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 *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae* in important compelled-speech cases. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1 (1986).

"The right to speak and the right to refrain from speaking are complimentary components" of the broader right to freedom of speech. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The government is perfectly free to proselytize its own view on any issue. But for nonprofit corporations as well as individuals, "the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec.*, 475 U.S. at 16 (plurality op.). The Petitioners' view, if adopted, would deprive domestic charities with foreign affiliates of that constitutionally guaranteed choice.

SUMMARY OF ARGUMENT

This Court considered this case in *United States Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013) ("*AOSI*"), and held that the government could not compel a U.S.-based organization to

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[*] 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.

"explicitly oppos[e] prostitution and sex trafficking," 22 U.S.C. § 7631(f) (the "Policy Requirement"), as a condition to receiving federal funds. Leveraging funding to compel speech on matters beyond the narrow aims of the federal program itself violates the First Amendment. *AOSI*, 570 U.S. at 208, 214-21.

Petitioners now ask this Court to find that the Policy Requirement compelling speech, which this Court already found unconstitutional, can be enforced against a U.S. entity through its foreign affiliate even if that compulsion harms the U.S. entity. Contrary to Petitioners' insistence, the harm to the U.S. entity is not eliminated or diminished just because the government is compelling the U.S. entity's clearly identified foreign affiliates to parrot the government's message. Although legally distinct, the U.S.-based Respondents and their foreign affiliates are uniform: their goals and objectives are identical, they make interdependent and consistent decisions, and, critically, they appear to outsiders to be one organization bearing the "same name, logo, brand, and mission." *All. for Open Soc. Int'l, Inc., v. United States Agency for Int'l Dev.*, 911 F.3d 104, 108 (2d Cir. 2018). These organizations speak with one voice, and to force speech onto any part of the organization is to force speech—and any harm resulting from that compelled speech—onto the entire organization.

The harm this unconstitutional statute creates is exacerbated by the enormous amount of money at stake. As Petitioners acknowledge (Pet. Br. 4), this federal funding program is unprecedented, with $79.7 billion distributed since 2003. When, as here, it is

attached to a government-spending program of such magnitude—compelling all relevant actors to proclaim the government-sanctioned message as their own—a compelled-speech condition violates the Free Speech Clause of the First Amendment.

Petitioners try to avoid this result by re-casting the question here as whether the government can force foreign entities to speak as a condition to receiving federal funds. But there is no dispute over whether the First Amendment applies extra-territorially—it does not. Instead, the question here is whether the government can compel a U.S. entity to speak through its foreign affiliate even though the compelled speech harms the U.S. entity. While Petitioners might answer this question in the affirmative, such a position is untenable, as it would permit the government to achieve indirectly what the Constitution forbids it to accomplish directly.

Amicus The American Center for Law and Justice ("ACLJ") goes even further, arguing that this Court's decision in *AOSI* should be revisited on grounds that the "government can categorically prefer to give money to applicants who formally condemn inherently wrongful activity." ACLJ Br. 1. True enough, the Spending Clause grants Congress the power to impose conditions to ensure that federal funds are used for their intended purpose. Indeed, one such permissible eligibility requirement was imposed here. In a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), 22 U.S.C. § 7631(e), Congress conditioned the receipt of federal funds on the recipient's agreement not to promote prostitution

or human trafficking. That condition is *not* challenged here, and in fact, every Respondent has already agreed not to promote prostitution or human trafficking in order to receive federal funds under the Leadership Act.

But federal funding powers are not unfettered. *AOSI* correctly held that when the federal program empowers the government to compel a U.S. charity to *affirmatively speak* to receive funding—articulating a message that appears to be the entity's own and which goes beyond the scope of the government program—Congress has crossed the line from merely ensuring that federal funds are used for their intended purpose into abridging First Amendment rights. *AOSI*, 570 U.S. at 221.

What's more, under Petitioners' logic, Congress may dictate Respondents' private speech, forcing them to espouse the government's viewpoint as their own. Yet when the political tides shift, the Policy Requirement can swiftly change to the opposing view, requiring Respondents to publicly espouse a new and entirely inconsistent message. The First Amendment cannot abide such burdens on private expression.

This Court has never before given Congress carte blanche to violate 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 promote policies that do not involve the use of those federal funds. This Court should affirm the decision below.

ARGUMENT

I. THE POLICY REQUIREMENT'S SPEECH COMPULSION HARMS U.S. ENTITIES IN VIOLATION OF THE FIRST AMENDMENT.

The First Amendment prohibits Congress from using its spending powers to compel private speech that cannot be cabined within the funded governmental program. *See AOSI*, 570 U.S. at 221. That is particularly true when, as here, so large an amount of government funding is at stake.

