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IN THE SUPREME COURT OF THE UNITED STATES

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AGENCY FOR INTERNATIONAL :

DEVELOPMENT, ET AL. :

Petitioners : No. 12-10

v. :

ALLIANCE FOR OPEN SOCIETY :

INTERNATIONAL, INC., ET AL. :

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Washington, D.C.

Monday, April 22, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

SRI SRINIVASAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioners.

DAVID W. BOWKER, ESQ., Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 12-10, Agency for International Development v. The Alliance for Open Society International.

Mr. Srinivasan.

ORAL ARGUMENT OF SRI SRINIVASAN  
ON BEHALF OF THE PETITIONERS

MR. SRINIVASAN: Thank you, Mr. Chief Justice, and may it please the Court:

Congress's comprehensive program to address the worldwide problem of HIV and AIDS includes a policy of opposing prostitution and sex trafficking because they contribute to the diseases' spread. And correspondingly, Congress determined -- determined that the government should partner with and should grant limited competitive Federal funding to those organizations that agree with the policy opposing prostitution and sex trafficking because organizations that agree with that policy are most likely to carry out the Federal program in conformity with the Federal policy priorities.

Now, no organization that carries out HIV programming is required to subscribe to the Federal

1 government's views, but, if an organization wants to  
2 partner with the Federal government and get Federal  
3 funds to carry out the Federal program, well, that  
4 organization --

5 CHIEF JUSTICE ROBERTS: Well, but I guess  
6 the problem is that there are a number of different ways  
7 you could carry out the program. And let's say you have  
8 an organization that focuses on a particular -- you  
9 know, the administration of hospitals or whatever it is  
10 that's covered by the program, and they regard this  
11 issue as collateral to what they're concerned with.

12 There -- there have to be some limitations  
13 on what type of loyalty oath you can require them to  
14 sign, isn't there?

15 MR. SRINIVASAN: Well, I think,  
16 Mr. Chief Justice, the way that Congress looked at this  
17 was to look at -- at the organizations with which the  
18 government is going to partner across the mine run of  
19 situations, and I think what one can do is look at  
20 Respondents' brief because Respondents encompass a  
21 variety of different types of organizations.

22 But Respondents' brief itself tells you, at  
23 pages 11 to 12 and at pages 32 and 33, that there are  
24 going to be situations, in their own experience, in  
25 which these issues about prostitution and --

1 CHIEF JUSTICE ROBERTS: Well, what if  
2 they --

3 MR. SRINIVASAN: -- and sex trafficking come  
4 into issue.

5 CHIEF JUSTICE ROBERTS: I appreciate that.  
6 What if they're not? What if the government  
7 has, in addition to this policy, a strong policy in  
8 promoting -- you know, recycling, and so they require  
9 everybody with whom they're going to do business, every  
10 grantee, to adopt a policy in favor of using renewable  
11 resources? Any problem with that?

12 MR. SRINIVASAN: Mr. Chief Justice, I think  
13 that would present a different question. Of course, you  
14 know that it presents a different question, but it would  
15 be a little bit more difficult for the -- for the  
16 following reason: That there is a germaneness component  
17 to Congress's -- the constitutionality of Congress's  
18 funding decisions in this area. And the more sweeping  
19 and the less germane the condition would be, the more  
20 it's open to constitutional attack.

21 Now, this condition is very, very germane  
22 because as -- because, as Congress found, prostitution  
23 and sex trafficking contribute to the spread of the  
24 disease, and so it makes good sense that Congress would  
25 have imposed this condition. And I think it's important

1 to understand --

2 JUSTICE BREYER: Well -- well, on that  
3 particular point, what should we do -- as far as I can  
4 tell from the briefs, the people who work with the  
5 prostitutes to try to prevent AIDS uniformly tell us  
6 that, if you go to those prostitutes and you try to get  
7 them to take steps to stop AIDS, it's very hard to do  
8 if, at the same time, you've announced you're against  
9 all prostitution.

10 So what they're saying is that the condition  
11 imposed will interfere with the objective, and if there  
12 is a germaneness requirement -- and nobody says the  
13 opposite. I mean, I've noted nobody denies what they're  
14 saying in terms of the effectiveness of their work,  
15 so -- I don't think.

16 At least, I didn't read them all with great  
17 care; maybe you can point to somebody who does. But, if  
18 everyone is telling us that this is counterproductive  
19 and the exact opposite -- then can we say, well, it  
20 isn't germane?

21 MR. SRINIVASAN: Well, Justice Breyer, I  
22 don't think so, and two responses on that score. First  
23 of all, everybody is not telling you that, and I'll tell  
24 you who's not telling you that in a second.

25 But the more -- but the overarching point is

1 that this is a policy determination that Congress, of  
2 course, took into account when it fashioned the statute,  
3 and it concluded that it was important to have an  
4 opposition to prostitution and sex trafficking.

5 Now, as far as the organizations that aren't  
6 telling you that, there is an amicus brief that's filed  
7 by 46 organizations that it's in our support --

8 JUSTICE BREYER: Well, that's quite a few,  
9 yes. That's true.

10 MR. SRINIVASAN: -- that's in our support,  
11 and the lead organization is the Coalition Against  
12 Trafficking in Women, and they -- they support us, and  
13 they think that the best way -- and they -- and they  
14 argued this passionately in their brief -- they think  
15 that the best way to provide services to the target  
16 audience is under a rubric of opposition to prostitution  
17 and sex trafficking.

18 And I would urge you to take a look at that  
19 brief because it explains why the program should be  
20 conducted in this fashion.

21 Now, is there a debate about --

22 JUSTICE GINSBURG: Mr. Srinivasan, there  
23 isn't -- at least I'm not familiar with anything quite  
24 like this, where, if you're not told, if you want to run  
25 a government program, you have to speak the government's

1 speech.

2                   This doesn't require the recipient to speak  
3 to anybody at all, except to the government itself, to  
4 say, I pledge that my policy is the government's policy.  
5 So it's making somebody adopt, as her own, the  
6 government's policy, rather than saying, I understand  
7 that I get my government money, I have to follow the  
8 government's rules about what I can say to the public.

9                   Here -- and is -- is there anything else  
10 quite like this, where you make a pledge to the  
11 government, but with respect to third parties doesn't  
12 apply?

13                   MR. SRINIVASAN: Justice Ginsburg, if I  
14 could just fight the premise of your question just very  
15 slightly and then explain why I think this kind of  
16 requirement makes sense in this particular context?

17                   The goal of this is not to persuade somebody  
18 to change their view. The goal of this is to partner  
19 with organizations that self-identify as organizations  
20 that agree with the government's policy priorities. And  
21 the reason the government has done that and the reason  
22 why Congress could -- felt that that was a good idea is  
23 straightforward, and that is that those organizations  
24 that agree with Congress's policy priorities are going  
25 to be more likely to be reliable and effective partners

1 in carrying out the government's program.

2 And one way to think about it is to envision  
3 this: You have a circumstance in which you're down to  
4 your last few dollars of a discretionary Federal  
5 funding, and you're looking at two different  
6 organizations that are competing for that money.

7 One of them comes to you and says, we agree  
8 with your policy of an opposition to prostitution and  
9 sex trafficking; and the other one says, we're not going  
10 to tell you whether we agree, we're going to remain  
11 studiously neutral, but we'll tell you that we'll  
12 conduct our affairs in a manner that's not inconsistent  
13 with your policy priorities.

14 I think it makes all the sense in the world  
15 for Congress to decide that the government should  
16 preferably partner with the former organization, rather  
17 than the latter, because they're going to be more  
18 reliable and more effective at carrying out the  
19 government's program.

20 And there's another aspect of this that I  
21 think that is important to highlight, and that is that  
22 we're not just talking about circumstances in which the  
23 conduct is -- is, arguably, going to be neutral, so that  
24 there's going to be no position taken.

