No. 19-177

IN THE

Supreme Court of the United States

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 RESPONDENTS

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QUESTION PRESENTED

In *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013), this Court held that the Policy Requirement—which requires recipients of federal funds to espouse the government's viewpoint on prostitution—"violates the First Amendment" by "compel[ling] 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" or "'cabin[ed]'" to affiliates that are "clearly identified" with respondents. *Id.* at 219-221.

The question presented is whether the district court abused its discretion in entering a permanent injunction to remedy that violation of the U.S.-based respondents' First Amendment rights by prohibiting the government from enforcing the Policy Requirement against both respondents and affiliates of respondents (wherever incorporated) that are clearly identified with respondents through the use of a shared name, brand, mission, and voice.

CORPORATE DISCLOSURE STATEMENT

Respondents have no parent corporations, and no publicly held company owns 10% or more of any respondent's stock.

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INTRODUCTION

"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." *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). In 2013, this Court vindicated that principle by holding that the government-mandated anti-prostitution pledge known as the Policy Requirement—a funding condition that forces recipients to espouse the government's view and deprives recipients of the freedom to determine

their own beliefs and decide whether and how to express them—"violates the First Amendment and cannot be sustained." *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 221 (2013) (*AOSI*).

For more than a year, the government failed to comply with that decision. It failed to remove the Policy Requirement from funding documents applicable to respondents and other U.S.-based organizations. And it insisted on applying the Policy Requirement to respondents' foreign affiliates, even though it is undisputed that respondents and their affiliates form unified organizations that share the same name, logo, brand, and mission and speak with a single voice that is imputed to respondents. The district court accordingly granted a permanent injunction barring enforcement of the Policy Requirement against respondents or their clearly identified affiliates—wherever incorporated—to provide complete relief for the First Amendment harm to the U.S.-based respondents.

That injunction was well within the court's broad remedial discretion. Contrary to the government's position, the formality of legal separation between respondents and their clearly identified affiliates is no levee against the compulsion of speech. As this Court held in *AOSI*, a compelled-speech condition like the Policy Requirement "by its very nature affects 'protected conduct outside the scope of the federally funded program.'" 570 U.S. at 218 (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 197 (1991)). It compels the affirmation of a belief that "cannot be confined" within the federally funded program or "'cabin[ed]'" to an affiliate, *id.* at 219, 221—at least not where affiliates are so closely identified with one another that they effectively speak for one another. Rather, when a funding condition requires recipients to "adopt" the government's view "as

their own," that view is imprinted on the recipient itself, not just the federally funded program, and will be attributed to any entity "clearly identified" with the recipient. *Id.* at 218-219; *see also Rust*, 500 U.S. at 197. The recipient cannot both avow the government's viewpoint "and then turn around and assert a contrary belief, or claim neutrality"—even when acting "on its own time and dime." *AOSI*, 570 U.S. at 218. And any "clearly identified" affiliate cannot speak contrary views freely without paying "the price of evident hypocrisy." 570 U.S. at 219.

The uncontested facts confirm what this Court understood: Imposing the pledge on respondents' clearly identified affiliates puts words in respondents' own mouths. It is undisputed, and the lower courts found based on an "unusually full record," Pet. App. 13a, that respondents and their affiliates "are not just affiliates—they are homogenous," Pet. App. 11a. They "present a unified front," *id.*, and compelling respondents' "often indistinguishable" affiliates to take the pledge therefore restricts respondents' own speech, Pet. App. 9a. The formality of legal separation does not prevent the attribution of the clearly identified affiliates' speech to respondents themselves—any more so than it does when the speech of a legally separate but closely identified affiliate is deemed an adequate channel for a funding recipient's free expression of its own views. *See Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 545 & n.6 (1983).

Even the government's regulations acknowledge that in the absence of visible indicia of "objective … independence" between a funding recipient and its affiliates, speech by one affiliate may be attributed to the other notwithstanding legal separation. 45 C.F.R. § 89.3. For that very reason, the government requires

that no entity affiliated with a funding recipient may engage in conduct inconsistent with the Policy Requirement unless the two entities maintain sufficient separation—not only in their corporate formalities, but in substance and appearance. As a result of that requirement and the clear identification between respondents and their affiliates, imposition of the Policy Requirement on respondents' affiliates would mean that respondents themselves must refrain from contradicting their affiliates' pledge. And in the common situation where the U.S.-based respondent subgrants funding to a foreign affiliate, it is the U.S.-based respondent that must compel its affiliate to take the pledge and police its affiliate's compliance.

Those requirements belie the government's reliance on legal separation, and confirm that enjoining application of the Policy Requirement to respondents' clearly identified affiliates—wherever incorporated—is necessary to remedy the violation of respondents' own First Amendment rights. This case has nothing to do with the rights of foreign organizations or any effort they might make to don the mantle of the First Amendment by claiming to partner with a U.S. organization. It is about the impact of the Policy Requirement on the U.S.-based respondents themselves and the remedy necessary to protect their own First Amendment rights. The district court did not abuse its discretion in concluding that the permanent injunction is necessary and appropriate to provide complete relief and finally end this litigation.

STATEMENT

A. Respondents And Their Affiliates

1. The global fight against HIV/AIDS

Respondents are U.S.-based nongovernmental organizations (NGOs) that lead the global fight against HIV/AIDS. Respondent InterAction is the largest alliance of U.S.-based international-development and humanitarian NGOs. Respondent Global Health Council (GHC) is the leading membership organization supporting and connecting advocates, implementers, and stakeholders around global health priorities. Members of InterAction or GHC include Cooperative for Assistance and Relief Everywhere, Inc. (CARE USA), one of the world's largest private international humanitarian organizations, JA197-198, 383-384; respondent Pathfinder, a global nonprofit focused on reproductive health, JA212-213; World Vision, Inc., a global Christian relief, development, and advocacy organization, *see* World Vision, Our Mission Statement, https://www.worldvision.org/about-us/mission-statement; and Save the Children Federation, Inc., which works to give children everywhere a healthy start, the opportunity to learn, and protection from harm, JA456-457.

Respondents engage in critical HIV/AIDS work around the world, conducting lifesaving programs in more than 120 countries with funding from the U.S. and foreign governments, agencies of the United Nations and World Bank, and private foundations. JA200-205, 213, 216-218, 221-222, 366, 384-385, 457-459; CAJA26, 61, 71, 293-295. For example, Pathfinder has engaged in HIV/AIDS prevention, care, and counseling across Africa and Asia, including efforts to prevent mother-to-child HIV transmission in Kenya and promote HIV-prevention methods among sex workers in India.

JA217, 221. CARE works with vulnerable populations to prevent the spread of HIV/AIDS, including in Bangladesh, where it has been recognized as a best-practices leader by UNAIDS and the World Health Organization for identifying effective prevention strategies involving sex workers as peer educators. JA203.

2. Respondents' affiliate networks

Respondents comprise and carry out their work through unified networks of entities operating around the world that "share the same name, logo, brand, and mission." Pet. App. 4a. The structures of these networks vary. Some respondents operate through unincorporated in-country branch offices. Others work through legally distinct entities incorporated overseas. And others employ a combination, depending on in-country conditions. For example, CARE uses both branch offices and separately incorporated affiliates. JA384-385. Save the Children operates in more than 100 countries through a combination of separate affiliates like Save the Children U.S. and branch offices of Save the Children International, a U.K. NGO. JA457-459. Pathfinder works through branch offices and foreign affiliates. JA367. World Vision International, based in California and affiliated with World Vision, Inc. (also a California nonprofit), oversees a partnership of separately incorporated affiliates around the globe. *See* World Vision, Our Structure, http://www.wvi.org/about-us/our-structure.

The structures of respondents' global networks are driven in substantial part by the U.S. and foreign governments' requirements and preferences. Some foreign governments require NGOs to be locally incorporated to perform public-health work in-country. JA368. The U.S. government—particularly petitioner U.S. Agency

for International Development (USAID)—also encourages NGOs to conduct HIV/AIDS work through such affiliates. JA390. For years, USAID has been shifting funding opportunities toward organizations with that structure. JA344, 373-375. For many grant opportunities, federal funding is available only to NGOs incorporated locally overseas. JA367-368, 374-375.

