

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES AGENCY FOR)
INTERNATIONAL DEVELOPMENT, ET AL.,)
Petitioners,)
v.) No. 19-177
ALLIANCE FOR OPEN SOCIETY)
INTERNATIONAL, INC., ET AL.,)
Respondents.)

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8 INTERNATIONAL, INC., ET AL.,)
9 Respondents.)
10 - - - - -

11
12 Washington, D.C.
13 Tuesday, May 5, 2020
14

15 The above-entitled matter came on
16 for oral argument before the Supreme Court of
17 the United States at 10:00 a.m.
18

19 APPEARANCES:
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22 on behalf of the Petitioners.
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24 on behalf of the Respondents.
25

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: This morning
4 we will hear argument in Case 19-177, United
5 States Agency for International Development
6 versus the Alliance for Open Society
7 International. I note at the outset that
8 Justice Kagan is recused in this case.

9 Mr. Michel.

10 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL

11 ON BEHALF OF THE PETITIONERS

12 MR. MICHEL: Mr. Chief Justice, and
13 may it please the Court:

14 Twenty years ago, the HIV/AIDS
15 pandemic was devastating the world. In
16 response, President Bush proposed and Congress
17 adopted the Leadership Act. Since reauthorized
18 three times, the Act has committed nearly 80
19 billion dollars to global AIDS relief, and it
20 has worked, saving more than 17 million lives in
21 the most successful American foreign aid effort
22 since the Marshall Plan.

23 The funding condition at issue here
24 requires recipients to have a policy opposing
25 prostitution and sex trafficking, which Congress

1 found are coercive practices that spread
2 HIV/AIDS and degrade women and girls. This
3 Court held that applying that condition to
4 Respondents' domestic entities violates the
5 unconstitutional conditions doctrine. But
6 Respondents sought more, and the question now is
7 whether the condition can still be applied to
8 foreign grant recipients operating abroad.

9 It can for two straightforward
10 reasons. Foreign entities lack constitutional
11 rights, so they cannot bring an unconstitutional
12 conditions claim, and neither can Respondents
13 because they are not subject to the funding
14 condition. Thanks to their victory in this
15 Court, Respondents can accept and use funds
16 without any compelled speech. To be sure,
17 Respondents can choose to affiliate with foreign
18 entities that must comply with the policy
19 condition, but any effect on Respondents'
20 message is now a product of their own choice,
21 not government compulsion.

22 Respondents' contrary view is
23 startling. They would allow U.S. non-profits to
24 export constitutional rights to legally separate
25 foreign entities abroad simply because they

1 share similar brands. That novel theory has no
2 basis in this Court's prior decision, it could
3 undermine long-standing regulations of foreign
4 speech, and it has no practical justification.

5 For 17 years, foreign recipients have
6 adhered to the policy condition without harming
7 the AIDS relief program or Respondents' speech.

8 This Court afforded Respondents all
9 the relief they deserve. The decision below
10 should be reversed.

11 CHIEF JUSTICE ROBERTS: Counsel, one
12 thing that I think is not clear from the record
13 is the precise relationship between the domestic
14 entity and its foreign affiliates. We -- we
15 know that there are no formal corporate ties but
16 that these entities share the same name, the
17 same logo, the same brand.

18 What -- what would you require beyond
19 that before attributing the speech of the
20 foreign entity to the domestic one?

21 MR. MICHEL: Mr. Chief Justice, you're
22 correct that the record is not particularly
23 thorough on that issue, despite 15 years of
24 litigation on -- on this matter. The district
25 court ultimately entered the injunction it

1 issued here based simply on -- on letter
2 briefing.

3 But our position is that the formal
4 distinction between the two entities, the -- the
5 U.S. entity and the foreign entity, is all that
6 is required to attach separate legal rights.

7 Of course, it's important to note that
8 Respondents and the foreign entities that they
9 claim as affiliates made the choice to be
10 separate legal entities. That choice, of
11 course, has certain benefits for them, such as
12 shielding them from liability, but it also has
13 --

14 CHIEF JUSTICE ROBERTS: Is it --

15 MR. MICHEL: -- certain perks.

16 CHIEF JUSTICE ROBERTS: -- is it
17 reasonable to insist on formal corporate ties in
18 this -- in this context?

19 I gather that it's undisputed that to
20 be effective in many of the foreign countries
21 involved here, you have to operate through a
22 foreign entity, that the -- the effort would not
23 be as effective if the American entity were the
24 one actually on the ground in the foreign
25 country.

