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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Miscellaneous: Page

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In response to the global HIV/AIDS pandemic, Congress authorized billions of dollars to be spent by private organizations, subject to conditions specified in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act or Act), 22 U.S.C. 7601 *et seq*. In 2013, this Court held that the condition requiring funding recipients to "have a policy explicitly opposing prostitution and sex trafficking," 22 U.S.C. 7631(f), could not be applied to respondents—"a group of domestic organizations"—under the unconstitutional-conditions doctrine, 570 U.S. 205, 210. Respondents now seek to expand that relief, contending (Br. 24-45) that the unconstitutional-conditions doctrine bars application of Section 7631(f) to foreign entities with which respondents assert an affiliation. That claim fails on its own terms. Respondents accept (Br. 36 n.3)

that foreign entities operating abroad have no constitutional rights. And respondents themselves are no longer subject to the funding condition.

Respondents contend (Br. 22) that their relief from compliance with Section 7631(f) should extend to foreign entities operating abroad because they "use the same name, brand, and logo and speak as one." But nothing in this Court's prior decision or any other authority supports that novel theory for exporting constitutional rights. Nor do respondents identify any basis for disregarding the corporate structures that they and their asserted foreign affiliates voluntarily selected.

In any event, respondents no longer face a choice between accepting funds and expressing their views. By virtue of this Court's 2013 decision, respondents are now free to receive Leadership Act grants—and to use those grants around the world—without complying with Section 7631(f). Respondents are thus not "compell[ed] * * * to adopt a particular belief as a condition of funding." 570 U.S. at 218.

To be sure, if respondents and a foreign entity decide to share logos or other identifiers, the foreign entity must comply with Section 7631(f) if it accepts Leadership Act funds. But any resulting conflict with respondents' views is now the product of respondents' choice to affiliate in that way with a foreign entity bound by Section 7631(f), not any government compulsion. Respondents' present claim thus fails largely because their prior claim succeeded. Respondents may continue to operate free of Section 7631(f), but foreign entities abroad that accept U.S.-taxpayer funds must comply with the conditions Congress established.

A. This Court's Prior Decision Does Not Bar Application Of Section 7631(f) To Foreign Entities Operating Abroad With Which Respondents Claim An Affiliation

Respondents' primary contention (Br. 24-36) is not that any generally applicable constitutional principle bars application of Section 7631(f) to foreign entities abroad that accept Leadership Act funds. Indeed, respondents accept (Br. 4, 36 n.3) that such entities have no constitutional rights. Respondents instead rely (Br. 24-36) almost entirely on this Court's 2013 decision, which they contend should be read to implicitly preclude application of Section 7631(f) to foreign entities operating abroad with which they have some affiliation. This Court's prior decision, however, did not address the question now presented. And nothing in its reasoning supports respondents' request to expand the relief they have already received.

1. The scope of this Court's 2013 decision is clear from the litigation that preceded it. Beginning in 2005, respondents challenged application of Section 7631(f) to "their funding under the [Leadership] Act." 570 U.S. at 211. Specifically, they objected to the requirement that they "agree in the award document that [they are] opposed to 'prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.'" *Id.* at 210 (citations omitted). Then, as now, respondents had affiliations with foreign entities that operate abroad. See Resp. Br. 15. But respondents did *not* challenge the government's application of Section 7631(f) to Leadership Act grants made to foreign entities. See 651 F.3d 218, 238. To the contrary, respondents sought relief only for "U.S.-based" entities, J.A. 193, and emphasized that foreign entities with which they had some affiliation had *complied with*

Section 7631(f) by adopting policies opposing prostitution and sex trafficking, J.A. 112, 147, 181.

