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 a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* CURRENT AND FORMER MEMBERS OF CONGRESS SUPPORTING RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are current and former Representatives, Senators, and Senate Leaders who were instrumental in the development, drafting, and passage of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Act"), Pub. L. No. 108–25, 117 Stat. 711. *Amici* have a strong interest in ensuring that the Court has accurate information about Congress's objectives and intent in enacting and reauthorizing the Act, including the "Policy Requirement" at issue. See 22 U.S.C. § 7631(f). Together with other legislators, *amici* submitted a brief on this topic last time this case was before the Court. See Brief of Certain Current and Former Members of Congress as *Amici Curiae* in Support of Respondents, *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.* (*AOSI*), 570 U.S. 205 (2013) (No. 12-10), 2013 WL 1399371.

Thomas A. Daschle was a Democratic Senator from 1987 to 2005, the Senate Majority Leader from 2001 to 2003, and the Senate Minority Leader from 1995 to 2001 and 2003 to 2005. Senator Daschle played an integral role in the effort to pass the Act in the Senate. Since leaving Congress, Senator Daschle has continued to distinguish himself as a leader and expert on domestic and global health issues. In 2012, he was named a Co-Chair of the International Advisory Board of the Center for the Church and Global AIDS.

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[1] No counsel for any party authored this brief in whole or in part, and no other entity or person made any monetary contribution toward the preparation and submission of this brief. The parties have consenting to the filing of this brief.

William H. Frist, M.D., a nationally recognized heart and lung transplant surgeon, was a Republican Senator from 1995 to 2007 and the Senate Majority Leader from 2003 to 2007. Senator Frist was one of the leaders of the conception, development, and passage of the Act in the Senate. He spoke on the Senate floor in 2003 in support of the Act and the need to support organizations that work directly with sex workers as part of an effective HIV/AIDS prevention strategy. Senator Frist's longstanding dedication to HIV/AIDS and other global health issues has continued since his departure from the Senate.

James Kolbe was a Republican Member of the House of Representatives from 1985 to 2007. During his final six years in the House, Congressman Kolbe was the Chairman of the House Appropriations Committee Subcommittee on Foreign Operations, Export Financing, and Related Programs (now known as the Subcommittee on State, Foreign Operations, and Related Programs), which oversees programs that are funded under the Act. He is a recipient of the George Marshall Award for Distinguished Service from the United States Agency for International Development.

Barbara Lee is a Democratic Member of the House of Representatives. Since becoming a member in 1998, Congresswoman Lee has established herself as one of the most committed leaders in the fight against HIV/AIDS. She has authored or co-authored every major piece of legislation dealing with global HIV/AIDS issues since she was elected to Congress, including the Act.

Nita M. Lowey has been a Democratic Member of the House of Representatives since 1989. She is the Chairwoman of the House Appropriations Committee and its Subcommittee on State, Foreign Operations,

and Related Programs, which oversees programs funded under the Act. Chairwoman Lowey was Chair of the Subcommittee on State, Foreign Operations, and Related Programs in 2008, when the reauthorization of the Act was passed. She has been and remains a strong advocate for global health and development, including the United States' global efforts to save the lives of people affected by HIV/AIDS and other deadly diseases.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court held in 2013 that the Policy Requirement—which requires organizations to adopt policies explicitly opposing prostitution to receive federal funding for anti-HIV/AIDS programs—violates the First Amendment. *AOSI*, 570 U.S. at 221. But Petitioners have continued enforcing that requirement against Respondents' legally separate but practically indistinguishable foreign affiliates. In now defending their refusal to abide by the Court's ruling, Petitioners mischaracterize the Policy Requirement's role in the statutory scheme. As current and former legislative leaders, *amici* write to correct those mischaracterizations, and to express their surprise and disappointment at the government's nearly two-decade crusade to enforce a provision that every court at every level has held to violate the Constitution.

First, Petitioners suggest that a requirement that private organizations make an anti-prostitution pledge to the government is a necessary part of the Leadership Act's overall strategy to fight HIV/AIDS. But the Act focuses on education and counseling to accomplish these objectives, and avoids public condemnation of prostitution—a fact evident in the structure of the Policy Requirement itself, which pre-

vents it from playing any role in the primary strategies that Congress has chosen. Indeed, Congress was rightly concerned that publicly condemning prostitution would impede recipients' work with affected communities, and thus removed language that would called for the "eradication" of prostitution. Likewise, Congress's decision to exempt the world's largest public-health agencies from the Policy Requirement underscores that the Requirement is not a central part of the Act's scheme.