25 There's also going to be occasions in which

1 the organizations that are providing services are going  
2 to have the opportunity to affirmatively embrace the  
3 government's policy in opposition to prostitution and  
4 sex trafficking.

5 JUSTICE ALITO: I'm not aware of any case in  
6 which this Court has held that it is permissible for  
7 Congress to condition Federal funding on the recipient's  
8 expression of agreement with ideas with which the  
9 recipient disagrees. I'm not aware of any case in which  
10 that kind of compelled speech has been permitted.

11 And I would be interested in -- and it seems  
12 to me like quite a -- a dangerous proposition. I would  
13 be interested in whatever limitations you think there  
14 might be on that rule, which seems to be the general  
15 rule that you're advocating. Other than the requirement  
16 of germaneness, is there anything else?

17 MR. SRINIVASAN: There -- there is  
18 germaneness, Justice Alito, and I can point to a couple  
19 of other limiting principles that have been noted in  
20 this Court's decisions and I think that are satisfied  
21 here.

22 One is that Finley talked about -- and I  
23 think it captures some other decisions in this -- this  
24 respect, disallowing the government from leveraging its  
25 control over funding conditions in a manner that

1 services a speech-suppressive objective. And so you  
2 have to be careful, and I think this maps --

3 JUSTICE SCALIA: Say it again. I didn't  
4 understand the point.

5 MR. SRINIVASAN: It -- it -- the government  
6 is limited from leveraging its control over funding  
7 conditions, so that it can achieve a speech --  
8 speech-suppressive objective.

9 And I think what the Court was getting at is  
10 that you want to be careful that the speech condition --  
11 the speech-related condition is tightly tethered to the  
12 programmatic objective and not allow the government  
13 to -- to have the program seep into other areas where it  
14 doesn't have to go.

15 JUSTICE ALITO: Well, let me give you this  
16 example, which is mentioned in one of the amicus briefs.  
17 The government provides lots of funding to universities  
18 to -- in various forms, either directly or through  
19 student loans, in the form of tax exemptions, so  
20 anything that would be germane to the general purpose of  
21 higher education, presumably, could be attached as a  
22 condition to those funds.

23 Would that be correct?

24 MR. SRINIVASAN: With -- with certain  
25 limitations. I mean, I think germaneness is a -- is a

1 criterion.

2 JUSTICE ALITO: With what -- with what  
3 limitations?

4 MR. SRINIVASAN: Well, I think --

5 JUSTICE ALITO: The government could have a  
6 whole list of things -- of principles that it thinks  
7 should be incorporated into higher education, and it  
8 could require a university, as a condition of receiving  
9 these -- this money, let's say directed through student  
10 loans, to express agreement with all of these  
11 propositions. Would that be true?

12 MR. SRINIVASAN: Well, I -- well, I'm not  
13 sure, Justice Alito, and of course it's going to be hard  
14 for me to decide that we are not going to defend  
15 something. But let me just give you a limiting idea  
16 that's out there, which is that I think there is an  
17 important distinction between circumstances in which the  
18 government is partnering with an organization to carry  
19 out a government program and circumstances in which the  
20 government is extending a Federal subsidy to an  
21 individual organization as kind of an across-the-board  
22 entitlement.

23 So in the generally applicable  
24 across-the-board --

25 JUSTICE SCALIA: What do you mean by,

1 "partnering"? How does this partnering differ --  
2 partnering differ from just giving them the money to do  
3 the job?

4 MR. SRINIVASAN: Well, I don't know that it  
5 the differs from giving the money to do the job. I  
6 guess what I'm saying is there are going to be  
7 circumstances, for example, like in Speiser, where the  
8 financial question doesn't have to do with the  
9 expenditure of the money by the recipient in a manner  
10 that's commensurate with congressional goals.

11 In that context, you're giving a generally  
12 applicable entitlement, and you're not so worried about  
13 how the money is being spent because that person is not  
14 partnering with the government in carrying out a Federal  
15 program. Here, the organizations are partnering with  
16 the government in carrying out the Federal program  
17 because it's the Federal HIV program that's --

18 JUSTICE SCALIA: I don't know what you --  
19 what do you mean by, "partnering"? You're just saying  
20 they are given money to carry out a particular program.  
21 Is that all --

22 MR. SRINIVASAN: Yes.

23 JUSTICE SCALIA: Is that all you mean by,  
24 "partnering"?

25 MR. SRINIVASAN: They are given money to

1 carry out --

2 JUSTICE SCALIA: To carry out a particular  
3 program?

4 MR. SRINIVASAN: But in concert with Federal  
5 policy priorities, so it's not just -- it's not just a  
6 naked grant of money. If you had an entitlement,  
7 Justice Scalia, for example, let's just consider your  
8 classic entitlement --

9 JUSTICE SCALIA: I understand. It is -- it  
10 is a naked grant of money to implement a particular  
11 program.

12 MR. SRINIVASAN: To implement a particular  
13 program and --

14 JUSTICE SCALIA: Okay. And you call that  
15 "partnering with the Federal government"?

16 MR. SRINIVASAN: I do.

17 JUSTICE SCALIA: Terrible verb, anyway.

18 (Laughter.)

19 MR. SRINIVASAN: Okay. My apologies for  
20 that. For associating with the organization recipient  
21 in carrying out a Federal program.

22 JUSTICE GINSBURG: Mr. Srinivasan, on this,  
23 it does seem to me unusual, as Justice Alito brought  
24 out, requiring somebody to say, "I believe this" or "I  
25 agree with the government on that." The Rust v.

1 Sullivan, which is one of the precedents on which you  
2 rely, made it a point that the doctor was not required  
3 to represent -- as his own views, not required to  
4 represent an opinion that he doesn't hold.

5 He has to adhere to the government's program  
6 in his dealings with the public, but he doesn't have to  
7 say, "I agree with the government."

8 MR. SRINIVASAN: Yes. That's true, Justice  
9 Ginsburg. But here's why --

10 JUSTICE GINSBURG: Is that just an  
11 irrelevant consideration in Rust, that no one -- no one  
12 was being obliged to say, I believe something, that they  
13 don't believe?

14 MR. SRINIVASAN: Well, here's why I think it  
15 makes sense in this context -- it is distinct in that  
16 respect, but here's why I think it makes sense in this  
17 specific context: What Congress wanted to do is secure  
18 an ex ante commitment from the organizations with which  
19 the government works to assure that they agreed with the  
20 government's policy priorities.

21 Now, where these programs are carried out is  
22 in the main, in foreign territory, in distant lands,  
23 and, in that context, I think Congress would have  
24 understood that monitoring of conduct can be  
25 particularly challenging.

1           And that monitoring is made all the more  
2 challenging because these issues can come into play  
3 through a myriad of interactions between the  
4 organizations that are working with the government and  
5 local communities and local officials.

6           JUSTICE BREYER: I see that, and I see you  
7 have two sides to the policy question. And then it  
8 seems to me that the case that Justice Ginsburg was  
9 speaking of is pretty relevant. Why? Well, that case,  
10 Regan and League of Women Voters, all seem quite  
11 comparable.

12           They are trying to balance the -- the desire  
13 of the government to further a policy objective with the  
14 undesirability of the government invading what would  
15 otherwise be a constitutional protected right to speech.

16           And the way they have done it is quite  
17 technical and narrow, but it may be applicable. In  
18 both, what they said was, don't worry about your  
19 protected speech as much as you are because there is  
20 another way you can do it here. You go through a -- an  
21 independent structured organization. And where that  
22 wasn't present, namely, the League of Women Voters, the  
23 Court struck it down.

