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 OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute ("Cato") is a nonpartisan, nonprofit think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Cato believes that the right not to speak is an essential part of the liberty guaranteed by the First and Fourteenth Amendments—and that when someone is forced to act as a mouthpiece for government ideas, that warrants the most rigorous judicial review. *See generally W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). When the state treads on the exercise of First Amendment liberty, it threatens the fundamental "principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (quotation marks and citation omitted). Cato has taken an active role in litigating First Amendment questions, including in the first presentation of this case. *See, e.g.*, Brief of the

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the Cato Institute, its members, or its counsel made a monetary contribution to fund the preparation or submission of this brief. The parties in this case have consented to the filing of this brief.

Cato Institute as *Amicus Curiae*, *Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc.,* 570 U.S. 205 (No. 12-10) (U.S. Apr. 3, 2013).

The forced speech imposed by the government in this case threatens the expressive freedom protected by the First Amendment. The government seeks to compel private organizations to spread government orthodoxy on an issue of international importance as a condition of receiving federal funding. This Court recognized in its earlier ruling in this case that this compulsion was patently unconstitutional. It held that the government may not condition funding on "pledg[ing] allegiance to the Government's policy of eradicating prostitution." *Agency for Int'l Dev.*, 570 U.S. at 220. Here, the government attempts to engage in the exact same behavior by attempting to exploit the formalities of corporate structure. Cato is deeply concerned with any government attempt to coerce expression but particularly so where—as here—the government seeks to evade a ruling of this Court meant to limit the power of government and protect the rights of private parties.

SUMMARY OF ARGUMENT

This case involves an issue that is nearly identical to the one that the Court addressed—and resolved—in the prior presentation of this very case, *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 2015 (2013) ("*AOSI I*"): whether the government has the power to compel speech of Respondents—domestic grant recipients who receive government funds to combat HIV/AIDS worldwide—using its spending power. This time, the government seeks to get its way by forcing Respondents to speak through their closely identified foreign affiliates. And the government boldly asserts that "there is no basis to bar" enforcement of its compelled speech regulation against such foreign entities. Pet. Br. 20. The Court has previously rejected the government's formalistic distinction between domestic funding recipients and their "closely identified" affiliates—foreign and domestic—and the Court should do so again here.

Much like the first time this case was before the Court in *AOSI I*, the government seeks to control private speech using the funding provisions of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. § 7601 *et seq.* (the "Leadership Act"). In addition to governing the appropriation of funds to combat HIV/AIDS, the Leadership Act imposes two related conditions: (1) that no funds "may be used to promote or advocate the legalization or practice of prostitution" (which is undisputed in this litigation), *id.* § 7631(e); and (2) that no funds may be used by an organization

"that does not have a policy explicitly opposing prostitution," *id.* § 7631(f) (the "Policy Requirement"). It is the latter condition that constitutes a compelled speech requirement that infringes Respondents' First Amendment right to refrain from adopting and speaking the government's message.

Despite this Court's clear ruling in *AOSI I*, the government continues to defy the First Amendment's restraints by attempting to enforce the unconstitutional Policy Requirement. Indeed, there is no serious dispute that the government's goal in this case is the same as its goal the last time the Court reviewed this issue: to force an affirmation from fund recipients that they agree with the government's policy to oppose prostitution and sex trafficking. This time, the government seeks to impose the same unconstitutional requirement on Respondents exclusively through their closely identified foreign affiliates. As the Court made clear in *AOSI I*, this corporate line-drawing is a distinction without a difference. This is a naked attempt by the government to evade the reach of this Court's previous holding and arrogate to itself the power the Court has already denied it.

In *AOSI I*, the Court held that the government does not have the power to force private grant recipients to adopt and espouse its anti-prostitution message. The Court barred the enforcement of the Policy Requirement against Respondents, holding that the Policy Requirement effectively compelled Respondents to speak the government's message and therefore violated the First Amendment. The Court further held

that the spending power does not permit such an infringement of Respondents' First Amendment right. Like many past cases, the Court adopted a functional approach to its First Amendment analysis, rejecting the government's proffered artificial distinction between legal entities that speak with one voice.