3. Respondents' and their affiliates' unified global voices

Regardless of corporate structure, each respondent and its co-branded branches and affiliates operate in practice as one cohesive body that "appear[s] to the public as [a] unified entit[y]." Pet. App. 5a. Each uses a shared name, logo, branding, mission, and voice that conveys one unified appearance and identity. For instance, CARE's affiliates, including CARE USA, are referred to simply as "CARE" or "CARE" plus the name of the country in which they operate—*e.g.*, "CARE India." JA388-389. World Vision, Save the Children, Pathfinder, and others follow the same convention. JA368-369, 457, 460. Respondents also share identical branding with their affiliates worldwide. Each organization—including the affiliates—presents its name (*e.g.*, "CARE" or "Save the Children") in the same font, style, and colors, and uses the same corporate logo, such as CARE's circle with overlapping hands around the circumference, or Save the Children's bright red circle around a child with outstretched arms. *E.g.*, JA377-382, 446-455.

Moreover, each respondent and its affiliates share a common mission and speak with a single voice about their public-health efforts and guiding principles. For example, all CARE affiliates are bound by a common code requiring commitment to CARE's "governance,

vision, mission, programming principles, humanitarian mandate, [and] common Codes of Ethics and Conduct." JA385. In Pathfinder's case, "every entity within the Pathfinder family, regardless of where it is incorporated, speaks as part of a common entity with a common voice." JA369. And each World Vision affiliate must "commit" to "uphold" core religious principles guiding World Vision's work to remain in the partnership. *See* World Vision, Our Vision and Values, https://www.wvi.org/about-us/our-vision-and-values.

That consistent messaging is critical to respondents and their public-health work. In practice, the common identity respondents share with their affiliates creates "a two-way street" in which actions or statements by an affiliate are imputed to the U.S. organization and vice versa. JA369. For example, "[i]n Pathfinder's experience, any Pathfinder entity, whether separately incorporated in a foreign country or not, is viewed by the public as part of a single entity." JA370. CARE affiliates "are viewed by the public as one CARE entity speaking in a single global voice." JA388-389. And Save the Children affiliates "are viewed by the public as speaking in a single global voice aligned to their common mission." JA460. Speaking with a unified voice across affiliates is essential to accomplishing each federation's public-health mission, raising funds, building a reputation, recruiting personnel, and keeping employees safe. *See, e.g.*, JA391 ("A common voice and approach is critical to CARE's success[.]"); JA461 ("Save the Children's strength and effectiveness as a global movement is in its collective, global identity and approach."); *see also* JA370-371, 386-387, 391-392.

Respondents and their affiliates therefore take steps to ensure consistency in their messages. For example, Pathfinder requires affiliates to vet proposed

communications with its U.S. headquarters before taking a position on public-health issues. JA371. And CARE's governing code carefully regulates all public messaging. JA385-386, 404-429. In short, respondents and their affiliates are unified organizations that look and speak as one.

B. The Leadership Act

1. PEPFAR funding

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act). 22 U.S.C. §§ 7601, 7603. Finding that partnerships with NGOs have been "critical to the success" of efforts to combat HIV/AIDS, *id.* §§ 7603(4), 7621(a), Congress appropriated billions of dollars to support the work of NGOs engaged in HIV/AIDS treatment and prevention. Those funds are distributed under the aegis of the President's Emergency Plan for AIDS Relief (PEPFAR) under rigorous eligibility requirements.

To win funding, an NGO must "demonstrate[] a capacity to undertake effective development activities." 22 U.S.C. § 2151u(a); JA350. To do so, applicants must identify every contract, grant, or cooperative agreement they have won during the past three years involving similar or related programs. JA351-352; USAID, ADS 303.3.9 (rev. Aug. 1, 2019), https://www.usaid.gov/sites/default/files/documents/1868/303.pdf. Applicants must demonstrate relevant experience and expertise and an ability to deploy key personnel promptly and must explain in detail their proposed technical approach and implementation plan, including staffing, organization, and budget. JA343-358.

Respondents commonly apply for and receive Leadership Act funds themselves and make subawards to affiliates that will carry out a particular program. *E.g.*, JA349. In such cases, the affiliate is subject to all the same requirements as the grant recipient, 2 C.F.R. § 200.330(a)(4), and the U.S. recipient must enforce and monitor the affiliate's compliance with all terms and conditions of the grants or risk losing the federal funding. 2 C.F.R. § 200.331(d); *see id.* § 200.331(e), (h).

2. The Policy Requirement

The Leadership Act places certain conditions on recipients' use of funds. Section 7631(e) bars recipients from using Leadership Act funds to "promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. § 7631(e). Respondents have scrupulously complied with that prohibition and have never challenged it in this litigation. But the Act also purports to impose an affirmative speech requirement, the "Policy Requirement," that is not tied to the use of federal funds. Instead, it affects each recipient on an organization-wide basis. Under the Policy Requirement, any "group or organization" receiving Leadership Act funds (except for certain international agencies) must "have a policy explicitly opposing prostitution and sex trafficking." *Id.* § 7631(f).

As implemented, the Policy Requirement not only requires an affirmative declaration of organization-wide policy, but also prohibits grant recipients from "engag[ing] in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking"—even when using private funds and acting outside the scope of the federal program. 45 C.F.R. § 89.3. Neither the Act nor the regulations specify

what speech or activities would be deemed "inconsistent with" opposition to prostitution.

Moreover, the Policy Requirement must be included in all sub-agreements entered into by a funding recipient. 70 Fed. Reg. 29,759-29,760 (May 4, 2005). Accordingly, when respondents receive and subgrant funding to their affiliates, respondents must make the Policy Requirement an "express term and condition" of the sub-agreements, and both the recipient and the affiliate must acknowledge that compliance is a prerequisite to the receipt of funds; that any violation shall be grounds for termination of the award; and that the government has the right to inspect the recipient's books and records to assess compliance. *Id.* at 29,760; *see* JA283-284; Pet. App. 132a.

Absent the Policy Requirement, respondents would not adopt policies expressing opposition to prostitution or permit their affiliates to do so. JA200-201, 204, 216-218, 369-372, 386-387, 391-392; CAJA32, 63, 300-301. To conduct effective public-health programs in many parts of the world, respondents prefer for their organizations to avoid taking stances on contentious political and cultural issues. JA218, 372-373; CAJA65. And respondents often work directly with sex workers through programs with proven success in reducing rates of HIV infection. JA202, 220-222; CAJA295. By compelling respondents to express a view they believe "stigmatizes one of the very groups whose trust they must earn to conduct effective HIV/AIDS prevention," the Policy Requirement impedes respondents' lifesaving work. CAJA37; *see* JA201-204, 220-226; CAJA65-66. And it chills respondents' privately funded speech about HIV/AIDS prevention in publications, at conferences, and in other forums. JA204-205, 220, 223-227.

C. Prior Litigation

1. Initial proceedings and the affiliate guidelines

For more than a year after the Leadership Act's enactment in 2003, the government did not enforce the Policy Requirement against U.S.-based NGOs because the Office of Legal Counsel (OLC) had determined that doing so would be unconstitutional. JA96. OLC further determined that the Policy Requirement could be applied to foreign organizations "only when they are engaged in activities overseas." *Id.* OLC subsequently changed its view, however, and in mid-2005, petitioners began enforcing the Policy Requirement against respondents.

Respondents filed suit, "advanc[ing] both facial and as-applied challenges." JA133-151; Doc. 40, at 3 n.2. The district court granted a preliminary injunction, holding that the Policy Requirement "compels [respondents] to speak in contravention of the First Amendment." 430 F. Supp. 2d 222, 278 (S.D.N.Y. 2006).

At oral argument on the government's appeal, the government informed the court of its intent to issue new regulations that it asserted would resolve respondents' First Amendment challenge. 254 F. App'x 843, 845-846 (2d Cir. 2007). As promulgated, those regulations purported to "clarif[y] that an independent organization affiliated with a recipient of Leadership Act funds need not have a policy explicitly opposing prostitution" and could engage in "inconsistent" activities, "so long as the affiliate satisfies the criteria for objective integrity and independence" from the recipient. CAJA21, 23. Among those criteria were whether the affiliate has separate personnel and facilities and whether "signs and other forms of identification … dis-

tinguish the Recipient from the affiliate[].” CAJA22-24. The government asserted this was necessary to avoid “attribut[ion]” of the affiliate’s views “to the recipient organization and thus to the Government.” CAJA21, 23.

The court of appeals remanded for consideration of the new regulations. 254 F. App’x at 846. The district court held that the affiliate guidelines did not cure the First Amendment problem of “requiring [respondents] to adopt the Government’s view.” 570 F. Supp. 2d 533, 545 (S.D.N.Y. 2008). The government appealed again. While the second appeal was pending, the government again revised the affiliate guidelines, purporting to allow greater flexibility for partnerships between entities that are subject to the Policy Requirement and affiliates that are not. JA248-265, 266-299.