Respondents now contend (Br. 24-36) that their right to avoid compliance with Section 7631(f) encompasses a right to avoid having Section 7631(f) applied to foreign entities with which they have an affiliation. But respondents did not assert that theory before this Court's 2013 decision. Respondents did not, for example, ask the district court to expand its injunction to bar application of Section 7631(f) to foreign entities with which they share logos or brands. Nor did respondents suggest in the court of appeals or this Court that application of Section 7631(f) to such recipients violated their own rights. See Pet. App. 15a-29a (Straub, J., dissenting). Indeed, to the extent respondents raised foreign affiliates in this Court, they emphasized the burden of establishing such entities to receive Leadership Act funds —an argument that appears to accept that these entities *would* be subject to Section 7631(f). See Gov't Br. 34 & n.1. At a minimum, this Court in 2013 had no reason to consider the question "now before" it. *United States* v. *Stitt*, 139 S. Ct. 399, 407 (2018). The Court's decision should therefore be read to "not decide" it. *Ibid.*

2. Despite that procedural background, respondents suggest (Br. 25-26 & n.2) that the Court barred application of Section 7631(f) to *any* funding recipient. They base that contention on the summary paragraph of the Court's opinion, which states that Section 7631(f) "compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program," and, "[i]n so doing, violates the First Amendment and cannot be sustained." 570 U.S. at 221. In respondents' view (Br. 25), that purportedly "categorical" statement implies that Section

7631(f) is facially invalid and cannot be applied even to foreign recipients of Leadership Act funds that have no asserted affiliation with domestic entities.

That reading cannot be squared with respondents' past or present theories of constitutional harm. As noted above, respondents previously challenged the "application" of Section 7631(f) only to "U.S.-based" entities, J.A. 193, and the court of appeals decision this Court affirmed in 2013 expressly stated that it was not addressing applications of Section 7631(f) to "foreign organizations," 651 F.3d at 238; see 12-10 Resp. Br. 42 n.11 (confirming that respondents brought only an "as-applied challenge"). And, the subsequent court of appeals decision that respondents now defend invalidated Section 7631(f) only as applied to foreign recipients with a "domestic affiliate" that can invoke its own constitutional rights. Pet. App. 10a. The logic of that decision cannot be extended to foreign recipients that have no "domestic affiliate" and therefore no plausible source of constitutional rights. *Ibid.*

Respondents' broad reading also runs counter to settled principles of constitutional adjudication. Declaring an Act of Congress unconstitutional is "the gravest and most delicate duty that this Court is called on to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). Accordingly, the Court's "normal rule" is "that partial, rather than facial, invalidation is the required course." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (citation omitted). Respondents offer no basis to infer that any arguable ambiguity in this Court's prior decision should be read to have implicitly invalidated all applications of Congress's enactment, rather than those that were before the Court. See, *e.g.*, *Arkansas Game & Fish Comm'n*

v. *United States*, 568 U.S. 23, 35 (2012) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," and "ought not to control the judgment in a subsequent suit when the very point is presented for decision.") (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).[1]

3. Respondents rely more extensively (Br. 28-30, 33-36) on the portion of this Court's 2013 opinion rejecting the government's argument that its "affiliate guidelines * * * alleviate any unconstitutional burden on respondents' First Amendment rights." 570 U.S. at 219. The lower courts relied almost entirely on the same passage in granting respondents' request for expanded relief. Pet. App. 7a-11a, 53a-55a. Respondents and the courts below, however, misread the Court's discussion.

a. The affiliate guidelines discussed in the Court's 2013 decision were "established while this litigation was pending." 570 U.S. at 219. The government adopted the

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[1] Respondents identify (Br. 26 n.2) two statements by the government during the 15-year history of this litigation that characterize the relief respondents previously sought or received as "facial." In context, however, those statements simply recognize that the reasoning of the lower courts would effectively result in the invalidation of Section 7631(f) with respect to all *domestic* recipients. *E.g.*, 12-10 Cert. Reply Br. 4-5 & n.1 (referring in a footnote to the Second Circuit's "facial invalidation" of Section 7631(f) while stating in the accompanying body paragraph that the Second Circuit's decision "effectively enjoins the operation of Section 7631(f) *with respect to domestic organizations*") (emphasis added). In keeping with that recognition, the government stopped applying Section 7631(f) to all domestic funding recipients—not just respondents—following this Court's 2013 decision. See Pet. App. 118a, 128a-132a.

