether the speech-burdening condition applies to a generally available public benefit, or to a smaller group, the proper First Amendment question remains the relationship between the condition and the program, not arbitrary factors such as the number of applicants affected or how "discretionary" a court deems a program to be.

In short, this Court's precedents make clear that Congress may not condition participation in a federal program on speech limitations that are outside the scope of the program being funded.

The Court of Appeals observed a "tension between the breadth of Congress's spending power on the one hand and the principle that a condition on the receipt of federal funds may not infringe upon the recipient's First Amendment rights on the other." *Alliance for Open Society Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 231 (2d Cir. 2011). *Amicus* respectfully submits

that the fundamental distinction between a permissible exercise of the Congress's spending power and an impermissible infringement of First Amendment rights is whether the condition ensures that funding is used for an intended and appropriate purpose. When Congress or other government entities have sought to impose speech-burdening conditions that go beyond ensuring that funds are not used for an unauthorized purpose, or beyond ensuring that funds are used properly (such as by delivering an ungarbled government message), the Court has consistently struck those conditions down.

II. Congress Does Not Have Authority Under the Spending Clause To Seek the Relinquishment of Constitutional Rights

Petitioners assert that the Spending Clause, as interpreted in *Dole*, gives the government "wide latitude to attach conditions to the receipt of federal assistance in order to further broad policy objectives." Pet'rs' Br. 17. Petitioners overread *Dole*, which addressed Congress's power to condition federal funding on a state's agreement to enact preferred federal policies. While even that power has its limits, *see National Federation of Independent Business v. Sibelius*, 132 S. Ct. 2566, 2603–07 (2012), *Dole* is a case about the appropriate boundaries of federalism and the implicit boundaries on federal power. *Dole* says nothing about the express restrictions on congressional power found in the First Amendment, much less Congress's power to condition federal benefits upon private citizens' agreement to surrender those rights.

In *Dole*, the Court held that Congress could condition five percent of federal highway funds on a state's adoption of a uniform drinking age. 483 U.S. at 211. The question

presented was whether Congress could use its power under the Spending Clause to regulate an area that the Twenty-First Amendment expressly conferred upon the States. The question was not whether Congress could condition the receipt of federal funding on the receipt of waivers of citizens' First Amendment rights. *See id.* at 205. In other words, *Dole* considered how far Congress could go in using the Spending Clause to expand federal regulatory authority. *Dole* did not consider whether Congress might use the federal treasury to impair express constitutional limitations on governmental power, limitations that apply to state and federal governments alike.

Although the Court stated that "constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly," *id.* at 209, the Court relied on *United States v. Butler*, 297 U.S. 1 (1936), as authority. Like *Dole*, *Butler* was an enumerated powers case, and the Court *struck down* the Agricultural Adjustment Act as exceeding Congress's power under the Spending Clause because the statute did not further a purpose entrusted to the national government. Nothing in *Butler* suggested that Congress has greater authority under the Spending Clause to induce waivers of constitutional rights than under its other enumerated powers, or greater authority than the States have in connection with their spending powers.

Simply put, Petitioners place more weight on *Dole* than it can reasonably bear. Indeed, their interpretation of *Dole* would gut the unconstitutional conditions doctrine. Were it correct, Congress would be free to barter with citizens for waivers of their constitutional rights, so

long as Congress defines the exchange to be in service of a program objective. Yet the Court has rejected such attempts to avoid the unconstitutional conditions doctrine, recognizing 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." *Velazquez*, 531 U.S. at 547–48.

Petitioners' application of *Dole* would remove any effective limit on Congress's power to impose rights-burdening conditions on benefits because Congress could simply define the otherwise unconstitutional objective as a "broad policy objective." For example, given that Congress has found condom usage to be an effective tool for preventing the spread of HIV/AIDS, 22 U.S.C. § 7601(35), then there would be no principled reason why Congress could not impose a policy requirement mandating that funding recipients adopt a policy condemning any organization, or even any church, that opposes birth control. Similarly, in the Affordable Care Act, Congress identified a national "policy objective" in expanding healthcare coverage. *See, e.g.*, 42 U.S.C. § 18091(2)(C). Under Petitioners' logic, Congress could promote such an objective by conditioning doctors' receipt of federal Medicaid funds on their voicing support for the Affordable Care Act.

The Court has never before given Congress carte blanche to adopt such patent violations of the First Amendment. There is no reason to do so now. Instead, the Court should adhere to the principle that Congress's power to condition funding is limited to ensuring that its funds are used to properly implement the program that Congress wishes to fund, not to compel private

organizations to adopt express "policies" that do not involve the use of those federal funds.