24           Now, if that's the right framework, then,  
25 here, I don't see how you could have an independently

1 structured organization for the reason that a group that  
2 said, I am -- I am opposed completely to prostitution,  
3 publicly, to get the money, and then set up a structure  
4 that said the opposite, would be seen as totally  
5 hypocritical. They wouldn't be able to get their  
6 message across.

7           They wouldn't be able to express, in any  
8 way, what it is they think about the -- the  
9 administration of AIDS in the context -- anti-AIDS in  
10 the context of prostitution.

11           That's a long question, but you see  
12 where -- where I've ended up.

13           MR. SRINIVASAN: I think I do.

14           JUSTICE BREYER: At the moment, for purposes  
15 of the question. So why isn't this case more like  
16 League of Women Voters and less like the other two?

17           MR. SRINIVASAN: For the following reasons,  
18 Justice Breyer: There is an alternative affiliated  
19 organizational vehicle in this case as well, and I think  
20 that's constitutionally significant. Now, I'm not going  
21 to quibble with Your Honor's point about how the  
22 organization that's the funding recipient has made this  
23 policy agreement and that that can have ripple effects.

24           But here's why that matters: The point of  
25 having an alternate vehicle is not that it remedies a

1 constitutional problem that already exists. The point  
2 of it is to get to this leveraging purpose that I was  
3 talking about earlier, and it's to show that what the  
4 government is doing is keeping the condition within its  
5 appropriate confines, and it's not allowing that  
6 condition to spread beyond that, into other realms.

7 And that purpose is fully served by the  
8 organizational affiliate alternative here. And I think  
9 it's important --

10 JUSTICE GINSBURG: But, Mr. Srinivasan,  
11 there is a difference in this international setting --  
12 you know, most of those separate affiliates was in  
13 Taxation Without Representation, and it was the cure for  
14 the Legal of Women Voters. But here, as the D.C.  
15 District Court said in its opinion, which was in your  
16 favor, oh, all you have to do is spin off a subsidiary  
17 that gets the government money; it's just a simple  
18 matter of corporate reorganization.

19 But you know that getting an NGO -- a new  
20 NGO recognized in dozens of foreign countries is no  
21 simple thing to accomplish. I mean, to take a concrete  
22 example, look what happened about a year and a half ago  
23 in Egypt, when the U.S. NGOs were indicted for  
24 criminal -- for not complying with the permit  
25 requirements of the country.

1           So it's one thing to set up a 501(c)(3) and  
2 501(c)(4) operating in the United States, each does its  
3 thing. But to require an NGO to then, in the countries  
4 where it's operating, get the necessary permits is quite  
5 an arduous thing.

6           MR. SRINIVASAN: Well, Justice Ginsburg, I  
7 guess it depends on which direction it runs as a  
8 principal point. I mean, of course, the recipient  
9 organization that's been conducting the program, to  
10 date, can continue to conduct the program, and the  
11 affiliate that's set up could be the alternate channel.  
12 And so you could run in the opposite direction, and I  
13 think you wouldn't run into that problem.

14           But I would like to address on this score an  
15 important point, which is that I think Respondents have  
16 suggested that there is a material distinction between,  
17 Justice Breyer, the circumstances in Rust and the  
18 circumstances in this case because Rust involves  
19 separate programs within a legal entity, and this case  
20 involves separate organizations.

21           And I think the point the Respondents are  
22 trying to make is that there is a distinction because at  
23 least, there, one legal entity could have multiple  
24 programs, some of which are subject to the condition and  
25 some of which are not, whereas, here, there is a

1 difference because this condition applies to an entire  
2 organization.

3 But I think that's a false premise, which --

4 JUSTICE BREYER: I wasn't excepting that  
5 one.

6 MR. SRINIVASAN: Okay.

7 JUSTICE BREYER: I was -- I mean, the main  
8 difference it seemed to me is, assuming all of that  
9 away, is that, here, the separate structure does not  
10 fulfill the constitutional need simply because the basic  
11 condition has to do with express speech, because when A  
12 says, I believe in X, and then they set up a separate  
13 structure -- and every one knows they have set it up; I  
14 mean, that's the point of it -- and the structure says,  
15 "just kidding," nobody believes them from day one.

16 And so you can't do it, and, if the  
17 government has its way and has awarded the thing  
18 properly, according to your criteria, the part that  
19 won't be believed is the "just kidding" part. And so  
20 the structure -- separate structure -- just doesn't work  
21 in terms of communicating their belief. And I don't  
22 think that's true in Rust, and I don't think it's true  
23 in Regan, and I do think it's true in FCC v. League of  
24 Women Voters.

25 MR. SRINIVASAN: I guess I'd -- I'd make two

1 points, Justice Breyer.

2 One is, as I was suggesting earlier, the  
3 purpose of having this alternate channel is not to  
4 remedy a constitutional violation that otherwise would  
5 exist. I mean, of course, we start from the premise  
6 that it's okay to require this condition at the front  
7 end. It's not that it's unconstitutional, and the way  
8 to compensate for that is to create this affiliate  
9 alternative.

10 We think the condition's okay ab initio.  
11 What the alternate vehicle does is to address this other  
12 problem, that it shows that the condition is  
13 appropriately tailored. It's not reaching beyond its  
14 appropriate confines because it's allowing --

15 JUSTICE BREYER: Boy, if -- if the  
16 structure -- the separate structure is not really part  
17 of a constitutional analysis, then the government could  
18 say, why not? It's easy to find policy reasons, and  
19 really find very, very decent and thoughtful people who  
20 agree with the policy reason, you know?

21 There -- there are people on both sides of  
22 these questions, and they come in and they say, okay,  
23 we're giving money for an anti-abortion purpose or a  
24 pro-abortion purpose, you know --

25 MR. SRINIVASAN: Well --

1 JUSTICE BREYER: -- and -- and, suddenly,  
2 people can't say anything in these areas in face of such  
3 a condition.

4 MR. SRINIVASAN: Well, as part of the -- as  
5 part of the constitutional analysis, I guess it's just  
6 addressing a different part of the constitutional  
7 analysis than -- than what Your -- Your Honor is  
8 addressing.

9 I guess the other points that I'd make are  
10 twofold. One is that I think there is something to the  
11 notion that, if the organizations are sufficiently  
12 separate, then -- as they have to be, to comply with the  
13 regulations -- then it does work that one organization  
14 can say that we have a particular policy, and the  
15 organization -- another organization -- another  
16 organization can say that we have a different policy,  
17 precisely because of the premise that they're  
18 sufficiently distinct.

19 So I'm not seeing the same degree of  
20 cognitive dissonance you are --

21 JUSTICE SOTOMAYOR: But that's --

22 MR. SRINIVASAN: -- and the other point I'd  
23 make --

24 JUSTICE SOTOMAYOR: I'm sorry.

25 Finish answering him, and then I'll --

1 MR. SRINIVASAN: Thank you, Justice  
2 Sotomayor.

3 The other point I'd make is this: That the  
4 speech-related objections that Respondents levy are  
5 twofold, one is they complain about the threshold  
6 condition. But the second is -- and this is -- may --  
7 manifests at pages 11 to 12 and 32 and 33 of their  
8 brief -- is that they want to engage in activities that  
9 involve affirmative speech.

10 They want to be able to participate in the  
11 dialogue about prostitution and sex trafficking and  
12 whether they should be legalized. And, with respect to  
13 that aspect of what Respondents are complaining --  
14 complaining about, I think the alternate affiliated  
15 organization opportunity is a perfect remedy, in the  
16 same way that it was in Rust and in the same way that  
17 it -- that it was in Regan.

18 JUSTICE SOTOMAYOR: The problem that I have  
19 with that answer is that it doesn't cure the  
20 organization's need to stay true to its own beliefs  
21 because if -- and I think this is what Justice Breyer is  
22 trying to get to -- if it truly an independent  
23 organization speaking, then that's that organization's  
24 belief; it's not an alternative under Rust to the needs  
25 of that organization to have its own personal views.