As Petitioners acknowledge, the Leadership Act "authorizes *unprecedented* federal funding, establishing 'the *largest* international public health program of its kind *ever* created.'" Pet. Br. 4 (quoting 22 U.S.C. § 7601(29)) (emphasis added). Since 2003, Congress has thrice approved legislation authorizing more Leadership Act funds. To date, "the United States has committed 'a total of *$79.7 billion*'" to "the HIV/AIDS component of the Leadership Act." Pet. Br. 6-7 (quoting H.R. Rep. No. 1014, 115th Cong., 2d Sess. 6 (2018)) (emphasis added). When so much money is tied to a compelled-speech mandate, it distorts the marketplace of ideas and creates the risk that federal funding will chill or eradicate any viewpoint contrary to the government's prevailing view. This Court should not bless so extensive a governmental overreach.

Rather than identify any authority supporting this large-scale, government-speech mandate, Petitioners contend that while the government may not *directly* harm U.S. entities by compelling them to speak—given this Court's opinion in *AOSI*—it may

still *indirectly* harm U.S. entities by compelling their foreign affiliates to speak. But the First Amendment does not permit the government to do indirectly what it may not do directly. *See Elrod v. Burns*, 427 U.S. 347, 359 (1976); *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

Petitioners seek to circumvent these constitutional protections by focusing on the legal entity that is compelled to speak (a foreign affiliate), rather than the entity actually harmed by the compelled speech (a U.S. entity). Pet. Br. 28. While "distinct legal entities exercise distinct legal rights and responsibilities," *id.*, this broad statement does not limit a U.S. entity's ability to obtain redress for constitutional harms created by government-compelled speech.

In *Heffernan v. City of Paterson, New Jersey*, 136 S. Ct. 1412, 1418 (2016), this Court confirmed that the proper focus of any First Amendment analysis is the harm inflicted on the U.S. citizen. The question before the Court was whether an employer violated the First Amendment when it believed—albeit mistakenly—that an employee was engaged in protected political activity and demoted him based on that mistaken belief. *Id.* According to the employer, there could be no First Amendment violation because the employee did not *actually* engage in activity protected by the First Amendment. *Id.* at 1416. This Court disagreed. Rejecting the suggestion that it must focus on whether the employee engaged in a protected activity, the Court instead focused on the "harm" at issue. Because discharging or demoting an employee for a constitutionally protected reason discourages

others from "engaging in protected activities," that harm is not "diminished" simply because the employer was mistaken about the nature of the activity. *Id*. at 1419.

Where an entity is incorporated changes nothing. For example, in *Kraft General Foods, Inc. v. Iowa Department of Revenue & Finance*, 505 U.S. 71 (1992), a corporate taxpayer argued that Iowa's income tax scheme violated the Constitution's foreign commerce clause because it permitted deductions for dividends received from domestic subsidiaries but did not permit deductions for dividends received from foreign subsidiaries. The Iowa Department of Revenue and Finance argued that though the tax discriminated against foreign commerce, "a taxpayer could avoid that discrimination by changing the domicile of the corporations through which it conducts its business." *Id*. at 78. This Court disagreed, holding that the mere fact that a company can avoid a constitutional harm by conducting "its foreign business through domestic subsidiaries instead of foreign subsidiaries" cannot salvage the unconstitutional tax scheme. *Id.* at 77-78.

When examining whether a statute compels speech in violation of the First Amendment, this Court thus focuses on the constitutional harm befalling the U.S. entity, and an impermissible harm cannot be tolerated simply because the U.S. entity has incorporated its affiliates overseas.

Here, Respondents and their close foreign affiliates act as one charity. *See* Resp. Br. 6-9; 34. Their goals and objectives are identical, and they work seamlessly with one another in carrying out the charity's mission. *Id*. They share the "same name,

logo, brand, and mission, even though they are distinct legal entities incorporated in various jurisdictions worldwide." *All. for Open Soc. Int'l, Inc.*, 911 F.3d at 108. Thus, when the government compels one part of the charity to speak, any harm caused by that compulsion is suffered by the charity as a whole.

Moreover, as the Court noted in *AOSI*, unlike compelled silence, the Policy Requirement compels speech "that by its nature cannot be confined within the scope of the Government program." *AOSI*, 570 U.S. at 221. This distinction is critical, as the Court focused in *Rust v. Sullivan*, 500 U.S. 173, 196-97 (1991), on the fact that the speech prohibitions 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. The same is not true here: Where an entity is forced to express the government's speech as its own, it cannot cabin that speech to any program or even to any nation. *See* Resp. Br. 2, 15-16, 17, 22, 32.