In this case, however, the government seeks to undermine the Court's First Amendment holding in *AOSI I* by demanding a technical distinction between domestic Respondents and their closely identified foreign affiliates. This distinction is unsupported by the record—which demonstrates that speech by close foreign affiliates is indistinguishable from Respondents' speech—or the Court's opinion in *AOSI I*. Indeed, the Court explicitly rejected the artificial distinction between domestic funding recipients and their closely identified foreign affiliates in *AOSI I*, finding that such a distinction resulted in "evident hypocrisy." *AOSI I*, 570 U.S. at 219.

The technical distinction between domestic organizations and their closely identified foreign affiliates is also unsupported by the Court's First Amendment jurisprudence more broadly. The Court has repeatedly held that one party's speech can implicate the First Amendment rights of a legally distinct party, and the fine line of corporate formality touted by the government is inconsistent with the Court's First Amendment precedents. Allowing the government's proposed formalisms to dictate the scope of the First Amendment's protections against compelled speech would fail "[t]o give speech the

breathing room it needs to flourish." *John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Alito, J., concurring).

It is of paramount importance that the Court reject the government's attempt to cabin the First Amendment's protections using artificial and technical distinctions between legal entities, even those who speak with one voice. The opportunities for all levels of government to compel speech through funding programs grow each year as the government's programs expand. The government has never been one to turn down an opportunity to compel private parties to spread its messages, and the government's position here, if accepted, would grant it significant leeway to accomplish that end. There is no doubt that if allowed, the government would expand the use of its funding power to require that its messages be adopted and espoused by the closely identified foreign affiliates of U.S. organizations. The end result would be that private entities' messages can be dictated—and the marketplace of ideas can be substantially influenced—by whomever is in power and grants funds.

ARGUMENT

I. THE GOVERNMENT MAY NOT FORCE PRIVATE PARTIES TO ADOPT AND ESPOUSE ITS VIEW THROUGH THE PRIVATE PARTIES' CLOSE AFFILIATES.

The Court has held repeatedly that the government may not use its funding power to control and dictate private speech. This Court's decision in *AOSI I* and decades of First Amendment precedents plainly

resolve this case for three reasons. First, in *AOSI I*, the Court made clear that the First Amendment restrains the coercive power of government, and the government's spending power provides no escape from that restraint. Second, the government should not be allowed to circumvent the First Amendment holding in *AOSI I* by mischaracterizing the speech at issue as that of "legally distinct foreign entities operating overseas." Pet. Br. I. Third, the First Amendment's protections against compelled speech do not depend on, and would be greatly undermined by reliance on, the formalities of corporate structure.

A. The First Amendment Restrains Government Power and Ensures Democratic Accountability.

There can be no question that the government violates the First Amendment when it forces private parties to adopt its own subjective views as their own. Such forced speech is presumptively unconstitutional, as the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citations omitted). "'At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'" *AOSI I*, 570 U.S. at 213 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994)). Thus, as this Court made clear in *AOSI I*, "the freedom of speech prohibits the government from telling people what they must say." *AOSI I*, 570 U.S. at 213. (citations omitted).

This bedrock principle constrains the government's spending power. Although the government has broad discretion to fund particular programs or activities, and to impose limits on how those funds are used, the government's funding limitations may not unconstitutionally burden First Amendment rights. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (discussing the Supreme Court's recognition of "a limit on Congress' ability to place conditions on the receipt of funds"). Indeed, the Court held in *AOSI I* that "the Government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." *AOSI I*, 570 U.S. at 214 (internal quotation marks and alterations omitted). Thus, the scope of the government's funding power is restricted to ensuring that the limits of its federal programs are observed and that public funds are spent for their authorized purpose, but the government may not "prohibit the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* at 217. The government, further, "cannot recast a condition on funding" to avoid constitutional limits, "lest the First Amendment be reduced to a simple semantic exercise." *Id.* at 215 (quoting *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001)) (quotation marks omitted).

