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.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

Statutes—Continued: Page

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Respondents acknowledge (Br. in Opp. 6, 27-29) that the foreign entities with which they have some affiliation are "legally separate" and have no constitutional rights. Respondents instead assert (*id.* at 25) that their "own First Amendment rights" preclude application of a federal statute to those legally distinct overseas entities. Respondents' sole purported authority for that "startling" proposition is the Court's prior decision in this case. Pet. App. 14a (Straub, J., dissenting); see 570 U.S. 205. But this Court did not address the question presented here, much less silently decree that respondents and legally separate foreign organizations with which they have some affiliation must be treated as one. Respondents' attempt to bootstrap their prior victory with respect to their own rights into a worldwide exemption for legally distinct foreign organizations thus

reflects a severe misreading of this Court's decision. And the divided court of appeals' acceptance of that misreading invalidates a provision of an Act of Congress enacted under its core spending power that affects billions of dollars in one of the Nation's most significant foreign-aid programs. This Court's review is again warranted.

A. The Court Of Appeals Erroneously Invalidated A Significant Application Of An Act of Congress On Constitutional Grounds

1. Congress's spending power allows it both to allocate federal funds and to "impose limits on the use of such funds." 570 U.S. at 213. The anti-prostitution policy requirement of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 22 U.S.C. 7631(f), is such a limit. This Court held in 2013 that Section 7631(f) cannot be imposed on a recipient at the expense of that recipient's constitutional rights. 570 U.S. at 218-219. Respondents acknowledge, however, that foreign entities have no applicable constitutional rights, and thus cannot invoke the unconstitutional-conditions doctrine. Br. in Opp. 3; see Pet. 16. Respondents further acknowledge (Br. in Opp. 6, 23, 27-29) that the foreign entities at issue here are "legally separate," and that respondents may not "even have standing" to invoke their interests. The result of those concessions is straightforward: When the government grants Leadership Act funds to foreign recipients, they must either comply with the condition in Section 7631(f) or "decline the funds." 570 U.S. at 214.

Respondents contend that enforcing Section 7631(f) against legally separate foreign entities with which they have some association violates "respondents' *own* First Amendment rights." Br. in Opp. 25 (emphasis added);

see Pet. App. 10a. That contention lacks merit. "A basic tenet of American corporate law is that" distinct legal entities exercise distinct legal rights and responsibilities. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003); see, *e.g.*, *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 188 (1982); Pet. 17. Such legal separation brings both benefits and burdens. As legally distinct entities, respondents generally are not liable for wrongful conduct by foreign entities with which they have an affiliation. By the same token, enforcing Section 7631(f) against such entities (*i.e.*, "CARE India") does not implicate the legal rights of respondents themselves (*i.e.*, "CARE"), any more than enforcement of other laws (*e.g.*, India's property or tax laws) against legally distinct foreign entities implicates respondents' own legal rights. Br. in Opp. 7-8. Respondents' reliance on their own asserted constitutional rights creates no exception to that principle. See *Daimler AG* v. *Bauman*, 571 U.S. 117, 134-136 (2014). Indeed, this Court relied on the distinction between corporate entities in its foundational decision in *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983). *Id.* at 544; cf. *Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 144-146 (2011) (relying on corporate separation in determining the "maker of a statement" under the securities laws).

Respondents alternatively contend that they and the "legally separate" foreign entities at issue, Br. in Opp. 6, 27-29, are actually "the same," *id.* at 27; see Pet. App. 11a. No support exists for such a constructive merger. There is a well-established mechanism for disregarding formal distinctions between legal entities: "piercing the corporate veil," which is a "rare exception, applied in