The revised guidelines—which remain in effect today—continue to require recipients of Leadership Act funds not only to comply with the Policy Requirement, but also to refrain from activities “inconsistent” with an opposition to prostitution and to maintain “objective … independence” from any affiliate engaged in inconsistent activities. 45 C.F.R. §§ 89.1(b), 89.3. “[T]he purpose” of that separation requirement, the government reiterated, “is to determine when an affiliated organization is so closely tied to the funding recipient that a reasonable observer would attribute its activities to the funding recipient.” JA258.

Under the regulations, neither the funding recipient nor any entity affiliated with it may engage in speech or conduct inconsistent with the Policy Requirement—even using private funds outside the scope of any federal program—unless the affiliate satisfies the requirement of “objective … independence” so that

the speech of the affiliate will not be attributed to the recipient (or, in turn, to the government). Whether "sufficient separation exists" is determined based on the totality of the facts, including any legal separation between the affiliates; separation of personnel, records, and facilities; and "[t]he extent to which signs and other forms of identification … distinguish the recipient from the affiliated organization." 45 C.F.R. § 89.3(b); *see* JA256-258.

In the renewed appeal, the government contended that these new guidelines "alleviate[d] any burden on recipients who do not wish to communicate the government's message" by allowing "[a]ny organization unwilling to state its opposition to prostitution" to "remain neutral … while 'setting up a subsidiary organization'" that would comply with the Policy Requirement. U.S. Br. 57, No. 08-4917 (2d Cir. May 11, 2010). "The parent organization," the government maintained, would "not [be] compelled to speak any message at all, and [could] continue to engage in activities inconsistent with the required policy with funding from other sources." *Id.* Only the affiliate would be bound by the Policy Requirement. *Id.*

The court of appeals rejected the government's argument, explaining that "whether the recipient is a parent or an affiliate, it is required to affirmatively speak the government's viewpoint on prostitution" in violation of the First Amendment. 651 F.3d 218, 239 (2d Cir. 2011).

2. This Court's 2013 decision

The government petitioned for certiorari, asserting that the decision below had amounted to "facial invalidation" of the Policy Requirement. 12-10 Gov't Cert.

Reply 5 & n.1. On the merits, the government again argued that the revised affiliate guidelines resolved any First Amendment violation, advancing two independent points. First, relying on *Rust* v. *Sullivan*, 500 U.S. 173 (1991), *FCC* v. *League of Women Voters of California*, 468 U.S. 364 (1984), and *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983), the government contended that the guidelines would "obviate any constitutional difficulty" by allowing respondents to accept Leadership Act funds and espouse the required anti-prostitution viewpoint themselves while engaging in inconsistent activities through affiliates. 12-10 Gov't Br. 46. On this view, affiliating with a separate entity that was not subject to the Policy Requirement would ostensibly provide an outlet for respondents' free expression.

Alternatively, the government argued, the guidelines would allow respondents to "form affiliates whose sole purpose is receiving and administering federal HIV/AIDS funding." 12-10 Gov't Br. 48. Respondents could forgo Leadership Act funds for their own accounts—and thus remain unbound by the Policy Requirement—while accepting those funds through affiliates that would comply with the Policy Requirement. *Id.* The government argued that by shifting the onus of compliance to their affiliates, respondents could "cabin the effects" of the Policy Requirement to those affiliates while remaining free themselves to express "contrary views on prostitution." *Id.* at 49.

In advancing these arguments, the government understood—as did this Court—that respondents operate globally, including through separately structured foreign entities. *See, e.g.*, JA208-209; 12-10 Gov't Br. 27. The government stated at oral argument that the Policy Requirement was necessary "[p]recisely because the

conduct here is carried out in foreign areas," where recipients "are identified as working with the United States government." 12-10 Oral Arg. Tr. 27-28. The government accordingly asserted a risk that without the Policy Requirement, funding recipients' inconsistent conduct or statements overseas could be "misattributed to the United States." *Id.* at 15, 58. Responding to Justice Breyer's concern that compelling "independently structured" but related entities to take two inconsistent positions "would be seen as totally hypocritical," the government answered that the affiliate guidelines would prevent the appearance of hypocrisy by requiring sufficient separation between affiliates to ensure that one entity's speech would not be attributed to the other. *Id.* at 16-17, 22. Justices Ginsburg and Kennedy, however, doubted whether this solution was practicable where the required separation "in this international setting" was not merely "a simple matter of corporate reorganization," but creating "a new NGO" and having it "recognized in dozens of foreign countries." *Id.* at 18-19; *see id.* at 27; JA229, 463-494; CAJA41, 303.

After considering those arguments, the Court held that the Policy Requirement "violates the First Amendment and cannot be sustained." *AOSI*, 570 U.S. 205, 220 (2013). The Court explained that, unlike the program-specific restrictions on speech in *Rust* and *Regan*, funding conditions that compel speech, like the Policy Requirement, necessarily "reach outside" the federal program. *Id.* at 217. "By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition … affects 'protected conduct outside the scope of the federally funded program.'" *Id.* at 218 (quoting *Rust*, 500 U.S. at 197). In other words, the Policy Requirement

compels "the affirmation of a belief that by its nature cannot be confined within the scope of the Government program." *Id.* at 221.

The Court rejected the government's argument that the affiliate guidelines obviated the First Amendment problem. Although the government had argued that those guidelines permitted respondents either to comply with the Policy Requirement themselves while speaking freely through their affiliates or to speak freely themselves while their affiliates complied with the Policy Requirement, the Court concluded that "[n]either approach [wa]s sufficient." *AOSI*, 570 U.S. at 219.

The Court explained that affiliate structures may be used to impose otherwise impermissible speech restrictions when those structures allow an organization whose speech is restricted "to exercise its First Amendment rights outside the scope of the federal program." *AOSI*, 570 U.S. at 219. But "[a]ffiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own." *Id.* That is because the effects of a compelled-speech requirement, unlike a speech restriction, cannot be "'cabin[ed]'" to an affiliate. *Id.* To the contrary, any affiliate "clearly identified" with a recipient compelled to espouse the government's view can express contrary views "only at the price of evident hypocrisy." *Id.* Imposing the Policy Requirement on one entity would thus necessarily impinge on the speech of affiliates "clearly identified" with it because compelled speech by its nature cannot be confined within the scope of the program. *Id.*; *see id.* at 221.

D. Proceedings Below

For more than a year, the government took no perceptible steps to implement this Court's ruling. It issued no new guidance or communications about funding opportunities. It continued to include the Policy Requirement in requests for grant applications—often without making clear that respondents are exempt or even acknowledging this Court's holding that the Policy Requirement is unconstitutional. CAJA395-398, 517-1379. Respondents repeatedly brought these failures and resulting chilling effects to the government's attention and eventually had to raise the prospect of further litigation. CAJA377, 389-390. Only then, in September 2014, did the government issue nonbinding interim guidance stating that U.S.-based NGOs are not required to have a policy opposing prostitution. JA300-341; Pet. App. 116a-119a. Yet the government continued thereafter to issue funding announcements that included the Policy Requirement without the required exemptions for respondents. CAJA382-383.

The government also continued to apply the Policy Requirement to respondents' clearly identified affiliates. The September 2014 guidance states that the Policy Requirement "remains applicable" to "foreign affiliates" of U.S. NGOs, "unless exempted by the [Leadership] Act or implementing regulations." Pet. App. 118a-119a; *see* JA316-317. And the guidance reiterates that any entity affiliated with a funding recipient subject to the Policy Requirement is prohibited from expressing inconsistent views unless it maintains "objective … independence" from the funding recipient to prevent the public from "attribut[ing]" the affiliate's views "to the recipient organization and thus to the Government." JA298; *see supra* pp. 10-11, 12-14.

Under these regulations, respondents and any other U.S. organization clearly identified with a foreign affiliate that receives Leadership Act funds cannot engage in activities "inconsistent" with the anti-prostitution pledge without jeopardizing their USAID funding. 45 C.F.R. § 89.3. And respondents cannot issue subawards to their own affiliates without imposing the Policy Requirement on them, policing their affiliates' compliance, and allowing the government to inspect their books and records to assess compliance. 2 C.F.R. § 200.331; *supra* p. 11. Respondents' failure to enforce the Policy Requirement against their affiliates would be grounds for "unilateral termination" of any USAID award. JA315-318; Pet. App. 132a.

Given these continuing burdens on their speech, respondents sought a permanent injunction to enforce this Court's decision by barring the government both from issuing communications containing the Policy Requirement without a clear exemption for respondents and their affiliates and from applying the Policy Requirement to "foreign affiliates that are 'clearly identified' with" respondents by, among other things, their "share[d] … name, brand, and mission." CAJA376-378. The district court received letter briefing, held a hearing, and received voluminous exhibits, declarations, and supplementary submissions. CAJA376-2063.