Finally, as the Court acknowledged in *AOSI*, Respondents' purpose is to "combat[] HIV/AIDS *overseas*," *AOSI*, 570 U.S. at 210 (emphasis added)—a purpose that is undermined when the U.S. entity is permitted to say one thing (or nothing) while its foreign affiliate is compelled to affirmatively utter the government's chosen viewpoint. This harm is not reduced just because it is inflicted indirectly through the U.S.-based entity's foreign affiliate. If anything, the harm is exacerbated by the extent of the government's compelled-speech program, which is unprecedented in size. The right to be free from such large-scale, government-dictated speech must be zealously protected, lest all relevant actors effectively

be reduced to one government spokesperson able to express just one viewpoint—a result that does violence to the First Amendment.

II. PETITIONERS' REMINDER THAT FOREIGN AFFILIATES LACK CONSTITUTIONAL RIGHTS IS BESIDE THE POINT.

Petitioners note that the foreign-based affiliates of U.S. organizations lack constitutional rights. Pet. Br. 23-27. We agree. But here "[t]he nature of the affiliate is not relevant," as the District Court explained, because *AOSI* does not protect "any right held by the affiliate." *All. for Open Soc. Int'l, Inc., v. United States Agency for Int'l Dev.*, 106 F. Supp. 3d 355, 361 (S.D.N.Y. 2015) (citation omitted). "Rather, it is the *domestic* NGO's constitutional right that the Court found is violated when the Government forces it to choose between forced speech and paying the price of evident hypocrisy. That constitutional violation is the same regardless of the nature of the affiliate." *Id.* (emphasis in original). Petitioners vigorously challenge the District Court's determination, but their arguments are misguided and their cited cases do not support their position.

Petitioners rely on *Braswell v. United States*, 487 U.S. 99 (1988), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), but neither of those cases involved a domestic citizen's constitutional right being violated as a result of government conduct. Pet. Br. 23-25. In *Braswell*, the Court held that a custodian of corporate records is merely a corporate agent, who could not claim a Fifth Amendment privilege against self-incrimination because corporations possess no such privilege. 487 U.S. at 110. In *Verdugo-Urquidez*,

the Court held that the Fourth Amendment did not apply to the search and seizure by U.S. agents of property owned by a nonresident alien and located in a foreign country with no domestic affiliation. 494 U.S. at 261. Neither of these cases is relevant here, when the Court has already determined that U.S. entities are constitutionally harmed by the compelled speech, and the only question is whether the government may inflict this harm indirectly, by forcing them to speak against their will through their foreign affiliates. By citing these cases, Petitioners improperly conflate the undisputed fact that foreign-based aliens lack constitutional rights, with the notion that the government may do indirectly what the Constitution prohibits it from doing directly.

Petitioners' reliance on *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904), is likewise inapt. Pet. Br. 25. In that case, the petitioner was a self-proclaimed anarchist and British citizen who faced deportation for unlawfully entering the country and for violating a statute that excluded aliens who were anarchists or advocated for the overthrow of the government by force or violence. *Id.* at 294. Although the petitioner argued that the First Amendment protected his conduct, the Court disagreed, ruling that the Constitution creates "the power to exclude" and "those who are excluded," including foreign aliens such as the petitioner, "c[ould not] assert the rights" of a "land to which they do not belong as citizens or otherwise." *Id*. at 292. Here, however, no one disputes that foreign affiliates lack constitutional rights. The only question is whether the government may harm a U.S. entity by compelling its foreign affiliate to speak.

The Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), also cited by Petitioners, is equally inapposite. Pet. Br. 25. In *Mandel*, the petitioner asked the Court to consider whether the U.S. government's decision to deny an alien scholar's visa violated the "First Amendment rights of American scholars and students who had invited him" to attend academic meetings. *Id.* at 754 (emphasis added). But the Court declined to reach this question, instead dismissing the case on well-settled principles of consular non-reviewability. *Id.* at 769-70 ("What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address or decide in this case.").

Petitioners' reliance on *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), is no less misplaced. Pet. Br. 22. There, the Court addressed Congress's power to condition federal funding on a state's agreement to enact preferred federal policies. The Court considered whether Congress could condition five percent of federal highway funds on a state's adopting a uniform drinking age, even though the Twenty-First Amendment expressly conferred upon the states the right to set that age. *Id.* But that case says nothing about whether Congress may condition the receipt of federal funding on the receipt of a citizen's waiver of his clearly established constitutional rights.