the case of fraud or certain other exceptional circumstances." *Dole*, 538 U.S. at 475. In concluding that respondents and the legally distinct foreign entities at issue here should be treated as one, the court of appeals observed that they "share their names, logos, and brands," and "present a unified front." Pet. App. 11a; see Br. in Opp. 7 (noting that respondents and foreign entities use the "same font, style, and colors"). But that does not come close to the "extraordinary circumstances, such as where the corporate parent excessively dominates its subsidiary in such a way as to make it a mere instrumentality of the parent," typically required to override the legal separation between distinct entities. *Balintulo* v. *Ford Motor Co.*, 796 F.3d 160, 168 (2d Cir. 2015) (citation and internal quotation marks omitted), cert. denied, 136 S. Ct. 2485 (2016); see *Dole*, 538 U.S. at 475. Respondents suggest (Br. in Opp. 27) that the court of appeals conducted an "application of law to fact." But the court did not purport to apply any law in pronouncing that foreign entities with which respondents have an affiliation "are not just affiliates—they are homogenous." Pet. App. 11a. Neither respondents nor the court identified any case in which legally distinct entities were treated as one under even roughly comparable circumstances. See *id.* at 45a (Straub, J., dissenting).

2. Respondents' position (like the court of appeals') ultimately comes down to the premise that this Court "already resolved the only constitutional claim in this case" in its prior decision. Br. in Opp. 22; see *id.* at 2-4, 22-25, 35; Pet. App. 7a (stating that this Court "considered th[e] question" presented and "resolved it in [respondents'] favor"). That understanding fundamentally misreads this Court's prior decision. See Pet. 20-25.

As an initial matter, this Court plainly did not *expressly* hold that the First Amendment bars application of Section 7631(f) to both respondents and legally separate foreign entities with which they have some connection. To the contrary, the Court described respondents as "a group of *domestic* organizations" that receive Leadership Act funds, and extensively discussed Leadership Act "funding recipients" as distinct from potential "affiliates." 570 U.S. at 210-211, 219 (emphasis added). Respondents observe (Br. in Opp. 2, 4, 16, 34) that the Court stated in its final paragraph that Section 7631(f) "violates the First Amendment and cannot be sustained." 570 U.S. at 221. But nothing in that summation suggests that it extended beyond the activities of the "domestic" funding recipients themselves, *id.* at 210, so as to preclude application of Section 7631(f) to foreign non-parties that lack constitutional rights. If the Court intended such a drastic and unprecedented extension, it surely would have said so.

The history and context of the litigation remove any doubt about the scope of the Court's prior decision. In the decision then under review, the Second Circuit affirmed the "as applied" injunction entered by the district court. 651 F.3d 218, 225; see 430 F. Supp. 2d 222, 239 (district court resolving only respondents' "as applied challenges"). The government's petition stated that the courts below had "effectively enjoin[ed] the operation of Section 7631(f) *with respect to domestic organizations*." 12-10 Pet. 12 (emphasis added); see 12-10 Cert. Reply Br. 4 (similar). And respondents' merits brief in this Court likewise stated that "this case

presents an as-applied challenge to the Policy Requirement." 12-10 Resp. Br. 42 n.11.[1]

Respondents, moreover, repeatedly emphasized their status as "U.S.-based" recipients of Leadership Act funds. 12-10 Resp. Br. 4-5, 10; 12-10 Br. in Opp. 5. The distinction between such domestic recipients and foreign-based recipients has a firm foundation in the law. See, *e.g.*, *Center for Reprod. Law & Policy* v. *Bush*, 304 F.3d 183, 188 (2d Cir. 2002) (Sotomayor, J.) (*CRLP*). Indeed, the Second Circuit had rested its decision on the difference between restrictions "on the First Amendment activities of *foreign* NGOs receiving U.S. government funds," and respondents' "challenge * * * to the impact of the Policy Requirement on *domestic* NGOs." 651 F.3d at 238; see 430 F. Supp. 2d at 266-267 & n.37 (similar reasoning by the district court). And in this Court, respondents appended to their brief in opposition an initial determination by the Office of Legal Counsel that Section 7631(f) could be enforced against foreign recipients but not domestic recipients, 12-10 Br. in Opp. App. 1a-2a, and pressed that point in their merits briefing, see 12-10 Resp. Br. 3, 13, 44. Given the attention devoted to the matter, it is implausible that this