In January 2015, the district court granted a permanent injunction ordering the government to revise its communications and barring the government from applying the Policy Requirement to respondents and their clearly identified affiliates, including those incorporated abroad. Pet. App. 46a-60a. The court relied on this Court's holding that the effects of the Policy Requirement cannot be "'cabin[ed]'" to an affiliate because imposing the Policy Requirement on a "'clearly identi-

fied'" affiliate would force respondents "to choose between forced speech and paying 'the price of evident hypocrisy.'" Pet. App. 53a-55a (quoting *AOSI*, 570 U.S. at 219). The affiliate's place of incorporation, the court found, was irrelevant to that analysis, because the violation of "the *domestic NGO's* constitutional right" is the same "regardless of the nature of the affiliate." Pet. App. 54a-55a (citation omitted).

The government appealed, and for approximately two years, respondents agreed to a series of stays and provided detailed information to the government about their affiliate networks to facilitate negotiation of what respondents hoped would be a comprehensive settlement to protect their First Amendment rights. But in January 2017, with an agreement close at hand, the government broke off negotiations and moved for reconsideration or clarification of the injunction. The district court denied the motion. Pet. App. 61a-71a.

After staying the injunction as to foreign affiliates, the court of appeals—over Judge Straub's dissent—affirmed the permanent injunction. Describing the issue on appeal as "narrow," Pet. App. 3a, the court concluded that respondents' foreign affiliates are not only "clearly identified" with respondents, but belong to the same "homogenous" organizations and are thus "often indistinguishable" from respondents, Pet. App. 8a-9a, 11a. And under *AOSI*, the court explained, respondents themselves are harmed when a "clearly identified" affiliate is forced to profess the government's views as its own because "forcing an entity's affiliate to speak the Government's message unconstitutionally impairs that entity's own ability to speak." Pet. App. 8a.

The court rejected any suggestion that this reasoning turned on where the affiliate might be incorporated.

Whether foreign affiliates lack First Amendment rights was irrelevant because the injunction remedies a violation of "the First Amendment rights of the *domestic plaintiffs*." Pet. App. 10a. And although the foreign context was "on full display" before this Court in 2013, nothing in this Court's analysis depended on an affiliate's place of incorporation: That analysis "speaks only of the harm to [respondents] due to their affiliation, not about the nature of the affiliated entity." Pet. App. 8a n.3. Finally, the court distinguished circuit precedent upholding funding conditions that merely restricted foreign organizations' speech, explaining that those cases had not involved clearly identified affiliates and had not considered forced-speech conditions that "compelled" NGOs to "make contradictory statements regarding their core objectives." Pet. App. 12a. The court accordingly held that the district court "did not abuse its discretion" in crafting the permanent injunction. *Id.*[1]

The court denied rehearing. Pet. App. 72a-73a. With respondents' consent, the court stayed its mandate pending further review, leaving in place the stay of the permanent injunction. Pet. App. 74a.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in concluding that the permanent injunction is necessary to provide complete relief to respondents for the First

[1] The court of appeals rejected the government's arguments that the injunction was procedurally improper or insufficiently clear, concluding that the government should have no difficulty identifying the covered affiliates given the "unusually full record in this case." Pet. App. 13a-14a.

Amendment harm this Court identified in *AOSI*. 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." 570 U.S. at 221. Unlike a restriction on speech, that compelled allegiance to the government's viewpoint cannot be "'cabin[ed]'" to one affiliate alone, but will instead be attributed to and constrain the speech of any other "clearly identified" affiliate. *Id.* at 219. And those effects do not depend on where the affiliate is incorporated. *AOSI*'s reasoning thus confirms that imposing the Policy Requirement on respondents' clearly identified foreign affiliates violates respondents' own First Amendment rights.

That analysis is consistent with the constitutional command that the government may not force citizens to express views they find objectionable. Relative to merely restricting a funding recipient's speech, compelled speech inflicts different and additional harm, imprinting the speaker itself with the government's view and depriving the speaker and those to whom its speech is attributed of control over their own message. And unlike speech restrictions, which can be remedied by limiting the restriction to a particular program or ensuring the availability of alternative channels of communication, compelled speech cannot be cured by simply keeping one channel of communication free. The remedy must ensure that the government's viewpoint is no longer forcibly imputed to the speaker.

The record confirms that respondents will suffer these harms absent the injunction. Respondents and their affiliates are unified organizations that use the same name, brand, and logo and speak as one. It is undisputed that, in practice, the affiliates' speech is imputed to respondents and vice versa. If a clearly identi-

fied affiliate is forced to take the government's pledge as a statement of organizational policy, respondents themselves cannot stay neutral or disavow that statement without undermining their own message and integrity and paying what the Court called "the price of evident hypocrisy." *AOSI*, 570 U.S. at 519. The government's affiliate regulations make that clear. Under those regulations, funding recipients must maintain objective independence from any entity that does not adhere to the recipient's anti-prostitution pledge. Without the injunction, each respondent must therefore conform its own speech and conduct to its affiliate's pledge to keep from jeopardizing not only their shared identity and reputation as a global public-health organization but also their federal funding.

Legal separation between respondents and their affiliates does not prevent that harm to the U.S.-based respondents' rights. An organization-wide affirmation of belief will necessarily be attributed to any clearly identified components of the organization, regardless of their corporate structure. The likelihood of attribution is a core element of this Court's First Amendment decisions. The only reason a legally separate but related entity can provide an "alternative channel" for a funding recipient's free expression in cases involving speech restrictions is because the speech of the closely identified affiliate serves by attribution as an outlet for the funding recipient's own speech. *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540 (1983). Even the government's affiliate regulations rest on the recognition that the speech of a clearly identified affiliate will be viewed as the speech of the recipient.

The government's policy arguments have no merit. Nothing in the record suggests that upholding the injunction will undermine either the Leadership Act or

foreign aid more generally. U.S. foreign aid is effective in countless other areas without imposing this kind of requirement. The government's specter of sham affiliations likewise fails in light of the record here and the myriad tools the government already uses to ensure that grant recipients are bona fide, qualified, and effective partners in the fight to end HIV/AIDS. If an independent foreign organization sought to object to a funding condition based on some "claimed" affiliation with a U.S. entity, that would be a new and different case. Respondents are well-known, steadfast partners that for nearly two decades have worked with the government to save millions of lives. Enforcing the Policy Requirement in a manner that forces these organizations to espouse the government's viewpoint as their own is not, and never has been, necessary or beneficial to the success of the PEPFAR program.

ARGUMENT

I. THE PERMANENT INJUNCTION PROPERLY REMEDIES THE VIOLATION OF RESPONDENTS' FIRST AMENDMENT RIGHTS

A. This Court's Reasoning In *AOSI* Confirms That Imposing The Policy Requirement On "Clearly Identified" Affiliates Violates Respondents' Freedom Of Speech

A district court's equitable powers to remedy constitutional violations are "'broad.'" *Hills* v. *Gautreaux*, 425 U.S. 284, 297 (1976). When a constitutional violation is found, a court should "tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" *Id.* at 293-294. While injunctive relief should be no more burdensome than necessary, it must provide "complete relief." *Califano* v. *Yamasaki*, 442

U.S. 682, 702 (1979). A court should accordingly "formulate an effective remedy" that will "achieve the greatest possible degree of [relief], taking into account the practicalities of the situation." *Gautreaux*, 425 U.S. at 297 (quotation marks omitted); *accord Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944) (equity jurisdiction entails power "to mould each decree to the necessities of the particular case"). And the scope of a remedial injunction is entrusted to the district court's discretion, reviewable only for abuse on appeal. *Gautreaux*, 425 U.S. at 306.

The injunction here was well within the district court's broad discretion. The government does not dispute that entry of a remedial decree was appropriate given the government's sustained failure to conform to this Court's 2013 decision. And the undisputed record confirms that restraining enforcement of the Policy Requirement against respondents' "clearly identified" foreign affiliates is necessary to provide complete relief for the violation of respondents' First Amendment rights. As the court of appeals found, respondents and their affiliates function as unified, "homogenous" organizations. Pet. App. 11a. Compelling one affiliate to espouse the government's view as its own "cannot be confined" to that particular affiliate, but instead is imputed to the whole organization and leaves respondents free to express a contrary view "only at the price of evident hypocrisy." *AOSI*, 570 U.S. at 219, 221. The reasoning of this Court's prior decision thus fully supports the lower courts' conclusion that the injunction is necessary to provide complete relief for the First Amendment violation this Court found.