guidelines to clarify the scope of Section 7631(f)'s directive that Leadership Act funds may not "be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. 7631(f); see 72 Fed. Reg. 41,076 (July 26, 2007). The guidelines provided that an "independent organization affiliated with a recipient of Leadership Act funds need not have a policy explicitly opposing prostitution and sex trafficking for the recipient to maintain compliance with the policy requirement." 72 Fed. Reg. at 41,076. The guidelines then enumerated —and subsequent amendments expanded—a list of factors to consider in determining whether an affiliated organization is "independent." *Id.* at 41,076-41,077; see 75 Fed. Reg. 18,760, 18,762 (Apr. 13, 2010).[2]

When this case was last before the Court, the government argued principally that Section 7631(f)'s requirement of a policy against prostitution and sex trafficking was constitutional because it fell within the "scope of the" program to fight HIV/AIDS established in the Leadership Act. 570 U.S. at 218 (citation omitted). The government also argued alternatively that, even if applying Section 7631(f) to respondents would be constitutionally problematic in its own right, the affiliate guidelines would "alleviate any unconstitutional

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[2] The guidelines in their current form require that an "affiliated organization" must have "objective integrity and independence," defined in part by reference to whether the affiliated organization "is a legally separate entity," has "separate personnel," maintains "separate accounting and timekeeping records," uses separate "facilities," and has "signs and other forms of identification that distinguish the recipient from the affiliated organization." 45 C.F.R. 89.3. The guidelines are reproduced in full in an appendix to this brief. App., *infra*, 1a-3a.

burden" by providing an alternative channel for respondents to exercise their First Amendment rights. *Id.* at 219. The Court first rejected the government's primary argument, *id.* at 217-218, and then rejected its fallback argument, explaining that establishing affiliates to comply with the funding condition would not "alleviate" the "unconstitutional burden" imposed by Section 7631(f)'s requirement that the "funding recipient espouse a specific belief as its own," *id.* at 219. In the passage heavily cited by respondents, the Court stated that "[i]f the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs," while "[i]f the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy." *Ibid.*

As the government explained in its opening brief (at 36-38), the Court's holding that establishing affiliates to accept Leadership Act funds would not "alleviate" the "unconstitutional burden" then imposed on respondents by Section 7631(f) did not speak to whether Section 7631(f) can continue to be applied to foreign entities that lack constitutional rights. 570 U.S. at 219. The conclusion that establishing affiliates for respondents to express their own views while complying with Section 7631(f) would not be a sufficient *alternative* to the constitutional violation did not create a freestanding, affirmative right for respondents to exempt their asserted foreign affiliates from compliance with Section 7631(f), now that respondents themselves are not subject to that condition. In particular, the Court did not hold that all "clearly identified" affiliates must necessarily be treated the same as respondents for purposes of analyzing the constitutionality of funding conditions.

Ibid. If the Court had meant to announce such a rule, it would have done so clearly, not by implication in rejecting an alternative argument. Respondents and the court of appeals are accordingly mistaken that this Court "considered th[e] question" presented and "resolved it in [respondents'] favor" in 2013. Pet. App. 7a; see Resp. Br. 32-33.

b. Respondents relatedly contend that the courts below "correctly applied this Court's *reasoning* to conclude that" applying Section 7631(f) to foreign "affiliates closely identified with respondents would infringe on respondents' own" rights. Resp. Br. 26 (emphasis added). But that argument is similarly misplaced. This Court reasoned that respondents' potential establishment of affiliates—as a means to comply with Section 7631(f) while carrying out their own work using Leadership Act funds—would not provide a sufficient alternative channel for respondents to exercise their speech rights. That "reasoning" (*ibid.*) cannot be separated from the Court's holding that applying Section 7631(f) to respondents would violate the unconstitutional-conditions doctrine by "compelling [them] to adopt a particular belief as a condition of funding." 570 U.S. at 218. Specifically, the Court's reasoning that affiliates could not "alleviate" the "unconstitutional burden" imposed on respondents by a compelled-speech condition without creating a risk of "evident hypocrisy" is inapposite now that respondents are not subject to that compelled-speech condition at all. *Id.* at 219. In short, respondents used to face a choice between compelled speech and evident hypocrisy, but—after this Court's 2013 decision—they do not.