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[1] Respondents identify (Br. in Opp. 13) one statement by the government characterizing the Second Circuit's decision as a "facial invalidation" of Section 7631(f). That statement—which appears in a parenthetical in a footnote addressing an alternative argument in a certiorari-stage filing, see 12-10 Cert. Reply Br. 5 n.1—directly follows a paragraph in which the government explained that "the decision below effectively enjoins the operation of Section 7631(f) *with respect to domestic organizations*," *id.* at 4 (emphasis added). As that explanation indicates (and as explained above), the parties and the courts all recognized that this case involved only an as-applied challenge.

Court rendered that critical distinction meaningless without so much as a word.[2]

Respondents rely most heavily (Br. in Opp. 25-26) on the paragraph of this Court's opinion explaining why the possibility of working with affiliates did not allow the government to apply Section 7631(f) to respondents. 570 U.S. at 219-220. In particular, respondents observe (Br. in Opp. 26) that the Court considered "the implications of allowing respondents to set up affiliates that would be subject to the Policy Requirement while respondents remained unbound." That contention, however, overlooks the critical distinction between being "unbound" by Section 7631(f) as the Court then analyzed it and being unbound by Section 7631(f) now. *Ibid.* Before this Court's decision, the only way for respondents to be "unbound" by Section 7631(f), *ibid.*, was to "decline funding," 570 U.S. at 219. Now, as a result of the Court's decision, respondents no longer face that choice; they are unbound by the condition in Section 7631(f) *and* free to accept funds. Respondents thus received exactly the relief they sought.

They did not, however, receive more. In concluding that working with affiliates was not "sufficient" to permit enforcement of Section 7631(f) against respondents

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[2] Respondents observe (Br. in Opp. 15-16) that several questions at oral argument explored potential difficulties in setting up affiliates in foreign countries. See 12-10 Oral Arg. Tr. 18, 27. Whatever inferences may properly be drawn from oral-argument questions, those questions addressed practical constraints respondents might experience in setting up new affiliates abroad to take advantage of the guidelines for separate entities, not the application of Section 7631(f) directly to existing (or even new) legally separate entities abroad. In fact, the premise of the questions appeared to be that Section 7631(f) *would* apply to a separately incorporated foreign entity that received Leadership Act funding. See *id.* at 18.

themselves, 570 U.S. at 219, the Court did not create a further, affirmative entitlement for respondents to have foreign affiliates who are also exempt from Section 7631(f). Nor did the Court create a freestanding First Amendment right to avoid perceived hypocrisy in maintaining connections with foreign entities. See Pet. 21-22. Respondents' overreading is bootstrapping on a global scale, and it has no basis in this Court's decision.

Respondents' logic also defies this Court's other funding-condition precedents. As explained in the petition (at 18-19), those decisions held that an entity with First Amendment rights must be allowed to express its views outside the funded program, either by itself or through an affiliate. See *Rust* v. *Sullivan*, 500 U.S. 173, 197 (1991); *FCC* v. *League of Women Voters*, 468 U.S. 364, 400 (1984); *Regan*, 461 U.S. at 544-545. But no case has held that the First Amendment requires that an entity both be relieved of a funding condition *and* have affiliates who are also free of the funding condition.

3. Finally, respondents observe (Br. in Opp. 28-29) that, "as a practical matter," they sometimes subgrant funds to "legally separate" foreign affiliates, and that in such cases they "must impose the Policy Requirement on [their] own affiliate" and "monitor the affiliate's compliance." Respondents assert (*id.* at 29) that this scenario presents "precisely the same choice they" had before this Court's 2013 decision—to "forgo the funds or accept the funds subject to the Policy Requirement and the price of evident hypocrisy." That is mistaken. There is no hypocrisy in enforcing against a subgrantee, whether affiliated or unaffiliated, a requirement to which that subgrantee is legally subject, even if the respondent organization is not itself subject to the same restriction. Such a scenario could arise as a result of a

broad array of foreign or U.S. restrictions on a foreign organization operating in a foreign country.