As an initial matter, *AOSI* invalidated the Policy Requirement in categorical terms. This Court made clear that Congress cannot leverage its spending power

to compel private parties to adopt and espouse its preferred policy positions as their own. The Policy Requirement, on its face, contravenes that limit and thus "cannot be sustained." 570 U.S. at 221. Where a statutory provision is unconstitutional on its face, an injunction that simply "prohibit[s] its enforcement is 'proper.'" *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (quoting *Citizens United* v. *FEC*, 558 U.S. 310, 333 (2010)).[2]

Even viewing this Court's prior decision as a narrower as-applied holding, however, the district court entered and the court of appeals affirmed a remedial decree that was tailored to protect the rights of respondents themselves. In doing so, the lower courts correctly applied this Court's reasoning to conclude that imposing the Policy Requirement on affiliates closely identified with respondents would infringe on respondents' own speech.

This Court in *AOSI* discerned a relevant constitutional line in its funding-condition decisions: A funding condition is valid if it "define[s] the limits of the government spending program," "specify[ing] the activities Congress wants to subsidize," whereas a condition crosses that line when it "seek[s] to leverage funding to regulate speech outside the contours of the program itself." 570 U.S. at 214-215. The Court contrasted a condition like the Policy Requirement that affirmative-

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[2] As noted, respondents brought both facial and as-applied challenges. *Supra* p. 12. While respondents have emphasized the as-applied aspects of their claim, the government previously characterized that claim as a "facial attack," Doc. 27 at 27, and secured this Court's review in 2012 by arguing that the case concerned the "facial invalidit[y]" of the Policy Requirement. *Supra* pp. 14-15.

ly compels recipients to adopt and espouse the government's preferred viewpoint with speech restrictions that merely limit what a grantee can say or do with federal funds. Funding conditions that restrict the recipient's speech within the scope of the federally funded program are generally lawful, the Court explained, so long as they leave the recipient "unfettered in its other activities." *Id.* at 217 (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 196 (1991)).

In *Rust*, for example, the Court upheld a funding condition under Title X of the Public Health Service Act that "barred [federally funded] projects from advocating abortion …, and required grantees to ensure that their [funded] projects were physically and financially separate from their other projects that engaged in the prohibited activities." *AOSI*, 570 U.S. at 216 (quotation marks omitted). The key distinction illuminated by *Rust*, the Court explained in *AOSI*, is that while "Congress can … selectively fund certain programs," it cannot bar grantees from "'engaging in … protected conduct outside the scope of the federally funded program.'" *Id.* at 217. The condition in *Rust* satisfied that standard because it "governed only the scope of the grantee's Title X projects" and "did not 'prohibit[] the recipient from engaging in … protected conduct outside the scope of the federally funded program.'" *Id.*; *see Rust*, 500 U.S. at 197.

Similarly, in *Regan* v. *Taxation With Representation of Washington*, the Court upheld the U.S. tax code's prohibition on substantial lobbying by charities that are tax-exempt under 26 U.S.C. § 501(c)(3). 461 U.S. 540 (1983). By limiting the tax exemption in that way, "Congress had merely 'chose[n] not to subsidize lobbying.'" *AOSI*, 570 U.S. at 215. That condition "did not prohibit [an] organization from lobbying Congress

altogether." *Id.* Rather, an organization that wished to engage in lobbying could set up "a 'dual structure[,]' … separately incorporating as a § 501(c)(3) organization and § 501(c)(4) organization." *Id.* The organization could "claim § 501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its § 501(c)(4) capacity with separate funds." *Id.*

As the Court held in *AOSI*, the Policy Requirement crosses the line identified in *Rust* by compelling speech that "by its nature cannot be confined" to the recipient's federally funded activities. 570 U.S. at 221. Mandating that recipients "profess a specific belief" entails the compelled adoption of a viewpoint by the organization, not a mere program-based restriction. *Id.* at 218. It imposes "a condition on the *recipient* of the subsidy rather than on a particular program or service." *Rust*, 500 U.S. at 197. Once an organization is forced to adopt the government's viewpoint, its freedom to speak on the subject is compromised for all purposes. The recipient cannot both "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"—even when acting "on its own time and dime." *AOSI*, 570 U.S. at 218.

Moreover, because the Policy Requirement "goes beyond defining the limits of the federally funded program to defining the recipient," *AOSI*, 570 U.S. at 218, the constitutional harm cannot be avoided by transferring the burden of complying with the Policy Requirement to a legally separate but clearly identified affiliate. That was the government's position in *AOSI*, which the Court rejected. As discussed, the government argued then, as now, that imposing the Policy Requirement on a legally separate affiliate would avoid

constitutional harm because doing so would "'cabin[] the effects' of the Policy Requirement within the scope of the federal program," leaving respondents free to express views contrary to the government's or remain neutral. *Id.* at 219 (quoting 12-10 Gov't Br. 48-49). The Court disagreed. It recognized that affiliate structures might eliminate a First Amendment violation in a *Rust*-type case, where the speech restriction is limited to a particular program and an organization can "exercise its First Amendment rights outside the scope of th[at] program" by speaking through its affiliates. 570 U.S. at 218-219. But a compelled-speech condition like the Policy Requirement "by its nature" infringes on respondents' speech even when imposed only on their affiliates. *Id.* at 219. As the Court explained, "[a]ffiliates cannot" solve a First Amendment problem "when the condition is that a funding recipient espouse a specific belief as its own"—at least where, as in this case, the affiliated entities are "clearly identified" with one another—because speech by the affiliate will be imputed to the respondent. *Id.*

As the lower courts correctly recognized, the affiliate's place of incorporation was immaterial to this Court's analysis. Pet. App. 8a & n.3, 54a-55a. Although the parties and the Court had focused on the foreign context of respondents' operations and affiliates, *supra* pp. 15-16, nothing in the Court's reasoning turned on where any affiliate was incorporated. What mattered was the "clear[] identif[ication]" between the respondent and the affiliate and the resulting attribution of speech by one entity to the other. *AOSI*, 570 U.S. at 218-221.

It was equally immaterial to the Court's analysis that the recipient and the affiliate were legally separate and that only one was formally bound to espouse the

government's view. By virtue of being "clearly identified," both entities would be yoked to the compulsory pledge, and the nominally unbound entity could disavow it only "at the price of evident hypocrisy" by contradicting a statement of organizational policy by its own affiliate. *AOSI*, 570 U.S. at 219. Imposing the Policy Requirement on respondents' affiliates thus harms respondents themselves in exactly the way this Court recognized.

B. The Injunction Implements The Constitutional Prohibition Against Compelled Speech

While *AOSI* alone would suffice to sustain the permanent injunction, the injunction finds further support in the fundamental principle that private parties have a right to control their speech and thought, free from government intrusion. The injunction implements the "cardinal constitutional command" that in a democracy the government may not "'*force* [*its*] *citizens*'" "to mouth support for views they find objectionable." *Janus* v. *American Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018) (quoting *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943)). "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977), *overruled on other grounds by Janus*, 138 S. Ct. 2448. The government therefore violates the First Amendment when it denies private persons the right to determine for themselves the content of their speech, including whether "to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977).

Compared to laws or funding conditions that merely restrict certain speech, government compulsion of speech inflicts "additional damage." *Janus*, 138 S. Ct. at 2464. When speech is compelled, "individuals are coerced into betraying their convictions." *Id.* "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning," and laws "commanding 'involuntary affirmation' of objected-to beliefs" therefore "require 'even more immediate and urgent grounds' than a law demanding silence." *Id.* (quoting *Barnette*, 319 U.S. at 633).

That difference between a restriction on speech and compelled speech is consequential for the remedy needed for a violation. Funding conditions that limit speech are only as problematic as the scope of the restriction, and the intrusion into free speech can be cured by ensuring that speech is unfettered outside the scope of the restriction. In *Regan* and *Rust*, for example, ensuring freedom of speech in the face of a ban on certain types of advocacy using federal funds simply required that the recipient be permitted to engage in such speech using private funds. By speaking its own message freely through a separately organized affiliate, an organization can comply with the conditions of the federal program while its freedom of speech remains otherwise unfettered. In *FCC* v. *League of Women Voters of California*, the Court thus invalidated a funding condition that barred broadcasters receiving federal grants from "absolutely … all editorializing," even with private funds. 468 U.S. 364, 400 (1984). But the Court noted that it would "plainly" pass muster under *Regan* to limit the ban to federal funds while allowing grantees to "establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds." *Id.* Restrictions that prohibit using

federal funds for certain disapproved speech raise no continuing constitutional concerns, then, as long as they "leave the grantee unfettered in its other activities." *Rust*, 500 U.S. at 196.