Second, Petitioners' continued enforcement of the Policy Requirement offends the separation of powers. Petitioners' cramped reading of this Court's 2013 decision would render that ruling a nullity in practical effect. And their defense of that reading relies on a distinction between domestic and foreign entities that Congress did not intend. It is evident from the Act's text that Congress drew no distinction based on the nationality of the funding recipient, and even more evident from this Court's reasoning that such a distinction makes no difference to (1) the harm that requirement inflicts on U.S.-based organizations, or (2) this Court's prior determination of its unconstitutionality. The executive may not evade this Court's decisions in this way, and it may not gerrymander congressional enactments to enforce a regime that Congress would never have adopted.

ARGUMENT

I. THE POLICY REQUIREMENT IS NOT A KEY PART OF THE ACT'S ANTI-HIV/AIDS STRATEGY.

Petitioners contend that the Policy Requirement reflects "Congress's broader strategic judgment" that a public anti-prostitution pledge by recipient organizations is "necessary . . . to fight HIV/AIDS." Pet. Br.

39–40. That is not correct. The Act entails a comprehensive set of hands-on strategies to prevent transmission of HIV/AIDS and to provide treatment and care for affected people and communities. When the Act addresses prostitution, it reflects Congress's view that education and counseling—not condemnation or public opposition—are the best tools to do so. Moreover, this choice tracks the Policy Requirement itself, which by its own terms demands that recipients make a pledge to the government, not that they publicize their pledge to others to alter behavior.

A. Congress Addressed Prostitution Through Education And Counseling, Not Express Condemnation.

The Act's groundbreaking anti-HIV/AIDS measures reflect Congress's determination that "HIV/AIDS has assumed pandemic proportions, spreading . . . to all corners of the world, and leaving an unprecedented path of death and devastation." 22 U.S.C. § 7601(1). The disease "threatens personal security," "undermines the economic security of a country and individual businesses," "destabilizes communities," "weakens the defenses of countries," and "poses a serious security issue for the international community." *Id.* § 7601(6)–(10). Recognizing that this "crisis demands a comprehensive, long-term, international response," *id.* § 7601(21), Congress passed and the President signed the Act to "launch[]" the "largest single upfront commitment in history for an international public health initiative involving a specific disease." *Remarks on Signing the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003*, 1 Pub. Papers 541, 541 (May 27, 2003), *available at* http://2001-2009.state.gov/p/af/rls/74868.htm. The Act committed "unprecedented resources" to this

"lifesaving" initiative. *Id.* at 543–44; see also 22 U.S.C. § 7671(a).

Congress determined that one aspect of the Act's wide-ranging "prevention" strategy would be to prioritize "the reduction of HIV/AIDS behavioral risks," including prostitution. 22 U.S.C. § 7611(a)(12). The most effective way to accomplish this reduction is through education and counseling, including: (1) "educating men and boys about the risks of procuring sex commercially and about the need to end violent behavior toward women and girls"; (2) "encouraging the correct and consistent use" of contraceptives; (3) "supporting comprehensive programs to promote alternative livelihoods, safety, and social reintegration strategies for commercial sex workers and their families"; (4) "promoting the delay of sexual debut and the reduction of multiple concurrent sexual partners"; and (5) "promoting abstinence from sexual activity and encouraging monogamy and faithfulness." *Id.* § 7611(a)(12)(A), (B), (C), (F), & (H). Although these education and counseling strategies include "encouraging" and "promoting" lower-risk behaviors and lifestyles, they do not include announcing explicit opposition to prostitution.

This approach has a compelling justification. Congress understood that an effective HIV/AIDS-fighting strategy requires not only collaboration with foreign governments and organizations, but also efforts by certain organizations to work directly with sex workers. These relationships require trust. As legislators emphasized during the 2003 Congressional debates:

> There are organizations who work directly with commercial sex workers and women who have been the victims of trafficking, to educate them about HIV/AIDS, to counsel them to get tested, to help them escape if they are being held

> against their will, and to provide them with condoms to protect themselves from infection. This work is not easy. It can also be dangerous. *It requires a relationship of trust between the organizations and the women who need protection.*
>
> . . . [W]e need to be able to support these organizations.