Consider, for example, the consequences of this Court's 2013 decision for a U.S.-based nonprofit that

seeks Leadership Act funds to perform HIV/AIDS relief in India. Cf. Resp. Br. 34. Previously, that entity could (1) apply for a grant itself, which would require compliance with Section 7631(f), or (2) establish an affiliate to apply for the grant and comply with Section 7631(f), thereby relieving the U.S.-based entity of the obligation to do so, but "at the price" of what this Court called "evident hypocrisy." 570 U.S. at 219. Now, the same U.S.-based entity has another option: it can apply for the grant itself *without* complying with Section 7631(f). The entity can thus obtain Leadership Act funds *and* maintain its preferred policy on prostitution and sex trafficking.[3] The entity can then use those funds to operate in India itself without making any statement with which it disagrees and without creating any risk of hypocrisy. The entity is accordingly not "compell[ed] * * * to adopt a particular belief as a condition of funding," and therefore has no claim under the unconstitutional-conditions doctrine. *Id.* at 218.

Respondents largely disregard that fundamental change resulting from this Court's decision. They contend (Br. 28), for example, that "[o]nce an organization is forced to adopt the government's viewpoint, its freedom to speak on the subject is compromised for all purposes." But respondents are (*ibid.*) no longer "forced to adopt the government's viewpoint" as a condition of receiving funds. As just explained, respondents can now obtain Leadership Act funds without altering their viewpoint (or adopting the government's) on prostitution or sex trafficking. Respondents similarly assert

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[3] The entity would remain subject to the separate requirement that it not "use[]" Leadership Act funds "to promote or advocate the legalization or practice of prostitution or sex trafficking," 22 U.S.C. 7631(e), which respondents have not challenged, see Resp. Br. 10.

(*ibid.*) that the "constitutional harm" identified by this Court in 2013 "cannot be avoided by transferring the burden of complying with [Section 7631(f)] to a legally separate but clearly identified affiliate." But respondents have (*ibid.*) no occasion to "transfer[]" any "burden of complying with" Section 7631(f) now that they are not required to comply with Section 7631(f). Numerous other aspects of respondents' argument similarly rely on premises that were true before 2013 but are no longer true after this Court's decision. See, *e.g.*, Resp. Br. 32 ("The speaker's own professed belief is dictated by the government both within and outside the federal program."); *id.* at 34-35 ("Unless [respondents] choose to forgo federal funding for the lifesaving work they carry out through their affiliates around the globe, they are no longer free to remain neutral, and can disavow an affiliate's pledge only 'at the price of evident hypocrisy.'") (quoting 570 U.S. at 219). In short, respondents are no longer subject to constitutional harm, because they have prevailed in this litigation.

To be sure, respondents can still *choose* to affiliate with foreign entities that receive Leadership Act funds. Such foreign entities—which lack a constitutional right to object to funding conditions, see Resp. Br. 36 n.3—must comply with Section 7631(f). But that restriction on foreign entities with which respondents share logos or brands does not compel respondents to say or do anything. To the extent respondents view the imposition of Section 7631(f) on the foreign entity's speech as disrupting their own message, they can solve the problem by applying for Leadership Act funding themselves, severing their connection to the foreign entity, or exercising their own speech rights to make their position clear. Cf. *Rumsfeld* v. *Forum for Academic & Institutional*

Rights, Inc., 547 U.S. 47, 65 (2006) (*FAIR*). Respondents are (Br. 30) thus "yoked to" the policy adopted by a foreign entity with which they have some affiliation only to the extent respondents choose to be. Such a voluntary decision cannot support an unconstitutional-conditions or compelled-speech claim.