In sum, Petitioners' suggestion that the government may compel a U.S. entity to speak through its foreign affiliate, even when that compelled speech unconstitutionally harms the U.S. entity, is unsupported by the cases Petitioners cite. While

Petitioners prefer to focus on *where* affiliates are incorporated, that is irrelevant.

III. *AOSI* CORRECTLY HELD THAT CONGRESS HAS LIMITED AUTHORITY TO BURDEN FIRST AMENDMENT RIGHTS AS A CONDITION TO RECEIVING FUNDS.

As shown, Petitioners erroneously argue that the constitutional harm to U.S. citizens caused by government-compelled speech is cured when inflicted indirectly through a U.S. entity's foreign affiliate. Pet. Br. 21-32. But *amicus* ACLJ goes even further, arguing that this Court's decision in *AOSI* should be revisited. ACLJ Br.1, 3. ACLJ is wrong.

To be sure, Congress may decide 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*, 500 U.S. at 193. Congress is also "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 also includes the ability to prohibit speech at cross purposes with Congress's intent when the speech restriction is within the scope of the government-funded project. *Id.* at 196. *Rust* thus validated speech restrictions ensuring that government funds were not spent to advance an aim that Congress had chosen not to fund.

The same principle applies to categories of speech, such as lobbying. In *Regan v. Taxation With Representation of Washington,* 461 U.S. 540 (1983), the Court upheld the denial of tax deductions under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), 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. And because the appellee 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.

Nor is there any dispute that "[t]he First Amendment does not mandate a viewpoint-neutral government," or that once the government decides to fund a program, the government is not required to enlist support from entities "who oppose or do not support" the goals of that program. *AOSI*, 570 U.S. at 221 (Scalia, dissenting). So if Hamas were a U.S. organization with constitutional rights, it could be disqualified from government-funded anti-terrorism programs because Hamas does not support anti-terrorism goals. *Id.* at 222. For the same reason, an entity that opposes marijuana bans could be disqualified from participating in a government-funded anti-drug program. ACLJ Br. 5.

The same is true here. Congress can—and did—achieve its goal of funding only those programs it wished to fund by requiring, as a funding condition, that all funded entities *refrain* from using federal funds to promote prostitution or sex trafficking. Respondents do not challenge this "eligibility" criterion. Resp. Br. 10 ("Respondents have scrupulously complied with [22 U.S.C. § 7631(e)] and have never challenged it in this litigation."). Indeed, as a necessary funding condition, each Respondent has already satisfied this requirement.

But the government's ability to impose eligibility criteria is not unfettered. When, as here, Congress requires, directly or indirectly, an entity to *affirmatively speak* to receive funding—articulating a message that appears to be the entity's own and which by definition cannot be confined within the narrow scope of the government program—Congress has not simply imposed permissible eligibility criteria but has instead run afoul of the First Amendment. *AOSI*, 570 U.S. at 218. The critical distinction is between, on the one hand, eligibility criteria that merely ensure the entity will use federal funds for their intended purpose, and, on the other hand, a requirement that goes beyond that narrow purpose and compels the entity, through its affiliates, to affirmatively act as the government's mouthpiece. While Congress can constitutionally enforce the former, it may not constitutionally enforce the latter.

Amicus ACLJ suggests that if Congress cannot compel speech then it will lose its ability to ensure that federal funds are used for their intended purpose. ACLJ Br. 5-6. This a false choice. As *AOSI* aptly noted,

an *unchallenged* provision of the Leadership Act already "ensures that federal funds will not be used for [the] prohibited purpose[]" of promoting prostitution and human trafficking, and the Policy Requirement "therefore must be doing something more," namely, "compelling a grant recipient to adopt a particular belief as a condition of funding." *AOSI*, 570 U.S. at 218-19.

Amicus ACLJ also tries to distinguish between "generally available public benefits" (which, it says, cannot be burdened with compelled-speech requirements) and the imposition of "eligibility criteria in a discretionary program affecting a small, voluntary pool of applicants" (which, according to ACLJ, can be burdened with compelled-speech requirements). ACLJ Br. 14-17. Yet the text of the First Amendment admits of no such distinction, and that principle cannot be derived from the Court's holdings. All government benefits—from tax breaks to subsidies to the creation of government jobs—are fairly described as both "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 what logically connects the condition to the program, not arbitrary factors such as the number of applicants affected or how "discretionary" a court considers a program to be. *AOSI* was thus correctly decided, and no reason exists to revisit that decision.

Simply put, adopting *amicus* ACLJ's arguments would permit Congress 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. This 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." *Legal Serv's Corp. v. Velazquez*, 531 U.S. 533, 547-48 (2001).

CONCLUSION

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

Respectfully submitted,

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