149 Cong. Rec. S6407, S6457 (daily ed. May 15, 2003) (statement of Sen. Leahy) (emphasis added). See also *id.* (statement of Sen. Frist, responding to Sen. Leahy) ("I agree that these organizations who work with prostitutes and women who are the victims of trafficking play an important role in preventing the spread of HIV/AIDS. We need to support these organizations . . . .").

Congress also recognized that a policy explicitly opposing prostitution could impede this vital collaboration and outreach. Such a policy may well (1) offend host nations, organizations, and groups that funding recipients seek to influence and help; (2) deter funding recipients from providing (or even discussing) effective treatment or prevention programs for people in this high-risk group; (3) cause those people to feel stigmatized and deter them from using available treatment and prevention programs. See, *e.g.*, Joint Appendix at 882, 884 ¶¶ 23, 26, *All. for Open Soc'y Int'l, Inc.* v. *U.S. Agency for Int'l Dev.*, 651 F.3d 218 (2d Cir. 2011) (No. 08-4917); *id.* at 847–48 ¶ 25. Indeed, experience bore out these concerns; the Policy Requirement "reportedly had the unintended consequence of scaring grantees away from doing effective outreach programs for sex workers." 154 Cong. Rec. H7061, H7120 (daily ed. July 24, 2008) (statement of Rep. Waxman).

To be sure, Congress understood that education and counseling cannot address violence and coercion, because "[v]ictims of coercive sexual encounters do not get to make choices about their sexual activities." 22 U.S.C. § 7601(23). Thus, the Act requires (1) "promoting cooperation with law enforcement to prosecute offenders of trafficking, rape, and sexual assault crimes with the goal of eliminating such crimes," and (2) "working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children." *Id.* § 7611(a)(12)(I) & (J).

By contrast, the Act does not require efforts to "prosecute" or "eliminate" non-violent, non-coercive prostitution. In fact, when it reauthorized the Act in 2008, Congress *removed* a provision explicitly making "eradicating prostitution" part of the Act's strategy for "the reduction of HIV/AIDS behavioral risks." *Id.* § 7611(a)(4) (2006); see Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, tit. I, sec. 101, § 7611(a), 122 Stat. 2918, 2923–24. These 2008 amendments made "important adjustments based on lessons learned over the past 5 years." 154 Cong. Rec. S1719, S1742 (daily ed. Mar. 7, 2008) (statement of Sen. Biden); see also *Various Bills and Resolutions: Markup Before the H. Comm. on Foreign Affairs*, Serial No. 110-158, 110th Cong. 206–07 (2008) (statement of Rep. Berman) ("We also have 5 years of experience under our belts. We know what works and what does not."). By making this change, Congress confirmed its intent to use education and counseling to address prostitution not involving violence or coercion.

Even so, Petitioners rely heavily on this congressional finding:

> 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. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic. One in nine South Africans is living with AIDS, and sexual assault is rampant, at a victimization rate of one in three women. Meanwhile in Cambodia, as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast Asia. Victims of coercive sexual encounters do not get to make choices about their sexual activities.

22 U.S.C. § 7601(23). Petitioners emphasize this finding's first sentence, which is one of forty-one findings in Section 7601, to support their contention that explicitly opposing prostitution is a necessary element of Congress's strategy. Pet. Br. 39–40. But read as a whole, the finding makes clear that it addresses prostitution in the contexts of sex "trafficking," "sexual violence," and "coercive sexual encounters." Nor does the finding require recipients to announce any position or take any action, or prescribe *how* prostitution should be addressed. Rather, those prescriptions are contained in the Act's other provisions. And as just explained, those provisions reflect Congress's choice of education and counseling as the best tools to address prostitution without undermining the Act's essential anti-HIV/AIDS mission.

B. The Act Avoids Treating The Policy Requirement As An Integral Part Of Congress's HIV/AIDS-Fighting Strategy.

Consistent with the broader strategy just described, the Policy Requirement's text and legislative history reflect Congress's recognition that explicitly opposing all prostitution would not help recipients pursue the Act's public-health goals. These sources also reveal that Congress tried to insulate its strategies from the Policy Requirement's effects.