In determining whether the government has violated the First Amendment, the Court has repeatedly adopted a functional approach. As discussed, *infra* Sect. I.C, the compelled speech protections of the First Amendment do not depend on

formalistic divisions between legal entities. The Court has regularly held that the First Amendment requires consideration of whether a third party would impute the speech of one speaker to another on the basis of proximity, relation, or perceived affiliation. For example, in *AOSI I*, the Court rejected the government's distinction between U.S.-based funding recipients and their affiliates, finding that compelling the speech of the recipients could not be saved by not compelling that speech from a "closely identified" affiliate. 570 U.S. at 219. The Court reasoned that speech by a distinct foreign entity "does not afford a means for the *recipient* to express *its* beliefs," and that speech of a "clearly identified" recipient cannot relieve a compelled speech requirement because the recipient could find relief "only at the price of evident hypocrisy." *Id.* (emphasis in original).

As was the case the last time this issue was before the Court, the government-speech doctrine does not save the Policy Requirement. As before, the Policy Requirement "goes beyond defining the limits of the federally funded program," *id.* at 218, and instead "requires [funding recipients] to pledge allegiance to the Government's policy of eradicating prostitution," *id.* at 220. "By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'" *Id.* at 218 (citation omitted). The Policy Requirement thus unconstitutionally conditions the *recipient* of the federal funds by "requiring recipients to profess a

specific belief" and transgresses the First Amendment. *Id.* (citations omitted).

B. The Government Mischaracterizes the Speech at Issue as that of Distinct Foreign Entities.

Contrary to the government's artificial line-drawing, this case remains one about the compelled speech of U.S. organizations. The speech of a U.S. organization is necessarily reflected by the speech of its closely identified affiliates, both foreign and domestic. Thus, even though the Government purports to target only foreign entities, the compelled speech requirement here is just as offensive as it was in *AOSI I* for two reasons.

First, as a purely factual matter, the record in this case demonstrates that speech by Respondents' foreign affiliates is indistinguishable from Respondents' speech. *See, e.g.*, Resp. Br. 7–9, 34–35. In the district court, Respondents submitted declarations demonstrating that their foreign affiliates were "clearly identified" with Respondents, JA368 (showing that Respondent Pathfinder International, Inc. is clearly identified with its foreign affiliates), and that positions of a foreign affiliate "will be imputed" to the U.S. organization, JA460 (showing that positions taken by a foreign affiliate of Save the Children Federal, Inc. ("SCUS"), a member of Respondent InterAction, "will be imputed to SCUS, even if SCUS has no position or a contrary position").

For example, Respondent Pathfinder International, Inc. ("Pathfinder") explained that

"negative action by any foreign affiliate—such as taking a public position at odds with other Pathfinder entities—can be imputed to the whole." JA369; *see also* JA388–89 (affirming that Cooperative for Assistance and Relief Everywhere, Inc. ("CARE") and its affiliates "are known as 'CARE' or 'CARE International', and are viewed by the public as one CARE entity speaking in a single global voice aligned to achieve a common mission"). Pathfinder further submitted images of signage used by Pathfinder across the globe, demonstrating the consistent branding and messaging that result in Pathfinder speaking with one unified, global voice. JA377–382.

Importantly, to the extent that *AOSI I* requires a factual determination that funding recipients and their affiliates are clearly identified with one another, the government has failed to dispute Respondents' evidence that they are "clearly identified" with their foreign affiliates. The government had ample opportunity to question and counter Respondents' evidence during the injunction proceedings, as well as in its motion for reconsideration of the district court's permanent injunction, but it failed to do so. Instead, the government has taken a hardline position that it may enforce the Policy Requirement against any foreign funding recipient, regardless of its close ties to a U.S.-based organization, simply because the recipient is a foreign legal entity operating abroad. *See* Pet. Br. 21.

The district court and the Second Circuit firmly rejected the government's artificial distinction between U.S. funding recipients and their "closely

identified" foreign affiliates. In light of the Court's holding in *AOSI I*, the district court held that the "constitutional violation is the same regardless of the nature of the affiliate," because, "it is the *domestic NGO's* constitutional right that the Court found is violated." *All. for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev.*, 106 F. Supp. 3d 355, 361 (S.D.N.Y. 2015). The Second Circuit affirmed, finding that "the foreign NGOs and plaintiffs are not just affiliates—they are homogenous. Plaintiffs share their names, logos, and brands with their foreign affiliates, and together they present a unified front." *All. for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev.*, 911 F.3d 104, 111 (2d Cir. 2018). Thus, as in *AOSI I*, the distinction between a domestic funding recipient and a closely identified foreign funding recipient is immaterial, because the compelled speech ultimately infringes on the domestic entity's First Amendment rights.[2]