III. The Policy Requirement Imposes an Unconstitutional Condition on the Receipt of Leadership Act Funding

The Policy Requirement is an unconstitutional condition because it burdens First Amendment rights to a far greater degree than the Spending Clause can possibly justify. This is true for several reasons.

First, the Policy Requirement is not necessary to ensure that government funds are used only for the program Congress is funding because participating organizations are independently barred from using Leadership Act funds "to promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. § 7631(e). Moreover, the government employs numerous constitutionally appropriate methods of ensuring that Leadership Act funds are properly spent, including audit requirements, 22 C.F.R. 226.26, and performance reports, 22 C.F.R. 226.51. *See* J.A. 92 (conditioning award on "be[ing] administered in accordance with the terms and conditions as set forth in 22 CFR 226" and in certain documents attached to the award letter). Unlike *Rust*, where Congress had prohibited the use of federal funds to suggest abortion as a family planning technique, and unlike *Regan*, where Congress had prohibited the use of tax-deductible funds to pay for lobbying, the Leadership Act both contains a prohibition on using funds to advocate for prostitution *and* a requirement that recipients affirmatively adopt a policy statement condemning prostitution. Because funding recipients are separately and effectively constrained in their use of federal funds,

the Policy Requirement does not serve the purpose cited in *Rust* and *Regan* of ensuring that funds are used only for their intended purpose.

Second, the Policy Requirement applies organization-wide, rather than within the scope of the HIV/AIDS program that Congress is funding. This distinction is critical because the Court focused in *Rust* on the fact that the restrictions on abortion counseling were limited to "the Title X *project*'s activities" and did not purport to affect "the Title X *grantee*" outside the scope of the project. *Rust*, 500 U.S. at 196–97 (emphasis in original). Although the Court has held that an entity-wide restriction on speech may be acceptable where an organization can separate into two related entities—one that advocates its preferred message, and one that remains silent to avoid spending federal funds—these cases are based on the premise that this structure allows the organization to achieve its First Amendment goals. *See Regan*, 461 U.S. at 552. Here, however, Respondents do not seek to advocate in favor of prostitution, but rather not to speak on the issue at all. *See*, *e.g.*, J.A. at 164 ("Pathfinder has been forced to stake out a policy position on an issue on which it wished to remain neutral at this time."). It is a hollow remedy to allow an organization to create a silent affiliate when the organization is required to speak and express a message that it does not wish to convey in the first place.

Third, the Policy Requirement is overbroad because it applies even where an organization is not seeking to address HIV/AIDS in prostitutes. The Leadership Act authorizes the use of funds to combat HIV/AIDS through a laundry list of methods, ranging from prevention to treatment. *See* 22 U.S.C. § 7631(b)(1) (appropriating funds

for purposes set forth in 22 U.S.C. § 2151b–2). None of those methods requires organizations to target HIV/AIDS in prostitutes; indeed, prostitution is not even mentioned in Section 2151b–2.[2] Where the Court has upheld conditions burdening First Amendment rights, those restrictions have been directly relevant to the ensuring that the government's program is not muddled together with a funding recipient's non-program objectives. Thus, the government can ensure that its message is clear, *Velazquez*, 531 U.S. at 542, or that non-program advocacy does not occur. *Rust*, 500 U.S. at 196–97. The Policy Requirement sweeps beyond these permissible purposes by requiring anti-prostitution speech even if a given Leadership Act program is designed to target some aspect of combating HIV/AIDS other than combating prostitution.

Fourth, the Policy Requirement affirmatively compels non-governmental speech by organizations that receive aid. This is private speech compelled under the program. Respondents are obliged to express the government's preferred policy on prostitution, even though no federal funds are used to make the speech and the organization might otherwise have no occasion to address the subject. This Court's precedents permitting the government to compel private speech are narrow indeed, and upholding

2. AOSI, for example, tries to reduce HIV/AIDS by reducing injection drug use. *Alliance for Open Society Int'l, Inc.*, 651 F.3d at 224. While some injection drug users may be prostitutes, the vector being targeted is injection drug use—which Congress specifically authorized as a type of program to be funded through the Leadership Act. 22 U.S.C. § 2151b–2(d)(1)(I) ("Assistance … shall, to the maximum extent practicable, be used to carry out the following activities: … assistance to help avoid substance abuse and intravenous drug use that can lead to HIV infection[.]").

the requirements under these circumstances would simply be unprecedented.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

Ilya Shapiro
Cato Institute
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200

Steven A. Engel
Counsel of Record
Eric C. Kirsch
Dechert LLP
1900 K Street NW
Washington, DC 20006
(202) 261-3300
steven.engel@dechert.com

Counsel for Amicus Curiae

April 3, 2013