First, the Policy Requirement's text suggests that it plays no active role in the Act's many strategies for combatting HIV/AIDS. The requirement itself obligates each recipient, as a condition of receiving funds under the Act, *to assure the government* that it "ha[s] a policy explicitly opposing prostitution." 22 U.S.C. § 7631(f). But it does not require the recipient to publicize this policy to anyone else. That tracks the descriptions of the Policy Requirement by its author and others in Congress as a "pledge" to the government. *E.g.*, 154 Cong. Rec. at H7116 (statement of Rep. Smith); see also 154 Cong. Rec. H1891, H1906 (daily ed. Apr. 2, 2008) (statement of Rep. Ros-Lehtinen) (USAID "has implemented [the Policy Requirement] by requiring that any group that receives funding sign a *pledge affirming* its opposition to" prostitution and sex trafficking (emphasis added)).

The Policy Requirement thus contrasts sharply with the Act's explicit "Message" provision, which requires "[t]he Global AIDS Coordinator" to "develop a message, *to be prominently displayed by each program receiving funds under this chapter*," that "the program is a commitment by citizens of the United States to the global fight against HIV/AIDS" and "is an effort on behalf of the citizens of the United States." 22 U.S.C. § 7611(h) (emphasis added). If

Congress believed the Policy Requirement was essential to the Act's anti-HIV/AIDS strategy—that is, if it thought recipients must actively publicize that they oppose prostitution to effectively fight the disease—it would have mandated that this policy be "prominently displayed" or otherwise conveyed to the public. It did not.

Congress also exempted some of the world's largest public-health agencies from the Policy Requirement. The Requirement "shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency." 22 U.S.C. § 7631(f); see *AOSI*, 570 U.S. at 210. These key organizations together account for a substantial portion of anti-HIV/AIDS funding. Again, if the Policy Requirement were as important to the congressional scheme as Petitioners claim, it would be odd for Congress to exempt these large and important organizations from its mandate.

Second, the Act's legislative history confirms that Congress deliberately crafted the Policy Requirement this way to *avoid* using recipients to convey a government message explicitly opposing prostitution. During the 2003 congressional debates, legislators raised concerns that the Policy Requirement could be seen as "condemn[ing] the behavior" of commercial sex workers, and thus "could impede" the "effectiveness" of efforts to "work directly with" people in that high-risk group. 149 Cong. Rec. at S6457 (statement of Sen. Leahy). To accommodate the "need to support . . . organizations" that "work with prostitutes," without "condon[ing] . . . prostitution or sex trafficking," Congress concluded that "the answer" was "to include a statement in the contract or grant agreement . . . that the organization is opposed to the prac-

tices of prostitution and sex trafficking because of the psychological and physical risks they pose for women." *Id.* (statement of Sen. Frist, responding to Sen. Leahy). That is, Congress designed the Policy Requirement *not to interfere* with the Act's vital public-health strategy.

In short, the Policy Requirement is not a lynchpin of Congress's anti-HIV/AIDS regime, but an addendum to it. Congress recognized the harms of prostitution and the role it plays in spreading HIV/AIDS, but realized that "outreach programs for sex workers," 154 Cong. Rec. at H7120 (statement of Rep. Waxman), would be more effective in minimizing that role than simply trying to "eradicate" prostitution altogether. Congress thus chose to focus on education and outreach. For all of these reasons, the Policy Requirement is not a key part of the congressional scheme, and is not necessary to effectuate its vital goals.

II. THE GOVERNMENT'S PERSISTENCE IN ENFORCING THE POLICY REQUIREMENT OFFENDS THE SEPARATION OF POWERS.

This Court has already held that, 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," the Policy Requirement "violates the First Amendment." *AOSI*, 570 U.S. at 221. When it reached this holding, the Court was fully aware of the statute's overseas reach, and it specifically considered the impact on Respondents' affiliates. Yet Petitioners have tried to evade this Court's decision by issuing novel "guidelines" that apply the Policy Requirement based on a distinction—U.S. organizations versus their foreign affiliates—that neither respects the Court's reasoning nor

tracks congressional intent. As current and former legislators, *amici* are surprised and disappointed that the executive branch would both attempt to evade this Court's ruling and usurp Congress's lawmaking authority in this way.

A. The Court's Reasoning Shows Why Petitioners Cannot Keep Enforcing The Policy Requirement Against Respondents' Clearly Identified Foreign Affiliates.