The same approach, however, cannot remedy the harm from compelled speech. *See AOSI*, 570 U.S. at 219-220. Unlike a speech restriction, which is cured by ensuring that the speaker is unfettered outside the scope of the funded program, compelled affirmations of belief like the one mandated by the Policy Requirement ascribe a view to the speaker itself that cannot be cast off. The speaker's own professed belief is dictated by the government both within and outside the federal program. And where the speaker is an organization, simply purporting to cabin the compulsion to one part of the organization does not work because the government's view is inscribed on the organization as a whole. *See id.*; *Rust*, 500 U.S. at 197.

The government proposes to remedy the harm from compelled speech the same way it would remedy a speech restriction, by relying on corporate formalities to ensure that private and federal funds remain segregated for their separate purposes. That ignores the "additional damage" wrought by government coercion of speech. *Janus*, 138 S. Ct. at 2464. The compulsion defines the recipient and cannot be channeled or cabined to a particular program or a particular affiliate of the "group or organization" on whose behalf the anti-prostitution pledge is made. 22 U.S.C. § 7631(f); *AOSI*, 570 U.S. at 519-520. Thus, where respondents' affiliates are "clearly identified" as part of the same whole, a requirement that the affiliates adopt and espouse the government's position necessarily imposes the government's viewpoint on respondents themselves. The dis-

trict court appropriately tailored the injunction to provide complete relief for that harm.

C. The Record Substantiates The Harm To Respondents

The government contends that it may impose the Policy Requirement on respondents' clearly identified affiliates because respondents themselves no longer confront "an impermissible choice between accepting government funding for a particular program and sacrificing their right to free speech 'outside the contours of the program.'" Pet. Br. 36. According to the government, even if the affiliates must take the pledge, respondents' own speech rights would be unabridged because respondents may accept federal funding without themselves complying with the Policy Requirement.

That assertion disregards *AOSI*'s explication of the harms that result when respondents' clearly identified affiliates must take the pledge and the real-world evidence showing that those harms are not merely theoretical. The current enforcement posture, of course, differs from the last time the case was before the Court in that the government now proposes to compel respondents' foreign affiliates to take the pledge while claiming to exempt respondents themselves. But the government proposed to impose the Policy Requirement only on respondents' affiliates last time, and this Court explained why doing so would continue to infringe on respondents' speech as long as the affiliates were "clearly identified." *AOSI*, 570 U.S. at 219. That reasoning was "necessary to th[e] result" in *AOSI* and cannot be relitigated here. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996).

The undisputed record bears out the harm foreseen in *AOSI*. As the court of appeals recognized, respondents and their affiliates, while legally separate, "maintain[] a unified global identity" and "appear to the public as unified entities" that are "often indistinguishable." Pet. App. 4a-5a, 9a, 11a. In effect, they "are not just affiliates—they are homogenous." Pet. App. 11a. Imposing the Policy Requirement on the affiliates—even if respondents are not bound—necessarily interferes with respondents' speech, just as this Court held, because the pledge cannot be cabined to the particular affiliate that takes it. If CARE in India is compelled to "avow[] the belief dictated by the Policy Requirement," for example, CARE USA cannot in practice "turn around and assert a contrary belief, or claim neutrality," without "evident hypocrisy." *AOSI*, 570 U.S. at 218-219. Requiring CARE USA's foreign affiliates "to continue to adhere to the Policy Requirement results in inconsistent messaging by the CARE global federation, dilution of [CARE's] brand and its collective voice, destruction of [its] common approach, and impairment of [its] ability to collaboratively accomplish [its] mission." JA391. Similarly, "if Pathfinder presented a public message on sex workers that deviated from the message imposed on its foreign affiliates, including if it said nothing at all, Pathfinder would be seen as a hypocrite." JA372 (transcription error omitted). That negative "perception" undercuts not only Pathfinder's standing in the public-health community, but also "its ability to raise private funds" and to "implement programs serving this vulnerable group." *Id.*

Enforcing the Policy Requirement against affiliates thus leaves respondents in the very situation described in *AOSI*: Unless they choose to forgo federal funding for the lifesaving work they carry out through their af-

filiates around the globe, they are no longer free to remain neutral, and can disavow an affiliate's pledge only "at the price of evident hypocrisy." *AOSI*, 570 U.S. at 219. The First Amendment prohibits the government from leveraging the spending power to compromise respondents' integrity, reputation, and message this way.

The affiliate regulations underscore the harm to respondents. As explained, when respondents' clearly identified affiliates are subjected to the Policy Requirement, respondents themselves must conform their message and curtail inconsistent speech to avoid a breach of their affiliates' pledge—a breach that could jeopardize federal funding for both respondents and their affiliates. 45 C.F.R. § 89.3; *see supra* pp. 10-11, 12-14, 19. The affiliate regulations lay out a non-exclusive set of factors the government will consider "case-by-case … based on the totality of the facts" to determine whether, under the circumstances here, U.S.-based affiliates lack "objective integrity and independence" from a foreign funding recipient so that their "activities" may be attributed to the funding recipient in violation of its pledge. 45 C.F.R. § 89.3. If the funding recipient and an affiliated entity do not demonstrate such objective separation (*i.e.*, if they are clearly identified), then the affiliated entity (here, the U.S. respondent) cannot engage in conduct inconsistent with the Policy Requirement. Contrary to the government's assertions (at 37-38), if the Policy Requirement is applied to respondents' clearly identified affiliates, then respondents themselves in fact are not free to contradict the government's viewpoint. Otherwise, the organization risks losing its federal funding.

The manner in which Leadership Act funds are disbursed further illustrates and worsens the harm to respondents. In many cases, the U.S.-based respond-

ent is the prime recipient of Leadership Act funds, which it then subgrants to a legally separate affiliate that will carry out the funded project. In that circumstance, the U.S. respondent becomes responsible for ensuring that the affiliate complies with all terms of the grant. *Supra* p. 10. Absent the injunction, that means the U.S. respondent must impose the Policy Requirement on its own affiliate, monitor the affiliate's compliance, and ensure that the affiliate maintains not only legal but public separation from any entities engaged in contrary speech—including the U.S. respondent itself. *See* 2 C.F.R. § 200.331(d); 45 C.F.R. § 89.3; *supra* pp. 11, 19. Compliance with those conditions is impossible, in fact, unless respondents refrain from "activities" the government would deem "inconsistent" with their affiliates' anti-prostitution pledge. 45 C.F.R. § 89.3. And respondents' own federal grants could be terminated for failing to enforce the Policy Requirement on the affiliate or for contradicting the pledge. JA308-309, 316-318, 339-340; Pet. App. 132a. Without the injunction, the harm to respondents will continue unabated in the ways previously identified in *AOSI*. [3]

II. LEGAL SEPARATION DOES NOT PREVENT CONSTITUTIONAL HARM BECAUSE SPEECH BY CLEARLY IDENTIFIED AFFILIATES IS ATTRIBUTED TO RESPONDENTS

Apart from its efforts to evade the reasoning of *AOSI*, the government relies primarily on the corpo-

[3] As the government emphasizes, this case thus concerns the impact of the Policy Requirement on U.S.-based organizations, just as it always has. The injunction protects only "the domestic NGO's constitutional right." Pet. App. 55a; *see* Pet. App. 10a. The government's extended argument that the First Amendment does not protect foreign entities operating abroad is simply irrelevant.

rate formalities of respondents' affiliate networks. In the government's view (at 27-33), "basic tenet[s] of corporate law" dictate that imposing the Policy Requirement on affiliates generally cannot harm respondents' speech rights so long as the two are legally separate. Pet. Br. 28 (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003)). According to the government, "imposition of a legal burden on one … entity generally does not directly implicate the legal rights of" other entities—no matter how closely affiliated—absent "'exceptional'" circumstances inapplicable here for "'piercing the corporate veil.'" *Id.* at 28-30. That argument misses the point and fails as a matter of corporate law.

To begin, respondents are not asking the Court to disregard corporate formalities. Foreign affiliates' legal separation from respondents accomplishes vital organizational goals, including satisfying eligibility requirements for certain funding opportunities, building local development capacities, and operating in countries that require local incorporation. *Supra* pp. 6-7.

While important for many purposes, however, legal separation does not determine whether compelled speech by affiliates would burden respondents. An entire body of "*relational law*" describes when "closely related" entities may or must be viewed in relationship to one another, rather than in isolation, as the government argues. 1 Blumberg et al., *Blumberg on Corporate Groups* § 6.05 (rev. 2020); *see generally id.* vols. 1-5. And courts and legislatures have long recognized reasons why characteristics or conduct of one affiliate might be attributed to another in numerous contexts.