Ultimately, respondents' position appears to contemplate a general right to invalidate funding conditions that might result in perceived "hypocrisy." 570 U.S. at 219; see Resp. Br. 34. But nothing in this Court's prior decision (or elsewhere in constitutional law, see pp. 13-20, *infra*) supports such a right. As explained above, the Court's conclusion that establishing affiliates would not be "sufficient" to alleviate the burden imposed on respondents by Section 7631(f)'s compelled-speech condition because of the risk of "evident hypocrisy" is inapposite now that respondents are not subject to Section 7631(f)'s compelled-speech condition. 570 U.S. at 219; see pp. 8-12, *supra*. The Court, moreover, has upheld numerous funding conditions that could be viewed by recipients as creating hypocrisy. In *FAIR*, for example, the Court upheld a funding condition that required law schools to provide military recruiters with access equal to that provided to other recruiters, even though the schools argued that compliance with the condition "could be viewed as sending the message that they see nothing wrong with the military's policies, when they do." 547 U.S. at 64-65. Likewise, in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), the Court upheld a funding condition that prohibited recipients from promoting or encouraging abortion within federally funded projects, even though the same entities vigorously advocated for abortion rights outside those projects. *Id.* at 192-193. The Court's prior decision in this case relied directly on

those precedents. 570 U.S. at 214-219. Now that respondents are free to obtain funds and express their views without relying on affiliates, any impression of hypocrisy created by applying that condition to foreign entities operating abroad does not cause respondents any constitutionally cognizable harm.[4]

B. No Other Legal Principle Bars Application Of Section 7631(f) To Foreign Entities Operating Abroad With Which Respondents Claim An Affiliation

Aside from their reading of this Court's prior decision, respondents invoke (Br. 36-45) several theories for extending their constitutional rights to legally distinct

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[4] Respondents contend (Br. 35) that the affiliate guidelines "underscore the harm to respondents." But the guidelines interpret the funding condition in Section 7631(f), see pp. 6-7, *supra*, and therefore do not apply to respondents' own receipt of Leadership Act funds now that Section 7631(f) does not apply to respondents. Respondents are accordingly mistaken to suggest (Br. 19, 23, 35) that their own funding could be jeopardized by the affiliate guidelines. Respondents also suggest (see *ibid.*) that their asserted foreign affiliates' funding could be jeopardized based on respondents' own failure to comply with Section 7631(f). But the guidelines require only that Leadership Act grant recipients subject to Section 7631(f) "have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking." 45 C.F.R. 89.3. The government does not consider respondents' professed neutrality (see Resp. Br. 11; see also 12-10 Resp. Br. 11) on prostitution and sex trafficking to be "activit[y] inconsistent" with a foreign grant "recipient's opposition to the practices of prostitution and sex trafficking." 45 C.F.R. 89.3. Accordingly, in the 13 years that the affiliate guidelines have been in place, the agencies that administer the Leadership Act have not canceled (or suggested that they would cancel) a grant to a foreign recipient based on respondents' own speech or actions.

foreign entities operating abroad. None of those theories has merit. Indeed, respondents concede two points that foreclose their unconstitutional-conditions claim: foreign entities operating abroad are not protected by the Constitution, and respondents themselves are not subject to the challenged condition. Respondents observe (Br. 2) that they and the foreign entities abroad that they claim as affiliates "share the same name, logo, brand, and mission." See Resp. Br. 3, 6-9, 22, 36-45 (similar formulations). But no legal principle suggests such a rationale for disregarding the separate corporate structures that respondents and the foreign entities have chosen. Having made the choice to remain legally separate, respondents can neither export their constitutional rights to foreign entities abroad nor import the speech of those entities as their own.

1. As the government explained in its opening brief (at 21-33), settled legal principles resolve this case: the foreign entities operating abroad to which the government applies Section 7631(f) lack constitutional rights, and respondents' own constitutional rights provide no basis for invalidating application of the statute to those legally distinct entities abroad. Indeed, respondents have in this litigation distinguished themselves from separate entities with which they have an affiliation for purposes of compliance with Section 7631(f). See, *e.g.*, J.A. 132 ("[Alliance for Open Society International, Inc. (AOSI)] believes that, as a legal matter, the actions of the Open Society Institute, with which it is affiliated, have no bearing on AOSI's compliance or non-compliance with [Section 7631(f)]."); see also J.A. 112, 147, 181.