1                   And -- and so I have that problem, which is  
2 how is it an alternative for that organization to be  
3 able to have its views?

4                   Let me posit a hypothetical that I'm  
5 actually very troubled by. Let's assume a city  
6 government is undertaking a campaign to prevent teen  
7 pregnancy and its associated problems, and it wants to  
8 promote the use of contraceptives that protect from  
9 contracting -- you know, diseases, things like that.

10                  And some of its programs involve the  
11 distribution of contraceptives, but others involve  
12 parenting classes for teenage mothers and offering them  
13 free daycare. And a church seeks funds for the daycare  
14 part and the parenting part.

15                  Can the city now say, because we have this  
16 really important need to avoid sexually transmitted  
17 diseases, anyone who seeks our funds also have to say  
18 they believe in the use of contraceptives?

19                  MR. SRINIVASAN: Justice Sotomayor --

20                  JUSTICE SOTOMAYOR: The church there would  
21 say, we don't believe, and why should we say we believe?

22                  MR. SRINIVASAN: I -- I'd certainly  
23 understand why a church would be reluctant to do that.  
24 I mean, I guess -- you know, one way to look at it is  
25 that the city, I think, would have to think very long

1 and hard about whether that's a -- a desirable policy  
2 objective, precisely because some of the organizations  
3 with which it wants to work are going to have difficulty  
4 abiding by it. And so there's going to have to be a  
5 front-end determination, as a matter of policy, about  
6 whether that's an appropriate thing to pursue.

7           But, if the city, as Congress did in this  
8 case, thought that it was an appropriate thing to do,  
9 then I think I would -- I think I would defend that --  
10 apart from -- you know, free exercise issues of other  
11 things that aren't in play here -- I think I would  
12 defend it, as long as it's sufficiently germane and as  
13 long as it's in furtherance of the policy objectives  
14 that Congress -- or by, in your hypothetical, the  
15 city --

16           JUSTICE ALITO: Well, why don't I give you  
17 another example that's along the same lines? The  
18 Federal government provides lots of funds to entities  
19 and individuals who are involved in the provision of  
20 health care.

21           So let's suppose Congress says that, we  
22 think that the issue of guns is very germane to public  
23 health, and therefore, we will not allow anybody to  
24 receive any of these funds directly or indirectly,  
25 unless that entity or person proclaims agreement with

1 whatever we happen to think at the moment about guns.

2           So they must either say we believe that guns  
3 should be strictly limited -- access to them should be  
4 strictly limited for public health purposes or that guns  
5 should be freely available because we think that  
6 promotes public health. That would be permissible,  
7 wouldn't it?

8           MR. SRINIVASAN: I don't know that it would,  
9 Justice Alito, on that --

10           JUSTICE ALITO: Well, why would it not?

11           MR. SRINIVASAN: -- because -- because I  
12 think, first of all, it would depend on whether  
13 there -- there is the requisite germaneness. It would  
14 depend on whether, in fact, the organizations are  
15 working with -- I'm trying to avoid using the word  
16 "partnering with" -- but are working with the -- the  
17 government in carrying out the program. It would depend  
18 on those kinds of considerations.

19           And whether -- another point to be made here  
20 is that a limitation that's been recognized in this  
21 Court's cases is that, at the end of the day, the  
22 government -- the government can't be seeking to  
23 suppress speech or to suppress disfavored viewpoints,  
24 even in the context of subsidization.

25           And you'd have to ask the question whether

1 that scheme is designed to do that. Now, if -- if it  
2 crossed all those thresholds, then I think, yes, I would  
3 defend that as well, but I do think that it presents  
4 different and more difficult questions.

5 I would like to --

6 JUSTICE KENNEDY: One -- one thing before  
7 your time is up. I have the same concerns that Justice  
8 Ginsburg expressed about the difficulty of simply  
9 creating structures in -- in foreign countries. If --  
10 and I've looked through all of your cases.

11 What's your closest case -- your best case  
12 for the fact that you should get extra deference because  
13 this is the foreign affairs field? I mean, I think of  
14 U.S. v. Curtis Wright. Anything more specific than  
15 that?

16 MR. SRINIVASAN: I don't know that I have a  
17 particular case, other than the doctrine, generally,  
18 Justice Kennedy. But I do think that the foreign  
19 location of this is significant vis-à-vis the concern  
20 that I think many of you have raised about why have an  
21 affirmative condition that requires espousal of a  
22 policy.

23 Precisely because the conduct here is  
24 carried out in foreign areas and precisely because it  
25 can involve myriad interactions with local officials and

1 local policymakers, as Respondents admittedly want to  
2 do, on these sensitive questions, it makes sense in this  
3 context -- particular sense in this context to secure an  
4 ex ante commitment of agreement with the government's  
5 policy because that will have a self-policing aspect to  
6 it.

7 It will be more designed to secure conduct  
8 in those areas that, in conformity with Federal policy,  
9 in a realm in which that conduct is particularly --  
10 particularly difficult to monitor.

11 I'd like to reserve the balance of my time  
12 for rebuttal, if I might.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 Mr. Bowker?

15 ORAL ARGUMENT OF DAVID W. BOWKER

16 ON BEHALF OF THE RESPONDENTS

17 MR. BOWKER: Mr. Chief Justice, and may it  
18 please the Court:

19 Respondents do not dispute that the Spending  
20 Clause gives the government significant authority to  
21 fund the programs of its choosing and to control speech  
22 and conduct within those programs.

23 The problem with the policy requirement is  
24 that it aims at grantees, requiring that they profess a  
25 personal belief and refrain from certain private speech

1 outside the context of the government program.

2 In Rust v. Sullivan, the Court held that the  
3 government could ban abortion-related speech in the  
4 government's own family planning program, but the  
5 grantees there were left unfettered in their personal  
6 beliefs and in their private speech outside the program.

7 CHIEF JUSTICE ROBERTS: I don't see why this  
8 is a -- you talk about banning their speech. The  
9 government is just picking out who is an appropriate  
10 partner to -- to assist in this project. It wants to go  
11 and find people who, like them, are opposed to  
12 prostitution, and all they want to do is make sure that  
13 you're opposed to prostitution.

14 It's like any other sort of condition -- you  
15 know, we want to make sure that you haven't been  
16 convicted of tax fraud over the last 10 years, so sign a  
17 certification that you -- you haven't. Yes, it's  
18 related to speech, but the whole program is about that.

19 Why would they want to sign up with somebody  
20 who didn't share the objectives of the program?

21 MR. BOWKER: Well, I think the policy  
22 requirement here has been applied a little differently  
23 than Mr. Chief Justice suggests. It -- it is applied in  
24 a way that is a funding condition, not part of the  
25 selection criteria.

1           When the government goes out to select its  
2 partners in this case, it -- it goes out with requests  
3 for applications, and those requests for applications  
4 pertain to the particular program at issue. And they  
5 are very detailed about what precisely is required for  
6 that program, including --

7           CHIEF JUSTICE ROBERTS: So it would be a  
8 different case, in your -- your view, as if -- when they  
9 have those criteria, they have one of them is, oh, by  
10 the way, you must agree with the objective of the  
11 program, which is to eliminate, to the extent possible,  
12 prostitution and sex trafficking?

13           MR. BOWKER: No. I don't -- I don't think  
14 that's right. I -- I think the government absolutely  
15 can pick partners who are dedicated to the particular  
16 program for which they are applying, but there are  
17 constitutionally permissible ways to do that.

18           One of the ways to do that is to look at  
19 technical capacity, past performance, references, what  
20 have you done before that shows you're able to do this  
21 particular program?