In *Copperweld Corp.* v. *Independence Tube Corp.*, for example, the Court rejected the notion that there was "any meaningful difference" for purposes of anti-

trust liability under § 1 of the Sherman Act between operating a corporate subunit "as a separate corporation" rather than "as an unincorporated division." 467 U.S. 752, 774 (1984). Under *Copperweld* and its progeny, the Court has, in fact, "eschewed" exactly the sort of "formalistic distinctions" the government now urges "in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *American Needle, Inc.* v. *NFL*, 560 U.S. 183, 191 (2010). Similarly, under the Lanham Act, legitimate use of a registered trademark by "related companies" does not affect the mark's validity, and is deemed to "inure to the benefit" of the trademark holder, so long as the "mark is not used in such [a] manner as to deceive the public." 15 U.S.C. § 1055. Courts have likewise treated "nominally separate business entities" as "a single employer" for purposes of federal labor and employment law. *E.g.*, *Radio & Television Broad. Technicians Local Union 1264* v. *Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965). Corporations can be haled into court based on actions by separate subsidiaries. *E.g.*, *International Shoe Co.* v. *Washington*, 326 U.S. 310, 317-319 (1945). And statutes and regulations may define "United States person[s]" to include foreign affiliates for some purposes but not others. *E.g.*, 15 U.S.C. § 8101; 15 C.F.R. § 760.1(b)(1).

The legal significance of corporate separation thus depends on the context. In *Copperweld*, for instance, the Court explained that "[t]he economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition." 467 U.S. at 772. Likewise, trademark protection turns not on corporate formalities but on whether the public is likely to be deceived by affiliates'

usage of the mark, 15 U.S.C. § 1125(a)(1)(A), thereby furthering trademark law's two goals to "[p]rotect property in the trademark and protect consumers from confusion." 1 McCarthy, *McCarthy on Trademarks and Unfair Competition* § 2:1 (5th ed. 2019); *see* 3 *id.* § 18:45.50.

The permanent injunction in this case reflects a similar understanding that legal separation does not always carry relevant significance. The issue here is the scope of the injunction necessary to "provide complete relief" to respondents for the violation of their speech rights. *Califano*, 442 U.S. at 702. And in that context, legal separation is not the answer because the affirmation of a belief easily crosses invisible corporate lines within an organization of entities that share one identity and voice.[4]

Indeed, in the First Amendment context, legal separation is insignificant where speech by one legally separate entity may be attributed to another. In the funding-conditions context, for example, attribution of speech from one entity to a legally separate entity is an indispensable premise for treating affiliates as "alternative channel[s] for expression." *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 546-547 (2001). The speech of the affiliate is necessarily viewed as the speech of the

[4] Contrary to the government's assertion (at 30), the decision below thus does not hold that legally separate affiliates "should be treated the 'same[]'" as respondents for all First Amendment purposes. The court of appeals held only that the "sameness" of respondents and their affiliates results in the same injury found in *AOSI*. Pet. App. 11a. Neither lower court suggested treating affiliates and respondents the "same" outside the limited context of remedying that injury.

restricted party notwithstanding the legal separation—otherwise, the affiliate could provide no channel for the restricted party's own expression. The concurrence in *Regan* underscored this point: In upholding the anti-lobbying restriction on tax-exempt charities there, "the Court's necessary assumption" was that a charity's "relationship" to an affiliated but legally separate 501(c)(4) would provide a channel for the charity itself to impart "its views" even though its lobbying would be carried out by a separate entity. 461 U.S. at 552-553 (Blackmun, J.). "If viewed in isolation," the anti-lobbying restriction on the 501(c)(3) charity would be an unconstitutional ban on protected speech by a class of entities rather than a valid definition of the scope of activities Congress wished to subsidize. *Id.* at 552. The charity's ability to engage affiliates to lobby "explicitly on [its] behalf" "avoided" that "constitutional defect"—but only because the speech of the separate affiliate is effectively the speech of the restricted entity itself. *Id.* at 553.

Even speech by legally separate entities lacking any formal affiliation or appearance of affiliation at all can give rise to attribution by a reasonable observer in context. In those cases, the First Amendment "principle of autonomy to control one's own speech" still prohibits the government from making the objecting party appear to endorse others' messages with which it disagrees. *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995). Thus, in *Hurley*, the Court barred Massachusetts from applying its public-accommodations law to compel the St. Patrick's Day parade to feature a gay, lesbian, and bisexual group over the organizers' objection. The group's participation, the Court explained, would "alter the expressive content" of the parade and "likely be

perceived" as approved by the organizers, even though the group had no affiliation with the organizers at all. *Id.* at 575. Under those circumstances, the Court held, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Id.* at 576. "Without deciding on the precise significance of the likelihood of misattribution," the Court held that "in the context of an expressive parade," the group's involvement would be "perceived by spectators as part of" "the parade's overall message," and it was up to the organizers—not the State—to decide whether or not to send that message. *Id.* at 577.

Similarly, the government may not infringe on private "choices of what to say and what to leave unsaid" by "compel[ling] access" to a utility company's billing envelopes for a legally separate third-party energy newsletter, *Pacific Gas & Elec. Co.* v. *Public Utilities Comm'n of California*, 475 U.S. 1, 11 (1986), or to newspaper column space for legally separate candidates' replies to "press criticism," *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 247 (1974). The objecting parties in those cases, the Court found, could be "forced either to appear to agree … or to respond," even in the absence of any apparent or formal legal relationship. *Pacific Gas*, 475 U.S. at 15.

Rather than legal separation, the determinative factor in these contexts is the likelihood that speech by one entity will be attributed to another. Conversely, when the Court has approved conditions requiring one party to host the speech of another, the Court has underscored the unlikelihood that a reasonable observer would ascribe approval of the third party's message to the objecting party. In *PruneYard Shopping Center* v.

Robins, for instance, the Court rejected a First Amendment challenge to provisions of the California state constitution that permitted the public to exercise free speech in parts of privately owned shopping centers. "The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition," the Court found, "will not likely be identified with those of the [shopping center's] owner." 447 U.S. 74, 87 (1980). So, too, in *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, the Court upheld a statute requiring law schools to grant equal access to military recruiters after finding that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," and that students can readily differentiate "speech a school sponsors" from speech it is legally required to permit. 547 U.S. 47, 65 (2006).

The Court's government-speech cases have likewise turned, in part, on the likelihood of attribution. For example, in permitting the government to disapprove the content of State-approved specialty license plates, *Walker* v. *Texas Division, Sons of Confederate Veterans, Inc.*, the Court observed that license plate designs were "'closely identified in the public mind with the [State].'" 135 S. Ct. 2239, 2248-2249 (2015); *accord Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 470-471 (2009) (finding "little chance that observers will fail to appreciate the identity of the [government] speaker" in the context of a permanent monument displayed on public property).

The scope of the injunction gives practical effect to these principles. It restrains the government from imposing the Policy Requirement on affiliates operating under respondents' same name, logo, and trademark because those affiliates' speech—as the Court anticipated in *AOSI*—will be attributed to respondents not-

withstanding their legal separation, leaving respondents unable to express a different view or remain silent on their own time and their own dime. The injunction therefore provides an "'effective remedy'" for the scope of compelled speech likely to be attributed to respondents. *Gautreaux*, 425 U.S. at 297. And it bars enforcement of the Policy Requirement where its real-world effect is to put words in respondents' mouths.[5]

Notwithstanding its current emphasis on legal separation, the government conceded below that "when two organizations are closely linked, in some circumstances the speech of one can been seen as the speech of both." U.S. Reply 9, No. 15-974 (2d Cir. Nov. 17, 2017). And it accepted that "part of the reason" for this Court's holding in *AOSI* regarding clearly identified affiliates was that "one organization cannot credibly disavow the speech of another if the two are closely as-

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[5] The government's cases are not to the contrary, but merely explain why attribution of speech from one affiliate to another was inappropriate on particular facts. *See, e.g.*, *Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 141-148 (2011) (whether defendant "made" related entity's statement under Rule 10b-5); *Dole*, 538 U.S. at 473-477 (whether subsidiary qualified as "instrumentality" under FSIA); *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 161-163 (2001) (whether sole shareholder of closely held corporation was sufficiently "separate" to incur liability under RICO). None of those cases holds—as the government suggests and its position requires—that legal separation is dispositive, let alone in the First Amendment context. The government cites *Regan* for that point, but as discussed below, *Regan* shows the opposite: Where one entity is barred from speaking with federal funds, a legally separate but related entity can provide an outlet for the restricted entity's expression only because of their "relationship"; were it otherwise, *Regan* would have come out the other way. *Supra* p. 40.

sociated." *Id.* That reasoning leaves no room for a distinction based on corporate formalities.