Respondents observe (Br. 37-39) that the law may disregard corporate formalities in certain contexts. But

as respondents' own authority (Br. 37) for that proposition confirms, such "special cases" are "exceptional departures" from the "fundamental" rule that separate legal entities exercise separate "legal rights and duties." 1 Phillip I. Blumberg et al., *Blumberg on Corporate Groups* § 6.05, at 6-15 (2d ed. Supp. 2020). Such departures may be justified when determining whether an economic transaction implicates the "antitrust dangers that § 1 [of the Sherman Act, 15 U.S.C. 1 *et seq.*] was designed to police." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 US. 752, 769 (1984); see Resp. Br. 37-38. And Congress can extend the legal rights or duties of the entity to "related companies" if it so chooses. 15 U.S.C. 1055; see Resp. Br. 38. But those and other scattered examples, most of which involve imputation of liability under particular statutes (Resp. Br. 38-39), provide no support for the far different claim respondents assert here—an attempt to invalidate a statutory condition on constitutional grounds by disregarding the corporate structure that they and their asserted affiliated selected. Cf. *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946) ("While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person.").

This Court's cases addressing unconstitutional-conditions claims, by contrast, undermine respondents' position. Those "cases involve situations in which the Government has placed a condition on the *recipient* of" federal funds, "thus effectively prohibiting the *recipient*

from engaging in the protected conduct outside the scope of the federally funded program." 570 U.S. at 218-219 (second emphasis added; citation omitted). Respondents' claim fails under that description of the doctrine, because they are not the "recipient" of federal funds subject to the "condition" they seek to challenge. *Id.* at 219. Indeed, respondents cite no case in which this Court has suggested that a party not "bound by a funding condition" can seek its invalidation as applied to different legal entities. *Ibid.*

To the contrary, the Court has adhered to corporate formalities in its most closely analogous decisions. In *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983), for example, the Court upheld application of a funding condition to an entity organized under one provision of the Tax Code ("Taxation With Representation Fund") because a separate entity incorporated under a different provision of the Code ("Taxation With Representation") could engage in First Amendment expression without being bound by the condition. *Id.* at 543-545. Respondents observe (Br. 16, 27-28, 40) that *Regan* involved a speech-restricting condition rather than a speech-compelling condition, and this Court relied on that distinction in concluding that establishing affiliates would not provide a sufficient alternative channel for respondents' speech when they were bound by Section 7631(f). See 570 U.S. at 219. But that distinction is irrelevant to respondents' present theory (Br. 2-3) that speech will be attributed between "clearly identified affiliates" based on their shared "name, logo, brand, and mission." If that understanding were correct, the speech of each of the two closely affiliated entities in *Regan* would have been attributed to the other. But this Court expressly rejected that view,

upholding the funding condition precisely because the speech of the entities would be kept separate. 461 U.S. at 543-545.

Respondents cite (Br. 40-42) First Amendment cases outside the unconstitutional-conditions context, but none involves a claim comparable to respondents' here. For example, the Court has "in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message." *FAIR*, 547 U.S. at 63 (citing, *inter alia*, *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995)). But the government here is not "forc[ing]" respondents to "host or accommodate" any other speaker's message in their own operations, or to affiliate with any other entity. *Ibid.* Respondents themselves chose to share names, logos, and trademarks with foreign entities abroad; respondents and those foreign entities have chosen to maintain corporate separation; and respondents are not forced by the government to express any message.

The government-speech cases cited by respondents (Br. 42) are equally inapposite. Those cases have arisen when there is ambiguity about whether to attribute particular forms of speech to a private party or the government. See, *e.g.*, *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248-2249 (2015) (license plates); *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 470-471 (2009) (statues in a public park). Here, no comparable ambiguity exists. Where Section 7631(f) applies to a Leadership Act grant, the "recipient" of the grant makes the required statement "in the award document." 570 U.S. at 210 (citing 45 C.F.R. 89.1(b)). There is no ambiguity about which entity is

making that statement; it is the funding "recipient" that signs "the award document." *Ibid.*