Second, the Court has already recognized that the speech of a "closely identified" foreign affiliate is the functional equivalent of speech of the domestic funding recipient. In *AOSI I*, the close relationship between domestic funding recipient respondents and their foreign affiliates doomed the Policy Requirement,

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[2] Respondents' associational rights are also at stake where, as here, the government affirmatively undermines domestic NGOs' ability to effectively and coherently associate with their affiliates, regardless of those affiliates' foreign status. *Cf. United States v. Robel*, 389 U.S. 258, 262 (1967) (finding unconstitutional a statute that penalized association with foreign-dominated organizations).

because the speech of the closely identified foreign affiliates was tied to the speech of the domestic funding recipients. Although the Court noted that the speech relationship between funding recipients and close affiliates may avoid compelled speech problems in some circumstances, *see AOSI I*, 570 U.S. at 219 (citing *Rust v. Sullivan*, 500 U.S. 173, 197–98 (1991)), such a solution was not available in *AOSI I*. The domestic funding recipient's right to free speech was violated when it was forced to choose between complying with the Policy Requirement—compelled speech—*or* exercising its speech right at "the price of evident hypocrisy" by allowing a closely identified foreign affiliate to take a contrary position. *Id.*

Treating Respondents and their closely identified foreign affiliates as a single speaker for First Amendment purposes makes particular sense here given that many foreign governments require U.S. NGOs to incorporate in their countries in order to operate, *see* JA368, and given that the U.S. Government itself requires U.S. NGOs to incorporate foreign entities as a condition of receiving certain funding. *See* JA367–68 (explaining that USAID "affirmatively encourages [Respondents] and other U.S.-based NGOs to operate through foreign affiliates," including by limiting certain Leadership Act programs to "NGOs that are incorporated in the country in which the program will be run"); *see also* Resp. Br. 6–7. The government's suggestion that "Respondents can operate directly in foreign countries, rather than through affiliates," Pet. Br. 38, thus rings hollow.

Although the government argues that closely identified foreign affiliates were not at issue in *AOSI I* and do not fall within *AOSI I*'s holding, that is manifestly incorrect. In *AOSI I*, the Court was well aware that Respondents utilized closely identified foreign affiliates. Respondents discussed their work with close foreign affiliates in their *AOSI I* merits brief. *See* Resp. Br. 49 (2013) (citations omitted). And during oral argument, the government asserted that the Policy Requirement was necessary "[p]recisely because the conduct here is carried out in foreign areas." Trans. of Oral Arg. at 27, No. 12-10 (Apr. 22, 2013). At oral argument, the Court also considered the relationship between domestic funding recipients and close foreign affiliates in the context of Justice Breyer's incredulity that "you could have an independently structured organization" where one entity espouses the government's message "in order to get the money," and another entity "said the opposite." Justice Breyer stated that this "would be seen as totally hypocritical," and the entities "wouldn't be able to get their message across." *Id.* at 16–17.

In response, the government argued that having an organizational affiliate rather than the funding recipient espouse the government's message would remedy any First Amendment problem. Justice Ginsburg cast doubt on that argument, stating that the separation between the recipient and the affiliate is different "in this international setting," where "getting . . . a new NGO recognized in dozens of foreign countries is no simple thing to accomplish." *Id.* at 18–19; *see also id.* at 27 (Justice Kennedy noting "I have the same concerns that Justice Ginsburg expressed

about the difficulty of simply creating structures in – foreign countries.").

Given the Court's awareness of the partnerships forged between domestic funding recipients and their closely identified foreign affiliates, the Court's use of the term "affiliates"—rather than "domestic affiliates"—in *AOSI I* is telling. The Court meant all closely identified affiliates, domestic and foreign.