Moreover, respondents now have an obvious option that they did not have before—to accept Leadership Act funds without complying with Section 7631(f) and then use those funds themselves. And that is not all. Other options include issuing a disclaimer that the foreign entity does not speak for the domestic entity or providing funding for the foreign entity from other sources. Those solutions are eminently workable and "practical," Br. in Opp. 28, particularly given the apparent absence of any real-world confusion about respondents' position on prostitution in the 16 years that Section 7631(f) has continuously been applied to foreign entities with which they have some affiliation, see Pet. 24, 28.

B. This Court's Review Is Warranted

By holding a significant application of an Act of Congress unconstitutional, the decision below meets a paradigmatic criterion for this Court's review. See Pet. 25-26. Respondents seek (Br. in Opp. 1-2, 25-35) to portray the decision as simply imposing a remedy to enforce this Court's prior holding. But that just circles back to the central dispute about what the Court decided. See pp. 4-8, *supra*. Respondents' discussion of the abuse-of-discretion standard of review (Br. in Opp. 3-4, 24-25) is similarly unavailing. A court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1168 n.3 (2017) (citation omitted), which is precisely what the courts below did here, see pp. 3-8, *supra*. Indeed, respondents do not dispute that, if the courts below extended this Court's decision by holding that Section 7631(f) cannot constitutionally be applied to foreign en-

tities with which they have some association, that holding would amount to an as-applied invalidation of a federal statute of the kind this Court frequently reviews. See, *e.g.*, *United States* v. *Haymond*, 139 S. Ct. 2369, 2373 (2019) (opinion of Gorsuch, J.).

Respondents suggest in places (Br. in Opp. 3, 32) that the question presented is not important. But cf. *id.* at 27 (describing the injunction as "extremely important"). They do not, however, dispute that the question affects billions of dollars in federal funds, and will only grow in importance as the government increases the percentage of affected funding that goes to foreign implementing recipients. See Pet. 27; Br. in Opp. 6. And many of respondents' arguments against the importance of the question presented, see, *e.g.*, Br. in Opp. 34 ("the Policy Requirement impedes, rather than advances, [public-health] goals"), simply amount to policy disagreements with Congress, see 22 U.S.C. 7601(23) ("Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices."). Respondents are of course free to advocate for legislative change, but their disagreement with Congress does not render unconstitutional the application of Section 7631(f) to the activities of foreign entities in foreign countries simply because they have some association with a U.S. entity. Nor does it render the court of appeals' decision holding that application of Section 7631(f) unconstitutional any less worthy of this Court's review.

In any event, global HIV/AIDS relief efforts under the Leadership Act have been a historic diplomatic and public-health success. See Pet. 6. Leaving in place the court of appeals' decision invalidating Section 7631(f)

would undermine a policy that Congress considered critical to the strategy to fight global HIV/AIDS, see 22 U.S.C. 7611(a)(12) (directing that "the reduction of HIV/AIDS behavioral risks" must be "a priority of all prevention efforts"); 22 U.S.C. 7601(23) (finding that the "sex industry, the trafficking of individuals into such industry, and sexual violence are * * * causes of and factors in the spread of the HIV/AIDS epidemic"), that has helped save lives around the world for the past 16 years. The court of appeals' decision also nullifies a core exercise of Congress's spending power in pursuit of foreign-affairs objectives of the kind that courts have long approved. See *Planned Parenthood Fed. of Am., Inc.* v. *Agency for Int'l Dev.*, 915 F.2d 59, 65-66 (2d Cir. 1990) (upholding the Mexico City policy against a similar constitutional challenge), cert. denied, 500 U.S. 952 (1991); *CRLP*, 304 F.3d at 190-191 (same); Pet. 12. At a minimum, this Court should not allow a lower court to take such a significant step without granting review.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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