Finally, respondents contend (Br. 44) that the government's affiliate guidelines support their contention that they and foreign entities with which they share common logos or brands should be treated as a single entity for purposes of an unconstitutional-conditions claim. But the affiliate guidelines do not interpret the Constitution or purport to attribute speech among entities for constitutional purposes. The guidelines instead define what is required to comply with Section 7631(f)'s directive that a funding recipient "have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. 7631(f); see 75 Fed. Reg. at 18,760. Of relevance here, the guidelines provide that a recipient subject to Section 7631(f) "must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking." 45 C.F.R. 89.3. But nothing in the guidelines suggests that different entities operating in different countries should be treated "as one" for constitutional purposes. Resp. Br. 22. At a minimum, any ambiguity in the guidelines should not be read to constructively merge respondents and the foreign entities that they claim as affiliates when they made a voluntary choice to remain legally distinct, and when treating them as one would invalidate a federal statute. Cf. *Rust*, 500 U.S. at 190-191.[5]

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[5] Respondents suggest (Br. 45) that they and the foreign entities chose to remain legally distinct in part because doing so would facilitate their receipt of grants under foreign law and federal funding priorities. Respondents' motives for their choice, however, are not relevant to the constitutional analysis. Respondents, moreover, do

2. Respondents' theory (Br. 39) of broad speech attribution across "invisible corporate lines" and international borders would have far-reaching consequences. A rule that U.S. entities can assert their own First Amendment rights to invalidate speech-related conditions applicable to foreign entities operating abroad that "share the same name, logo, brand, and mission and speak with a single voice," Resp. Br. 2, could call into question numerous governmental actions. A U.S. entity could, for example, assert a First Amendment objection to statutory restrictions on election-campaign contributions by its foreign affiliates abroad. Cf. *Bluman* v. *FEC*, 800 F. Supp. 2d 281, 289 (D.D.C. 2011) (Kavanaugh, J.) (noting consensus "that the government may bar foreign citizens *abroad* from making contributions" in U.S. elections), aff'd, 565 U.S. 1104 (2012). Likewise, a U.S. entity could challenge the longstanding "Mexico City Policy" on the theory that its prohibition of U.S. aid to foreign entities that actively promote abortion as a method of family planning abroad infringes the speech rights of domestic affiliates. *Center for Reprod. Law & Policy* v. *Bush*, 304 F.3d 183, 186, 190 (2d Cir. 2002) (Sotomayor, J.) (rejecting a similar claim); see *Planned Parenthood Fed'n of Am., Inc.* v. *Agency for Int'l Dev.*, 915 F.2d 59, 64-65 (2d Cir. 1990) (same), cert. denied, 500 U.S. 952 (1991).

Even if respondents' proposed rule were limited to funding conditions that operate as speech requirements rather than speech restrictions (cf. Resp. Br. 49 n.7), it

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not challenge any federal funding priorities, and they do not seriously contend that an otherwise-constitutional application of U.S. law could become unconstitutional based on requirements imposed by foreign nations.

would still produce untenable results. As the government explained in its opening brief (at 31-32), Congress and the Executive Branch condition the provision of U.S. aid to foreign recipients on adherence to particular viewpoints, some of which could be objectionable to foreign entities or to their affiliates in the United States. A condition requiring foreign grant recipients in a particular foreign-aid program to have, for example, a policy opposing illegal-drug abuse or certain forms of discrimination might give rise to objections similar to those advanced by respondents here. Under respondents' theory (Br. 26), domestic entities claiming an affiliation with foreign funding recipients could seek to invalidate those conditions for unconstitutionally infringing the domestic entities' "own speech."

Respondents do not dispute that those results are the logical consequence of their position. They instead suggest (Br. 48) that such scenarios must involve "sham affiliations" between "new and unfamiliar entities." But established entities with genuine affiliations could bring claims similar to those asserted by respondents here. And respondents provide no reason why those claims would fail if their claims here succeed. Respondents' position would thus open the door to a potentially broad range of constitutional challenges to Legislative and Executive Branch "judgment[s]" made under their core spending and foreign relations powers. *FAIR*, 547 U.S. at 67. Such disruptive consequences weigh heavily in favor of applying ordinary legal principles and attributing the speech of foreign entities operating abroad to those entities, not to domestic entities claiming some affiliation with them.