C. The First Amendment's Protections Against Compelled Speech Do Not Depend on the Formalities of Corporate Structure.

This Court has repeatedly recognized that one party's speech can implicate the First Amendment rights of a legally distinct party, even when the two parties lack any organizational affiliation. For example, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court considered "whether Massachusetts [could] require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." 515 U.S. 557, 559 (1995). In unanimously concluding that Massachusetts could not impose such a requirement, the Court rejected an argument that the parade organizers did not have a First Amendment interest because the expression came from the *marchers*, not the *organizers*. *See id.* at 575–77. The Court instead found that the marchers' speech was inseparable from the organizers' speech because "the parade's overall message is distilled from the individual presentations

along the way, and each unit's expression is perceived by spectators as part of the whole." *Id.* at 577. Here, while Respondents and their affiliates are legally separate corporate entities, the public perceives the organizations—which all share the same branding, messaging, and vision—as part of a global, uniform whole. *See* I.B, *supra*. Thus, just as in *Hurley*, "every participating unit affects the message conveyed by the" organization as a whole. *Hurley*, 515 U.S. at 572.

Indeed, this principle—that the speech of one party may be attributed to another legally distinct party—is commonly accepted in First Amendment jurisprudence and has been conceded by the government.[3] In another case, this Court found that it was impermissible to compel a company to include speech by a legally distinct party on its billing envelope because the company would "appear to agree with [the separate party]'s views[.]" *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 15 (1986); *see also, e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2252–53 (2015) (finding that license plates are government speech but may nevertheless constitute impermissible compelled speech of legally separate private parties because "a vehicle 'is readily associated with its operator'" (quoting *Wooley v. Maynard*, 430 U.S. 705, 717 n.15, 715 (1977))). This principle applies in full force here; allowing First Amendment protections against

[3] *See* Resp. Br. 3 (explaining that requirement of "objective . . . independence," 45 C.F.R. § 89.3, implies that affiliates' speech may be imputed to one another), 43–44 (quoting government position before the court below).

compelled speech to turn on technical corporate formalities would fail to "give speech the breathing room it needs to flourish[.]" *John Doe No. 1*, 561 U.S. at 212 (Alito, J., concurring).

The government's reliance on *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), for the contrary proposition is misplaced. The government argues that "*Regan* distinguished between—indeed, based its holding on the distinction between—legally separate organizations, even though those organizations were closely affiliated and shared substantially the same name." Pet. Br. 31. The government ignores that the Court found this distinction inapposite when the funding condition is *compelled* speech, rather than *prohibited* speech. *AOSI I*, 570 U.S. at 219–20 (internal citation omitted) ("When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program. Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own."). *Regan* is thus just as inapposite now as it was in 2013.

The government's reliance on corporate veil-piercing is similarly meritless. Piercing the corporate veil is an action in equity taken "in the interests of justice where [the corporate form] is used to defeat an overriding public policy." *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 713 (1974) (citations omitted). Applying this test in the First Amendment context would make little sense

because it would turn the rights-protective constitutional inquiry on its head. That is, the First Amendment requires *the government* to show that it has a compelling interest before it compels a private party to speak. *See, e.g.*, *Pac. Gas & Elec. Co.*, 475 U.S. at 16–17. The corporate veil-piercing test would do the opposite, forcing the *private party* to show the furtherance of an "overriding public policy," *Bangor Punta Operations*, 417 U.S. at 729, in order to secure its First Amendment rights against compelled speech. The government offers no support—nor could it—for rejecting the longstanding principle that "[t]he First Amendment is a limitation on government, not a grant of power." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring).

This Court should reject the government's formalistic position, particularly in light of the vast expansion of government power that would result.

II. THE FIRST AMENDMENT'S RESTRAINTS ON GOVERNMENT ARE NEEDED NOW MORE THAN EVER.

Today, government grant programs extend into every facet of society. The government provides grants "to assist socially disadvantaged and veteran farmers and ranchers in owning and operating farms and ranches." *Outreach and Assistance for Socially Disadvantaged and Veteran Farmers and Ranchers*, General Services Administration ("GSA"), https://bit.ly/32bX4WB (last visited Mar. 3, 2020). It uses public funds to "promote[] a fair global playing

field for workers in the United States and around the world by enforcing trade commitments, strengthening labor standards," and other means. *International Labor Programs*, GSA, https://bit.ly/37JafQ0 (last visited Mar. 3, 2020). It supports efforts to "[k]eep guns out of the hands of persons prohibited by federal or state law from receiving or possessing firearms." *NICS Act Record Improvement Program*, GSA, https://bit.ly/2P80k05 (last visited Mar. 3, 2020). The list could go on. *See Active Grants*, GSA, https://beta.sam.gov/search?index=cfda (last visited Mar. 3, 2020) (showing more than 2,000 active grants). This far-reaching web of funding assistance creates the potential for a vast expansion of government power. Without a robust First Amendment check, government spending conditions could have a drastic influence on the marketplace of ideas.