22           JUSTICE SCALIA: Well, it isn't just able to  
23 do. Are -- are you saying that they -- they just can't  
24 make it a prior condition, but they can select  
25 applicants on the basis of which ones they know agree

1 with the government's objectives?

2           You -- you have two equally qualified --  
3 technically, two equally qualified applicants, and the  
4 government intentionally picks the one whose views on --  
5 on prostitution are -- are similar to the government's.  
6 Is -- is that bad?

7           MR. BOWKER: Yes. And -- and the reason  
8 it's bad is because the government there is focused on  
9 viewpoint and not on ability to perform the program.  
10 The problem -- the problem with focusing --

11           JUSTICE KENNEDY: But let -- let me -- let  
12 me ask you this: Suppose that you're a Congressman or a  
13 Congresswomen, and you are a constitutional expert, and  
14 you take your oath to uphold the Constitution very  
15 seriously.

16           A funding bill comes before you. You're the  
17 chairman of the committee, and you decide that you're  
18 going to fund A, rather than B, because you like their  
19 speech much better. Is that a violation of the  
20 Constitution?

21           MR. BOWKER: Well --

22           JUSTICE KENNEDY: Because you like their  
23 policies much better?

24           MR. BOWKER: The -- the Congress can  
25 certainly fund a particular program and not fund others.

1 And we have no -- we have no argument with that. The  
2 spending condition -- the Spending Clause definitely  
3 comes with that ancillary power. And, in fact, that's  
4 what the Congress did here. It said, we want to -- we  
5 want to fund a fight against HIV/AIDS. We don't want to  
6 support that disease, and we want to oppose  
7 prostitution, we don't want to support that practice.

8 What it cannot do, then, is take its  
9 viewpoint and impose its viewpoint on the grantee and  
10 make it a -- make it a condition.

11 JUSTICE KENNEDY: Well, I'm -- I'm not quite  
12 sure I -- I see the difference, that the -- a  
13 conscientious Congressperson cannot -- can, in your  
14 view, say, I'm going to prefer organization A over  
15 organization B because I like their policies better --

16 MR. BOWKER: Well, I don't --

17 JUSTICE KENNEDY: -- across the board, with  
18 reference to drugs, with reference to guns, with  
19 reference to public health.

20 MR. BOWKER: If -- if Congress is looking at  
21 the viewpoint of an organization and deciding whether to  
22 fund it based on its viewpoint, I think that's  
23 problematic. And the reason I think it's problematic is  
24 because this Court has said to deny a subsidy or a  
25 benefit on the basis of the exercise of one's First

1 Amendment rights, including holding one's own views, to  
2 deny a subsidy on that ground --

3 JUSTICE SCALIA: Well, my goodness. They  
4 can't --

5 MR. BOWKER: -- is problematic.

6 JUSTICE SCALIA: -- they can't fund the Boy  
7 Scouts of America because they like the programs that  
8 the BSA has? They -- they have to treat them  
9 equivalently with the Muslim Brotherhood? Is that  
10 really what you're suggesting?

11 MR. BOWKER: Not at all. I think --

12 JUSTICE SCALIA: Well, then, you can take  
13 into account the -- the principles and the -- and the  
14 policies of -- of the organization that you're giving  
15 funding to.

16 MR. BOWKER: Well, this Court has never said  
17 that the Congress can make a decision based on viewpoint  
18 alone.

19 JUSTICE BREYER: But there's no way to  
20 separate -- with an organization in the field that does  
21 things, there is no way, I don't think, to separate what  
22 they do from what they say. Congress has two opposite  
23 views on this in front of it.

24 MR. BOWKER: Sure.

25 JUSTICE BREYER: One is the view that the

1 way to fight AIDS is consistent with and is furthered by  
2 longer term efforts to abolish trafficking in women,  
3 okay? Prostitution.

4 All right. The other view is the better way  
5 to do it is to go into the active sex worker area and --  
6 and not express views on the merits of what they are  
7 doing, okay?

8 So they have two opposite views, and -- and,  
9 moreover, the groups that do this act on those views.  
10 So why can't they say, we prefer view A or B, whichever  
11 it is, and -- because that's what our program is about?

12 MR. BOWKER: Congress can -- can certainly  
13 decide what programs to fund and what programs not to  
14 fund. But, when Congress makes that decision, Congress  
15 then can't take the next step to say the only people who  
16 can get funds under this particular program are people  
17 who agree with us and who will refrain from saying  
18 anything inconsistent in their private speech.

19 JUSTICE SCALIA: But you -- you go further  
20 than that. In answer to my question, you -- you go  
21 further than that, and you say, moreover, even without  
22 making it a condition precedent to getting the money,  
23 Congress can -- the government cannot intentionally  
24 select those people that it thinks are in accord with  
25 its views. Right? Isn't that what you said?

1 MR. BOWKER: The Court has never said that's  
2 okay, and it's our -- and it's our --

3 JUSTICE SCALIA: I'm not asking what the  
4 Court said; I'm asking what you're saying.

5 MR. BOWKER: It's our position that it is  
6 constitutionally problematic to make funding decisions  
7 based on the viewpoint of grantees.

8 JUSTICE SCALIA: Problematic or -- or  
9 unconstitutional?

10 MR. BOWKER: Unconstitutional as applied  
11 here.

12 JUSTICE SCALIA: Okay.

13 MR. BOWKER: However -- however, we are not  
14 saying that there is no circumstance in which the  
15 government's interest wouldn't be compelling enough to  
16 override the First Amendment right. Now, in our  
17 situation --

18 CHIEF JUSTICE ROBERTS: So let's just say  
19 the government wants to have an ad campaign to  
20 discourage people from smoking and they are looking for  
21 ad agencies to -- to help them with it. And an ad  
22 agency comes in and says, look, we are the best ad  
23 agency there is; we know exactly how to get to the  
24 markets; we know what's persuasive and all of that.

25 And yet -- and then the ad agency says --

1 you know, come work at our agency if you smoke; we think  
2 smoking is okay; we have smoking breaks; we do all this.  
3 The government can't take that into account?

4 MR. BOWKER: I think the rules are different  
5 when the government hires a spokesperson. When the  
6 government hires a spokesperson, the government has the  
7 right under the -- under its ancillary power, under the  
8 Spending Clause, to control what that spokesperson says  
9 for the government. And --

10 CHIEF JUSTICE ROBERTS: Well, isn't that  
11 part of what's going on here? One of the things we want  
12 to do is eradicate prostitution and sex trafficking, and  
13 we want you to get that message out, and the one thing  
14 we're sure of is if you're not in -- if you're in  
15 favor -- or you're not opposed to it because you have  
16 other objectives, you're not going to help get the  
17 message out at all?

18 MR. BOWKER: Well, the -- the government  
19 does say that. The government says, what we need to  
20 prevent is the situation where the -- the government  
21 spokesperson says one thing with public funds, turns  
22 right around and says the opposite with private funds.

23 And what we say is this is an as-applied  
24 challenge. We have -- it's -- the government concedes  
25 my clients have not been enlisted as government

1 spokespersons and they are not responsible for conveying  
2 any viewpoint or any message.

3           And I'd like to talk for a moment about what  
4 my clients really do. In the field, my clients provide  
5 services in the fight against HIV/AIDS, things such as  
6 preventing mother-to-child transmission of HIV in  
7 Tanzania, caring for orphans of AIDS victims in Kenya,  
8 and providing HIV/AIDS support services in places like  
9 Vietnam.

10           And -- and this is a JA 88 and 89, where you  
11 can see the list of things that my clients do. None of  
12 those things relate to an opposition to prostitution and  
13 none of those things relates to messaging.