Moreover, the record documents the reality of "two-way" attribution of speech from respondents to their affiliates and vice versa. *Supra* pp. 7-9. In 2005, for instance, CARE was accused by a member of Congress of being out of compliance due to its "privately funded work with sex worker[s]," based on mere association with an entirely unaffiliated entity whose views he "impute[d]" to CARE. JA202-203; CAJA323. Indeed, the government's own regulations confirm that reality. As reflected in those regulations, the Policy Requirement sweeps in not only the speech of the funding recipient formally bound by it, but also speech by any affiliate "so closely tied to the funding recipient that a reasonable observer would attribute [the affiliate's] activities to the funding recipient," and vice versa. JA258. The government does not treat legal separation as dispositive when enforcing the Policy Requirement because it recognizes the likelihood that speech will be attributed from one entity to the other. Rather, it considers "signs and other forms of identification" linking entities to each other and thus expects entities clearly identified with the recipient not to contradict their affiliate's pledge. 45 C.F.R. § 89.3. The government does so, it claims, to "guard against a public perception" of inconsistent speech by its partners that could "risk … confusing [its own] message opposing prostitution." JA298.

All of that contradicts the government's position in this phase of the litigation. The government cannot count respondents' speech against an affiliate's compliance on the ground that the speech of one amounts to the speech of the other, but then pretend respondents are not harmed by having the government's viewpoint

attributed to them when it is imposed on their affiliate. The injunction prevents that plainly inequitable result.

The same principles resolve the government's contention (at 38) that respondents' remedy is to simply disclaim their affiliates' pledge. A disclaimer does not eliminate the pledge taken by the affiliate on behalf of the whole "group or organization" and attributed to all "clearly identified" parts of that organization—it simply undermines respondents' integrity. *AOSI*, 570 U.S. at 219. And there is a significant risk that a disclaimer would violate the affiliate regulations. *Supra* pp. 35-36.

Nor is it incumbent on respondents to disassociate from their affiliates or reorder their organizations to escape an unconstitutional condition. *See* Pet. Br. 38. That is not possible in many instances due to local law, U.S. funding restrictions, and the practical burdens and expenses of creating and registering new branches or entities, as brought to the Court's attention in 2013. *Supra* pp. 6-7, 15-16. Respondents should be free to structure themselves as they see fit and should not be made to incur the harm from the Policy Requirement. It is the government that must cease violating the First Amendment.

III. THE GOVERNMENT'S POLICY ARGUMENTS FAIL

As it did in 2013, the government seeks (at 39-42) to defend the Policy Requirement on policy grounds, suggesting that compelled speech advances important public-health goals and that restraining enforcement against respondents' clearly identified foreign affiliates would frustrate the aims of the Leadership Act or foreign aid more generally. Those arguments are irrelevant. The government cites no doctrinal reason why even meritorious policy considerations could excuse vi-

olating the First Amendment, and there is none. The government cannot force its citizens to espouse its preferred viewpoint against their will. *See Janus*, 138 S. Ct. at 2463. However laudable Congress's goals in enacting the Policy Requirement, they cannot justify compelling respondents—including through speech by their clearly identified affiliates—to "pledge allegiance to [Congress's] policy of eradicating prostitution." *AOSI*, 570 U.S. at 220.

In any event, the government's policy arguments are meritless. As the government concedes (at 19), the Leadership Act has been the cornerstone of an anti-HIV/AIDS program that has seen great success around the world, and respondents have been indispensable to that success. But the Policy Requirement itself has played no role in achieving that result. Some of the world's largest public-health agencies, accounting for a substantial portion of all PEPFAR spending, are exempt from the Policy Requirement by statute. *See* 22 U.S.C. § 7631(f) (exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organizations; the International AIDS Vaccine Initiative; and all United Nations agencies). Their exemption belies the notion that compliance with the Policy Requirement has ever been, or was ever expected to be, important to the success of the program. Moreover, since the entry of the first preliminary injunction in this case roughly fifteen years ago, respondents themselves have never been constitutionally subject to it. Yet the government concedes (at 19) that respondents have contributed only positively to the program's success.

The government credits (at 41-42) the success of the PEPFAR program to enforcement of the Policy Requirement against foreign entities. But that suggestion is unsupported by any record evidence and un-

moored from reality. In fifteen years of annual reports to Congress, the government has not once mentioned the Policy Requirement, much less identified any contribution it has made to the success of the PEPFAR program, even in the context of foreign organizations.[6]

To the contrary, the unrebutted record demonstrates that the Policy Requirement impedes, rather than advances, the Leadership Act's public-health goals. *See* CAJA34-37, 65-66, 76-77, 302-303. The only evidence in the record is that compelling funding recipients to espouse the government's anti-prostitution viewpoint harms the government's private partners and undermines the effectiveness of their anti-HIV/AIDS programs with one of the most crucial and vulnerable populations. *See* JA201-205; JA218-227; *supra* p. 11. As HIV/AIDS experts and public-health authorities have recognized, organizing and working cooperatively with sex workers is often necessary to provide care to those individuals and to educate them about HIV-prevention methods. *See, e.g.*, 12-10 Public Health Deans & Professors Amicus Br. 15-21; 12-10 Secretariat of Joint United Nations Programme on HIV/AIDS Amicus Br. 13-15. And while the government acknowledges (at 40) "policy disagreements" about the most effective ways to engage sex-worker communities in the fight against HIV/AIDS, it ignores that the purpose and effect of the Policy Requirement is to shut down that debate—substituting a one-sided government orthodoxy for a healthy exchange in the marketplace of ideas.

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[6] *See* U.S. Dep't of State, Annual Reports to Congress on PEPFAR, https://www.state.gov/annual-reports-to-congress-on-the-presidents-emergency-plan-for-aids-relief.

The government's assertion (at 31) that upholding the injunction would have "untenable consequences" for foreign aid more generally is similarly unsupported. Funding conditions involving "ideological commitments" like the Policy Requirement are exceedingly "rare." *AOSI*, 570 U.S. at 226 (Scalia, J., dissenting). As this Court has observed, that is likely because "such compulsion so plainly violates the Constitution." *Janus*, 138 S. Ct. at 2464. Indeed, the government identifies no other real-world context in which it has partnered with private entities on the condition that its partners not only espouse its view on a topic of public concern but also conform their own and all of their affiliates' activities to that professed view.

The government alludes (at 32) to the imagined possibility that foreign entities might create sham affiliations to usurp First Amendment rights, and it repeatedly denigrates respondents' networks as merely "claimed" affiliates. Pet. Br. 15, 17, 29, 31. This case, however, is not about new and unfamiliar entities attempting to secure rights through sham affiliations. This case concerns longstanding, reliable partners of the U.S. government who for the past seventeen years have helped to save millions of lives as part of the most successful global health program in history. Respondents are bona fide U.S. organizations with hard-earned reputations based on proven track records of successful global-health work; they operate through clearly identified affiliates in part because of petitioners' funding preferences and the requirements of foreign law; and they do so under a unified and carefully managed common public identity and voice that make the speech of one affiliate the speech of all affiliates. *Supra* pp. 5-9. The record is clear, and undisputed, on each score. These trusted organizations seek not to "bootstrap"

new entitlements onto this Court's 2013 decision, but to obtain complete relief from an unconstitutional condition the government has continued to impose despite this Court's admonition.

The government has many tools to ensure the effectiveness of its programs without violating the First Amendment. It already imposes rigorous screening and eligibility requirements for PEPFAR grants. *Supra* p. 9. It can and does reserve the right to monitor funding recipients' work and their compliance with federal law and to conscript respondents themselves to police the speech and activities of their affiliates to ensure compliance. *Supra* pp. 10-11. But it cannot exact a pledge of fealty to its preferred policy—an affirmation of belief that would be imputed to respondents for all purposes and activities, whether federally funded or not. Such a pledge "violates the First Amendment and cannot be sustained." *AOSI*, 570 U.S. at 221. The district court did not abuse its discretion in entering the permanent injunction to grant respondents full and final relief for that continuing violation.[7]

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[7] Upholding the injunction has no relevance to lower-court decisions rejecting challenges to restrictions on abortion-related advocacy by foreign NGOs that accept federal funding. *See* Pet. Br. 32 (citing *Center for Reproductive Law & Policy* v. *Bush*, 304 F.3d 183 (2d Cir. 2002); *Planned Parenthood Fed'n of Am., Inc.* v. *USAID*, 915 F.2d 59 (2d Cir. 1990); and *DKT Mem'l Fund Ltd.* v. *USAID*, 887 F.2d 275 (D.C. Cir. 1989)). As the court of appeals noted, none of those cases involved compelled speech, the risk of attribution and evident hypocrisy for "closely identified organizations," or any burden on the speech rights of domestic NGOs. Pet. App. 12a. *AOSI* appears to be sui generis in its combination of those features.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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