Limiting the First Amendment's reach would allow the government to demand that domestic organizations—through their foreign affiliates—agree with and adopt the government's views. And there is every reason to believe that the government would take advantage of this new power. As *amicus* has previously explained, governments at all levels have increasingly turned to compelled disclosure regimes to push their chosen agenda. *See, e.g.*, Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioner, at 14–22, *CTIA – The Wireless Association v. City of Berkeley, California,* No. 19-439 (2019). And they have repeatedly leveraged funding conditions to do so. For example, one state attempted to "prohibit boycotting the State of Israel as a condition of public employment," thus "requiring contractors to cease and

refrain from engaging in constitutionally protected speech." *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 730, 754 (W.D. Tex. 2019). Another state institution demanded that one of its employees "sign an Oath of Loyalty" "[a]s a condition of continuing employment[.]" *Regents of the Univ. of Cal. v. Aisen*, No. 15-CV-1766-BEN (BLM), 2016 WL 1428072, at *3 (S.D. Cal. Apr. 12, 2016). Another conditioned charities' use of funds from state-authorized bingo tournaments on not using the funds for political advocacy, purportedly to advance its interest in "reducing the size of the gambling industry[.]" *Dep't of Tex., Veterans of Foreign Wars of United States v. Tex. Lottery Comm'n*, 760 F.3d 427, 431, 437–41 (5th Cir. 2014). And governments made these attempts *after* this Court reaffirmed that these sorts of conditions are unconstitutional in *AOSI I*.

Loosening the First Amendment's limitations on government will have predictable results. The government could force fund recipients to espouse any number of messages that may come into government favor:

- NGOs (or their foreign affiliates) receiving government funding to provide health services could be required to give a disclaimer before administering vaccines stating that vaccinations are likely to do more harm than good. *Cf. Possible Side effects from Vaccines*, Centers for Disease Control and Prevention (last updated Jan. 8, 2020), https://www.cdc.gov/vaccines/vac-gen/side-

effects.htm.

- Organizations (or their foreign affiliates) that receive funds to help export U.S. agricultural products to developing countries could be forced to declare that their products have been genetically altered and are less healthy than organic alternatives. *Cf. Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 69–70 (2d Cir. 1996) (finding that Vermont law requiring labeling of products from cows treated with growth hormone was compelled speech); NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE; DIVISION ON EARTH AND LIFE STUDIES; BOARD ON AGRICULTURE AND NATURAL RESOURCES; COMMITTEE ON GENETICALLY ENGINEERED CROPS, PAST EXPERIENCE AND FUTURE PROSPECTS, Ch. 5 (2016), *available at* https://www.ncbi.nlm.nih.gov/books/NBK425334/ (last visited Mar. 3, 2020); *Emerging Markets Program*, USDA, https://www.fas.usda.gov/programs/emerging-markets-program-emp (last visited Mar. 3, 2020).

- Scientific groups (or their foreign affiliates) that receive funds to research climate change could be forced to maintain a policy statement declaring that they do not believe that the effects of climate change justify the economic harm of cutting emissions. *Cf. President Trump: Putting Coal Country Back to Work*, Whitehouse.gov (Feb. 16, 2017), https://www.whitehouse.gov/briefings-

statements/president-trump-putting-coal-country-back-work/.

This would effectively mean that speech is dictated by whomever is in power and grants funds. The First Amendment cannot tolerate this affront to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]" *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The First Amendment must be maintained as a vital check on government power to compel private parties' agreement with its subjective policy preferences. The position of the United States in this case should be rejected.

CONCLUSION

The decision of the Second Circuit should be affirmed.

Respectfully submitted,

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March 4, 2020