14           JUSTICE SOTOMAYOR: Excuse me. That's my  
15 problem, which is I'm trying to tease out what your  
16 position is, okay? I -- I have an understanding of  
17 you're saying, you can't compel me to say I don't like  
18 something. And -- and that's like a oath of loyalty.  
19 That -- that's understandable.

20           But, if the government said the following  
21 more clearly -- this is an oddly phrased policy, okay,  
22 because it seems to be requiring this oath. But if it  
23 simply said, if you're an organization that wants our  
24 funds, you have to say that you're not going to promote  
25 actively the contrary policy, would that be okay?

1           You're not going to go out there and do  
2 things to promote the legalization of prostitution  
3 because that's going to undermine our message. Those  
4 are two different positions, so tell me where you draw  
5 the line.

6           MR. BOWKER: Certainly, that would be okay  
7 within the four corners of the government program. The  
8 government controls speech and conduct within its  
9 program. It can tell us what not to say within the  
10 program. And that's Rust.

11           JUSTICE SOTOMAYOR: Yes, that's Rust.

12           MR. BOWKER: And that's Rust. And what --

13           JUSTICE SOTOMAYOR: This is a step further.

14           MR. BOWKER: And what Rust says, and I -- I  
15 think we fall back on Rust, which we think is just on  
16 all fours with where we are here, and that is what the  
17 government cannot do -- and I think this answers your  
18 question -- is, outside the government program, the  
19 government cannot control private speech.

20           And it was critical in that case -- Justice  
21 Rehnquist, at pages 196 and 197, said, "The doctors  
22 there and the public health organizations there are free  
23 to engage in their own private speech and their own  
24 activities, and they are not required to endorse any  
25 viewpoint they don't, in fact, hold."

1                   And here --

2                   CHIEF JUSTICE ROBERTS: But that is saying  
3 this is what's happening in Rust, okay? And Rust is  
4 okay. That's very different from saying, it has to be  
5 that way, and, if it's any other way, it's no good. It  
6 seems to me that you're just taking the limitation on  
7 the facts in Rust and saying that is an absolute  
8 requirement, which is a misreading of the case.

9                   MR. BOWKER: Rust does not say that, to be  
10 clear. But the reasoning of Rust -- and the majority's  
11 reasoning there makes quite clear that the reason the  
12 Court was comfortable there is that the recipient was  
13 not the target of the control. The control was around  
14 the program, and the recipient was free outside the  
15 program.

16                   And -- and Respondents here have respected  
17 that line. There is no question that, for the past 10  
18 years, even though the policy requirement has not been  
19 enforced -- initially because the Department of Justice  
20 concluded that it is unconstitutional and then,  
21 subsequently, because the district court enjoined it --  
22 it has not been enforced for the last decade,  
23 essentially.

24                   JUSTICE SOTOMAYOR: So --

25                   MR. BOWKER: And there's no evidence of harm

1 at all here, so there's none of this undercutting the  
2 program that the government is alleging here.

3 Sorry, Justice.

4 JUSTICE SOTOMAYOR: No, no, no. I cut you  
5 off.

6 But -- but I guess what I'm -- I keep going  
7 back -- you keep going back and forth on this it -- it's  
8 not okay to tell me to take an oath of loyalty. But  
9 would it be okay for you to step outside the doors of  
10 this program and pass out literature that promotes the  
11 legalization of prostitution?

12 Am I making my question clear?

13 MR. BOWKER: Yes.

14 JUSTICE SOTOMAYOR: Which is how do you --  
15 how do you answer the question of why does the  
16 Constitution bar the government from saying, look, if  
17 you're going to work with me, you can't go out there and  
18 promote a -- actively promote --

19 MR. BOWKER: Right.

20 JUSTICE SOTOMAYOR: -- a different message?

21 MR. BOWKER: That's not the case here, but  
22 taking that case --

23 JUSTICE SOTOMAYOR: Well --

24 MR. BOWKER: Taking that case, I think the  
25 government can't do that. I think the government cannot

1 gag an organization's private speech outside the  
2 program.

3 Now, even the government says there has to  
4 be some germaneness between what they are doing in the  
5 program and what our requirement is. So I do think it  
6 would be a tougher case for us and a stronger case for  
7 the government if my clients were engaged in a program  
8 that opposed prostitution -- we're not, but if we  
9 were -- and then we went right outside and said the  
10 opposite with our private funds, I think they would have  
11 an easier time showing that there is some compelling  
12 interest that overrides the First Amendment interest.

13 Now, I think it would depend on the facts,  
14 and those are not the facts here.

15 JUSTICE BREYER: Only because -- see, it's  
16 not -- it's not, in my opinion, not a viewpoint matter,  
17 if they're going to fund a -- a group that wants to end  
18 discrimination against women around the world because  
19 they think all kinds of good things will flow from that.  
20 The government wants to fund it. Of course, such a  
21 group has a viewpoint; that's why they're in the  
22 business.

23 So the word isn't "viewpoint." And you  
24 started to say something about that there is more than  
25 that here, it has to do with the express nature. And,

1 then, in answering Justice Sotomayor, you went a little  
2 bit further on that. And what are the form of  
3 words -- if you were me and if I were to decide in your  
4 favor, what form of words would you dictate to describe  
5 where it is in your opinion that the First Amendment  
6 cuts in with a preventative restriction?

7 How do you describe it? I -- I don't think  
8 you can, in terms of viewpoint.

9 MR. BOWKER: I don't think you can, in terms  
10 of viewpoint, either, Justice Breyer. I do think that  
11 the key -- the key that this Court outlined in Rust is  
12 the government's authority to control its program. And,  
13 if there is a threat to its program and the government  
14 needs to take some action in order to protect its  
15 program, prevent the message from being garbled or  
16 distorted, whatever the language is, then the  
17 government's case is strongest.

18 Here, that is not at all what is happening.  
19 As I described, our programs are not opposition to  
20 prostitution programs. Our programs are HIV testing.  
21 These are mother-to-child transmission situations, where  
22 we're trying to stop the disease from spreading.

23 JUSTICE SCALIA: Let me -- can I -- can I be  
24 sure --

25 MR. BOWKER: Yes.

1 JUSTICE SCALIA: -- I understand what you've  
2 just conceded in -- in your response to Justice Breyer?

3 The government could require, as a condition  
4 to come into this program and become a partner with the  
5 United States, that the recipient not have the viewpoint  
6 of favoring prostitution?

7 MR. BOWKER: No.

8 JUSTICE SCALIA: Well, you said it's not a  
9 viewpoint thing.

10 MR. BOWKER: No. The government cannot  
11 target viewpoint, and, for us, that's -- that's a  
12 bright-line rule.

13 JUSTICE SCALIA: I thought that's what you  
14 just said to Justice Breyer.

15 JUSTICE BREYER: I did, too, because I -- I  
16 didn't see the reason. I thought that was -- I can  
17 think of dozens and dozens of programs all over the  
18 world that the government supports, in some way or  
19 other, and, of course, the people in those programs have  
20 a certain viewpoint, and, of course, they don't hold the  
21 opposite viewpoint.

22 Otherwise, they wouldn't be in the program.  
23 So -- so that's why I didn't find that useful. But,  
24 now, I don't think you can have it both ways between  
25 answering these questions. What is the answer?

1 MR. BOWKER: Well --

2 JUSTICE SCALIA: Him or me? You have to  
3 choose.

4 (Laughter.)

5 MR. BOWKER: Mr. Chief Justice, I need your  
6 help on --

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: You can always  
9 choose me, too.

10 (Laughter.)

11 MR. BOWKER: Well, our position here is that  
12 viewpoint is not the basis on which a decision can be  
13 made. That is our position. We think the government  
14 has a multitude of permissible grounds on which to make  
15 these types of decisions, and they do it every day in  
16 every other program where they don't have this odd  
17 policy requirement. They do it every day.