This Court has already articulated the constitutional principle that controls here. By "demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern," the Policy Requirement "by its very nature affects 'protected conduct outside the scope of the federally funded program.'" *AOSI*, 570 U.S. at 218 (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 197 (1991)). And the Court specifically addressed the implications of affiliated organizations in this context: "Affiliates cannot [allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program] when the condition is that a funding recipient espouse a specific belief as its own." *Id.* at 219. "If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy." *Id.*

For precisely these reasons, Petitioners' proffered distinction between U.S.-based recipients and their foreign affiliates does not avoid the First Amendment harms the Court identified. The Court's decision nowhere suggests that the impermissibility of compelled hypocrisy depends on the nationality of the "clearly identified" affiliate. Nor does such a distinction make

sense in practice. That a "clearly identified" affiliate may be formed under the laws of the country where the U.S.-based organization seeks to advance Congress's goals does not somehow reduce the clarity of its identification with that organization. It also does not avoid the "evident hypocrisy" that necessarily flows from a compelled contradiction in viewpoints and presumed values between entities that publicly appear inseparable, if not "indistinguishable." See Pet. App. 9a, 11a–12a.

It follows that Petitioners' domestic-or-foreign distinction does not avoid the unconstitutional harm the Policy Requirement causes to U.S.-based entities. In turn, this case presents no occasion to wrestle with constitutional rights allegedly "export[ed]" to foreigners. *Contra* Pet. Br. 32. Indeed, the contrary view—that the Court's reasoning does not address the relationship between U.S.-based organizations and their foreign affiliates—would leave those organizations in the same situation they were in before the Court's decision: forced to choose between (i) foregoing essential funding for life-saving global work and (ii) mouthing words they object to and cannot retract even when they act outside the federal program. Petitioners' position here would thus deprive this Court's 2013 decision of all practical effect.

It is not appropriate for the executive branch to attempt this kind of end-run around this Court's rulings. This Court has said "what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and Petitioners must abide by that ruling. That is true especially given the demonstrable harm that U.S.-based organizations fighting HIV/AIDS continue to face as a result of the government's misconceived enforcement practices.

B. Congress Did Not And Would Not Adopt Petitioners' Proffered Distinction Between Domestic And Foreign Recipients.

Petitioners' focus on foreign affiliates also has no basis in the Act. Petitioners offer no sign that Congress intended to discriminate between U.S.-based organizations and their foreign affiliates. The Policy Requirement itself contains no such language. And even assuming that applying the Policy Requirement to foreign affiliates is constitutional, Congress did not "provide[ ] for severance of unconstitutional applications" of the Requirement. See *United States* v. *Booker*, 543 U.S. 220, 320–21 & n.9 (2005) (Thomas, J., dissenting in part) (collecting examples). Nor do Petitioners try to answer the question a Court "must . . . ask" "[a]fter finding an application or portion of a statute unconstitutional": "Would the legislature have preferred what is left of its statute to no statute at all?" *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006). Here, the answer is no. For all the reasons above, Congress would not have adopted a Policy Requirement that applies only to some (publicly indistinguishable) components of multinational organizations, with the effect that even domestic recipients must choose between free speech and vital funding.

Petitioners' continued enforcement of the Policy Requirement against foreign affiliates thus amounts to an attempted amendment of the Act. That effort oversteps basic constitutional boundaries. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker," and that "the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S.

579, 587 (1952); see also *Springer* v. *Gov't of Philippine Islands*, 277 U.S. 189, 201–02 (1928) (noting the "general rule" that "the executive cannot exercise either legislative or judicial power"). Similarly, "the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure,'" *Clinton* v. *City of New York*, 524 U.S. 417, 439–40 (1998), and the executive's role in this procedure is limited "to the recommending of laws [the President] thinks wise and the vetoing of laws he thinks bad," *Youngstown*, 343 U.S. at 587.

A bald attempt by the executive to add distinguishing language to a statute where none exists clashes with these principles. The more appropriate course is to honor the result of the Constitution's legislative process by "presum[ing]" that Congress "says in [the] statute what it means and means in [the] statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253–54 (1992). If Congress wanted to distinguish between domestic organizations and their foreign affiliates in applying the Policy Requirement, it would have said so. But it did not say so. And the Court has now made clear that what Congress *did* say was unconstitutional. Congress—and Congress alone—is free to amend the Act to try to cure this defect.

CONCLUSION

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

Respectfully submitted,

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