C. Practical And Policy Considerations Support Application Of Section 7631(f) To Foreign Entities Operating Abroad With Which Respondents Claim An Affiliation

Despite their differences in this long-running litigation, the government and respondents agree that the Leadership Act has produced inspiring success in the global fight against HIV/AIDS. See Gov't Br. 3-7; Resp. Br. 48 (describing the Act as "part of the most successful global health program in history"). Section 7631(f) has been part of the Act since its inception, and it reflects Congress's textually enumerated finding that "[p]rostitution and" sex trafficking "are degrading to women and children" and serve as "causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23); see *ibid.* ("[I]t should be the policy of the United States to eradicate such practices."). Policy disagreements have existed about Section 7631(f) from the outset. Compare Resp. Br. 47 (citing opposition to the policy), with 12-10 Amici Br. of Coalition Against Trafficking in Women et al. 1-37 (supporting the policy). But Congress has repeatedly reauthorized the Leadership Act, and three Presidents have signed those reauthorizations, without altering Section 7631(f). See Gov't Br. 6-7. Contrary to respondents' suggestion (Br. 47), moreover, the government has recognized the "critical" importance of Section 7631(f) to "the effectiveness of Congress's plan and to the U.S. Government's foreign policy," 72 Fed. Reg. at 41,076, by continuing to enforce and defend the provision—including twice in this Court.

Practical and policy considerations support continued enforcement of Section 7631(f) to foreign entities operating abroad. Respondents observe (Br. 46) that they have not been subject to Section 7631(f) for most of the Leadership Act's existence. But it is equally true

that the foreign entities with which they assert an affiliation have been subject to Section 7631(f) for the entire 17 years that the Leadership Act has been in effect. Gov't Br. 41. Respondents do not identify any concrete way in which continuing to apply Section 7631(f) to those foreign entities would interfere with their successful implementation of the Act. Nor do respondents "identify even one specific instance where a foreign affiliate's position on prostitution" or sex trafficking "actually resulted in harm such as lost Leadership Act funding, lost private funding, or even inconsistent messaging." Pet. App. 42a (Straub, J., dissenting). Respondents' inability to identify such harm underscores that the congressional judgment in Section 7631(f) should remain in place with respect to foreign entities operating abroad that lack constitutional rights.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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APPENDIX

1. 45 C.F.R. 89.1 provides:

Applicability and requirements.

(a) This regulation applies to all recipients unless they are exempted from the policy requirement by the Leadership Act or other statute.

(b) The Department of Health and Human Services (HS) components shall include in the public announcement of the availability of the grant, cooperative agreement, contract, or other funding instrument involving Leadership Act HIV/AIDS funds the requirement that recipients agree that they are opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. This requirement shall also be included in the award documents for any grant, cooperative agreement or other funding instrument involving Leadership Act HIV/AIDS funds entered into with the recipient.

2. 45 C.F.R. 89.2 provides:

Definitions.

For the purposes of this part:

Commercial sex act means any sex act on account of which anything of value is given to or received by any person.

Leadership Act means the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Public Law 108 25, as amended (22 U.S.C. 7601 7682).

Prostitution means procuring or providing any commercial sex act.

Recipients are contractors, grantees, applicants or awardees who receive Leadership Act funds for HIV/AIDS programs directly or indirectly from HHS.

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sext act.

3. 45 C.F.R. 89.3 provides:

Organizational integrity of recipients.

A recipient must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children ("restricted activities"). A recipient will be found to have objective integrity and independence from such an organization if:

(a) The affiliated organization receives no transfer of Leadership Act HIV/AIDS funds, and Leadership Act HIV/AIDS funds do not subsidize restricted activities; and

(b) The recipient is, to the extent practicable in the circumstances, separate from the affiliated organization. Mere bookkeeping separation of Leadership Act HIV/AIDS funds from other funds is not sufficient. HHS will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient separation exists. The presence or absence of any one or more factors relating to legal, physical, and financial separation will not

be determinative. Factors relevant to this determination shall include, but not be limited to, the following:

(1) Whether the organization is a legally separate entity;

(2) The existence of separate personnel or other allocation of personnel that maintains adequate separation of the activities of the affiliated organization from the recipient;

(3) The existence of separate accounting and timekeeping records;

(4) The degree of separation of the recipient's facilities from facilities in which restricted activities occur; and

(5) The extent to which signs and other forms of identification that distinguish the recipient from the affiliated organization are present.