18 CHIEF JUSTICE ROBERTS: Your approach, it  
19 seems to me, is just dealing with the breadth of the  
20 program. If the program here solely concerned  
21 prostitution and sex trafficking and not other areas  
22 where you say, look, we do a great job in these other  
23 areas, we just don't get involved in that area.

24 But, if the sole program was on prostitution  
25 and sex trafficking, you -- you wouldn't have a leg to

1 stand on, would you?

2 MR. BOWKER: We absolutely would have a leg  
3 to stand on, and let me just explain --

4 CHIEF JUSTICE ROBERTS: So you're an  
5 organization --

6 MR. BOWKER: -- what I attempted to concede  
7 before, and that is, if -- if the government -- in that  
8 narrow case, where the government is hiring a  
9 spokesperson, which is what they've focused on, saying  
10 one thing with public funds and turning right around and  
11 saying another with private funds, there is no case that  
12 says they can gag the private speech of that  
13 spokesperson.

14 But what we're saying is it is certainly  
15 possible that they would have a stronger case in that  
16 particular circumstance; however, this is an as-applied  
17 challenge. My clients are not spokespersons; they  
18 concede that. My clients are not delivering a message  
19 or any particular viewpoint on behalf of the government,  
20 and they concede that.

21 JUSTICE KENNEDY: Let me -- let me just  
22 ask -- ask this one more time. It seems -- because it  
23 seems to me that, when you get into the details of your  
24 answer, you indicate, oh, well, the government has lots  
25 of other criteria it could use, which seems to me just

1 an invitation to disguise what the government's real  
2 motive is.

3 Suppose the government's interested in  
4 preventing and stopping the spread of malaria. And  
5 there's an organization that's marvelous at delivering  
6 the proper message for this, but they criticize the  
7 United States often. So they choose an organization  
8 that's not quite as good, but is quiet on these other  
9 issues.

10 Is that permissible for the Congress to do?

11 MR. BOWKER: No, I don't think it is. To  
12 the extent the -- the criteria used by the Congress are  
13 merely pretext to --

14 JUSTICE KENNEDY: Well, this isn't -- no.  
15 My concern was that your position was pretext. Here,  
16 the Congress is right upfront.

17 MR. BOWKER: And says this is the reason.

18 JUSTICE KENNEDY: And they say, the reason  
19 we're not giving to organization A is because it's  
20 always critical of the United States, even though its  
21 technical skills are better, we prefer organization B.  
22 Congress cannot do that?

23 MR. BOWKER: Congress cannot do that.

24 Now --

25 JUSTICE KENNEDY: And your best case for

1 that proposition is what?

2 MR. BOWKER: Well, even the government  
3 concedes that -- that they can't do that. They -- what  
4 they say is that in -- it must be germane. That's their  
5 limiting principle.

6 JUSTICE KENNEDY: Well, I'm -- I'm not sure  
7 they should if they're going to -- if they're going to  
8 be able to establish the principle that allows them to  
9 prevail in this case, and that's why I'm asking.

10 MR. BOWKER: I -- I don't think that that's  
11 permissible because all that is, is penalizing a  
12 particular viewpoint and withholding a subsidy or  
13 benefit based on viewpoint.

14 CHIEF JUSTICE ROBERTS: I just want to make  
15 sure I -- the government has a program to develop water  
16 resources, and let's say it's in South Africa before the  
17 abolition of apartheid. And there's a pro-apartheid  
18 group and an anti-apartheid group.

19 And you're saying the government can only  
20 decide which one is better at digging wells, and it  
21 can't say, we're going to prefer the anti-apartheid  
22 group?

23 MR. BOWKER: Well, that -- I don't think it  
24 can make that decision based on viewpoint. However --

25 CHIEF JUSTICE ROBERTS: Viewpoint on

1    apartheid.  It can't say -- so the other one shows we've  
2    got a better record, we dig the wells quicker.

3                   MR. BOWKER:  I mean, the -- the reason that  
4    that case is so much tougher than this one is because,  
5    in this one, they're not attempting to select  
6    organizations that will do the best job by using the  
7    policy requirement.

8                   The policy requirement is being used after  
9    the organization has been selected to say, now that  
10   you've been selected, we want you to toe the line.  We  
11   want you to profess your belief in our viewpoint and not  
12   to say anything with your private funds outside the  
13   program.  So it is so far beyond this -- this weighing  
14   in a selection situation.

15                   CHIEF JUSTICE ROBERTS:  Well, it goes to  
16   the -- it goes to the effectiveness of the program.  
17   It's related to it.  The United States doesn't want the  
18   company or the organization that goes into a village and  
19   says, we're going to bring -- you know, this is from the  
20   United States, we're bringing you fresh water, and it's  
21   a -- it's a pro-apartheid group.

22                   That does undermine what they are trying to  
23   do, just as in this case, to have the organization  
24   providing the services that your organization provides  
25   be identified as as an organization that doesn't want to

1 abolish prostitution.

2 MR. BOWKER: Yes, I understand.

3 I -- I think the government could -- if it  
4 could make the case that an organization will be unable  
5 to do this effectively because of what it has said in  
6 the past -- or what it has done in the past or how --  
7 how the population associates -- what the population  
8 associates with that organization.

9 But here -- here -- and the government even  
10 concedes -- there would -- there has to be some -- I  
11 think the word was -- it has to be tightly tethered to  
12 the programmatic objective. Now, we think that's --  
13 that's way too easy to fulfill; that should not be the  
14 standard. But that's what they say the limiting  
15 principle is, is germaneness, tightly tethered.

16 In -- in your example, I think that probably  
17 doesn't even meet their limiting principle. But, in our  
18 case -- in our case, there is no tethering at all. We  
19 are out testing for the disease by extracting blood and  
20 running tests. We're out caring for orphans. We are  
21 out improving public health services that NGOs deliver,  
22 and they're saying, now, you have to profess your belief  
23 in our particular viewpoint --

24 JUSTICE SCALIA: It doesn't say, "profess  
25 belief." I was going to ask you about that. That's not

1 what the statute says. It just says they have to have a  
2 policy.

3 MR. BOWKER: Well --

4 JUSTICE SCALIA: A policy. Which means, I  
5 suppose, they have to tell their employees don't do  
6 anything to -- to foster prostitution, but they don't  
7 have to get up -- get up and announce publicly, we  
8 oppose prostitution, do they?

9 MS. GOLDENBERG: Well, as it's been applied  
10 to us, it's more than just have a policy. It's have a  
11 policy and then tell us you agree with our policy, and  
12 we want to make sure that you believe it, so we know  
13 that you will do a good job in the program. So the  
14 purpose here is to police --

15 JUSTICE SCALIA: They can get all that  
16 without making you profess it, unless -- unless you  
17 consider the only -- only profession to be the assurance  
18 to the -- to your partner, the United States government,  
19 that you -- that you, in, fact oppose prostitution.

20 MR. BOWKER: Well, that's -- that's  
21 precisely it, Justice Scalia, is we are required to  
22 profess our allegiance to the government.

23 JUSTICE SCALIA: To tell the government.  
24 Okay. That's -- that's the only profession you're  
25 talking about?

1 MR. BOWKER: That's the profession that  
2 we're required to --

3 JUSTICE SCALIA: Oh, okay.

4 MR. BOWKER: -- that's the pledge. As -- as  
5 the author of -- of the provision called it, it was the  
6 pledge. That's the pledge to the government. Now --

7 JUSTICE BREYER: And then they're doing  
8 that, they say, because we're part of the belief, as a  
9 matter of policy, that the best way to go about this,  
10 whether you think so or not, is to restrict the grants  
11 to those people who will oppose the long-term extension  
12 of prostitution expressly.

13 Now, that's their view of how to get rid of  
14 AIDS, you say. Might disagree with it, but there are  
15 plenty of people who think the opposite. So they're  
16 saying we're not doing it for any reason other than to  
17 further our policy.

18 MR. BOWKER: The government, no doubt, has a  
19 good reason for putting it there. The problem is the  
20 First Amendment, and where does that -- where does that  
21 end? What is the limiting principle? If all that's  
22 required here is germaneness and then you give a dollar  
23 and you own the viewpoint and you own the private  
24 speech, where does that end?

25 What that means is -- on the government's

1 theory, the government can give you -- can give anyone  
2 in the country a dollar in Medicare funds and say, okay,  
3 now that you've taken a dollar of our money, we want you  
4 to profess your agreement with the Affordable Care Act,  
5 and we want you to never say anything inconsistent with  
6 that in your private speech.

7           That is -- that is wildly inconsistent with  
8 the First Amendment. That's exactly what's happening  
9 here. The only difference is the subject of  
10 prostitution. That's what makes it less palatable.

11           But for us --

12           JUSTICE GINSBURG: Are you -- what -- are  
13 you saying that you can -- within the government  
14 program, within the government program, the government  
15 can specify whatever it wants, including this -- this  
16 policy, but it can't then say, and the organization  
17 outside the program is also bound by this profession?

18           MR. BOWKER: Within the program, they can  
19 tell us, if we are speaking for them, what to say,  
20 and -- on their behalf, not ours, and they can tell us  
21 what not to say, which is Rust. They cannot command  
22 fealty to their viewpoint, and they certainly cannot  
23 control our private speech outside the program.

24           Now, to be clear, I just want to address one  
25 last thing before my time runs. To be clear,

1 Respondents here do not promote prostitution, nor do  
2 they approve of it. They merely want to be free in  
3 their own private programs to operate those programs as  
4 they see fit, consistent with public health objectives,  
5 and they want to be able to participate in the policy  
6 conferences.

7 They want to be able to publish papers, and  
8 they want to be able to be a part of the discussion in  
9 the marketplace of ideas right here in the United  
10 States, not in the -- in the nether reaches of the  
11 world -- right here in the United States.

12 They would like to be free to engage in this  
13 important discussion and to be unfettered by a policy  
14 requirement that demands fealty to the government's  
15 viewpoint.

16 Now, the First Amendment gives Respondents  
17 that right, and -- and that's why we are here.

18 So unless the Court has further questions?

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Srinivasan, you have 4 minutes  
21 remaining.

22 REBUTTAL ARGUMENT OF SRI SRINIVASAN

23 ON BEHALF OF THE PETITIONERS

24 MR. SRINIVASAN: Thank you, Mr. Chief  
25 Justice.

1                   Just a -- a few points in rebuttal.

2                   First, by -- by way of characterizing this  
3 requirement, I think there has been a suggestion made  
4 that what we are trying to do is impose a viewpoint on  
5 organizations. This is not a matter of imposing a  
6 viewpoint on somebody.

7                   It's a matter of picking organizations with  
8 which to work who self-identify as having views that are  
9 commensurate with the government's views, so that they  
10 will be reliable in carrying out the government's  
11 program.

12                   Now, Justice Kennedy, you'd asked about  
13 why -- whether the foreign context of the case--

14                   JUSTICE ALITO: I don't -- I don't want to  
15 interrupt your rebuttal, but I don't see the difference  
16 between those two -- those two things that you just  
17 tried to distinguish.

18                   MR. SRINIVASAN: Because it goes to  
19 the -- the limitation that the Court has imposed in its  
20 decisions about leveraging funding so as to suppress  
21 viewpoints. That's not what's going on here. This is  
22 not a case in which funding is being leveraged to  
23 suppress a viewpoint.

24                   It's a case in which we are trying to get an  
25 ex ante determination of whether the organizations that

1 are going to carry out the Federal program agree with  
2 our policies. If they do, they can participate --

3 JUSTICE ALITO: Well, suppose you have an  
4 organization that previously has expressed support for  
5 the legalization of -- of prostitution, but, then, when  
6 you tell them, well, if that's your policy, you can't  
7 get our money, they say, well, we need your money, so  
8 we're going to have to say uncle and, now, we are  
9 opposed to the legalization of prostitution.

10 That then -- that isn't trying to change  
11 people's viewpoint?

12 MR. SRINIVASAN: I don't think --

13 JUSTICE ALITO: To change the viewpoint that  
14 they are expressing?

15 MR. SRINIVASAN: It's not -- Justice Alito,  
16 with all respect, I don't think it's trying to change  
17 their viewpoint. I think if they decide, later on, that  
18 they would affirm to us that they agree with the policy  
19 at that point in time, well, we may -- we may take that  
20 observation and engage them.

21 But I don't think that effort is to try to  
22 change their viewpoint. It's to try to get them to  
23 self -- to self-identify that they are going to be  
24 reliable in carrying out the government program.

25 Justice Kennedy, you'd asked the question

1 about whether the foreign context matters, and I talked  
2 about why it matters, in the sense that monitoring can  
3 be challenging in this context. It also matters in  
4 another sense, that I should add, which is that, when  
5 the organizations are doing this work in those areas,  
6 they are identified as working with the United States  
7 government.

8           There is a statutory provision at 291(a) of  
9 the Petition Appendix, which is 22 U.S.C. 7611(h), and  
10 that requires the global AIDS coordinator to develop a  
11 message that enhances awareness by program recipients  
12 that the program is an effort on behalf of the citizens  
13 of the United States.

14           So there is a real perception out there  
15 that, when the organization is carrying out its  
16 functions, it's doing so at the behest of the United  
17 States citizens. And part of what Congress wanted to do  
18 was to avoid a misimpression about why -- about what the  
19 United States' policy priorities are.

20           And one way to do that is to assure that the  
21 organizations with which the United States works share  
22 the United States' policy commitment against  
23 prostitution and sex trafficking.

24           JUSTICE SOTOMAYOR: I would have less  
25 problem accepting your message if there weren't four

1 major organizations who were exempted from the policy  
2 requirement and -- medical science -- vaccinators are  
3 exempted.

4           There seems to be a bit of selection on the  
5 part of the government in terms of who it wants to work  
6 with. It would seem to me that, if you really wanted to  
7 protect the U.S., you wouldn't exempt anybody from this.

8           MR. SRINIVASAN: Justice Sotomayor, Congress  
9 is not required to -- to pursue every objective, no  
10 matter what the cost may be. The Court confronted a  
11 similar situation in *Regan*. That case involved an  
12 exemption for veterans. The Court applied a rationality  
13 standard and said -- said that was fine. And there's,  
14 certainly, a rationale here --

15           JUSTICE GINSBURG: Mr. Srinivasan, that was  
16 one -- one -- veterans. Everybody else was subject to  
17 the lobbying restriction. Here, it's 20 percent of the  
18 funds go to the organizations that are free from this  
19 pledge.

20           MR. SRINIVASAN: Justice Ginsburg, I think  
21 the exemption for these organizations makes good sense  
22 if you consider the character of the organizations.  
23 Three of the four are -- have members that are sovereign  
24 entities. And so one can understand --

25           CHIEF JUSTICE ROBERTS: Mr. Srinivasan --

1 MR. SRINIVASAN: Can I just finish this  
2 thought?

3 One can understand why Congress would have  
4 wanted to tread with sensitivity when -- when we are  
5 dealing with foreign countries, especially foreign  
6 countries that have different views about prostitution.

7 And there's less of a danger -- and this is  
8 the final point -- there's less of a danger in that  
9 context that those entities' views are going to be  
10 misattributed to the United States precisely because  
11 they are foreign countries.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Counsel.

14 The case is submitted.

15 (Whereupon, at 12:00 p.m., the case in the  
16 above-entitled matter was submitted.)

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