1 MR. MICHEL: Well, two points on that,
2 Mr. Chief Justice. First, I think that that is
3 not true as a uniform matter. Many of the
4 Respondents, the U.S. entities do, in fact,
5 operate in foreign countries through branch
6 offices, and, as a result of this Court's prior
7 decision, they always have a choice to operate
8 in that way without compromising their speech in
9 any way. They are, in other words, completely
10 in charge of their own message while also
11 accepting Leadership Act funds.

12 And -- and to take your second point,
13 if they make the choice to operate through a
14 foreign entity because they decide that that is
15 more convenient or more effective, they have to
16 accept the bitter with the sweet to be sure
17 operating through a distinct legal entity, but
18 they're not without recourse. They can, for
19 example, explain that the policy statement being
20 issued by the foreign entity doesn't reflect
21 their own views.

22 Their free speech allows them to do
23 that. And I -- and I would note as --

24 CHIEF JUSTICE ROBERTS: Presumably --
25 presumably, it does reflect their own views.

1 You know, they have the same name, the same
2 logo, the same brand.

3 And I wonder if it makes more sense to
4 think of the foreign entity as simply another
5 channel for the domestic entity's speech.

6 MR. MICHEL: Mr. Chief Justice, with
7 respect, I don't -- I don't think it does. And
8 I think, you know, when that was the only option
9 available, as it was in the Court's decision
10 last time, I can understand, of course, why the
11 Court decided the case the way it did.

12 But now that Respondents have a
13 separate choice, in fact, the very choice that
14 they were fighting for last time, any
15 consequences of the choice to operate as
16 separate entities is a result of their own
17 decisions.

18 And -- and I -- I --

19 CHIEF JUSTICE ROBERTS: Thank you --

20 MR. MICHEL: -- wanted to note --

21 CHIEF JUSTICE ROBERTS: -- thank you.

22 Thank you, counsel.

23 Justice Thomas?

24 JUSTICE THOMAS: Mr. Michel, the
25 Respondent seems to argue that your guidelines

1 on -- your affiliate guidelines actually support
2 their argument. What do you think of that?

3 MR. MICHEL: Justice Thomas, I -- I
4 don't think that they do as -- as an initial
5 matter and, even if they did, I think that would
6 at most be a basis for challenging the
7 guidelines, not -- not the constitutionality of
8 the statute.

9 And to start with the first point, the
10 guidelines, which are reproduced at -- at pages
11 1A through 3A of our reply brief, simply provide
12 that an entity can affiliate with a separate
13 entity that has a different policy on
14 prostitution and sex trafficking if it meets
15 certain requirements, and -- and there are five
16 non-exhaustive requirements spelled out there.

17 Four of those would generally be
18 satisfied by an entity that has legal
19 separation. So I think it would be a rare
20 circumstance that these regulations would ever
21 result in the denial of funding to a foreign
22 affiliate.

23 And -- and to make one related point,
24 Respondents themselves are no longer subject to
25 the policy requirement as a result of their

1 prior decision in this case. So, if they run
2 afoul of these regulations, which simply
3 interpret what it means to have a policy
4 opposing prostitution and sex trafficking, these
5 regulations can't be a mechanism for depriving
6 the Respondents themselves of funds.

7 JUSTICE THOMAS: When this case was
8 here last, I seem to remember it was about the
9 domestic organization. The -- what has changed
10 since it was here?

11 The -- there was very little talk.
12 The only time that affiliates actually came up
13 was as an alternative to the enforcement
14 procedures that were being used toward the
15 domestic organizations then.

16 So what has changed since this case
17 was here last?

18 MR. MICHEL: Well, Justice Thomas,
19 you're exactly right. That was all that was at
20 issue last time. And the only thing that has
21 changed is that Respondents have asked for
22 broader relief.

23 And although, you know, we fully
24 accept the Court's prior decision, we -- we --
25 we submit that Respondents are simply not

1 entitled to any further relief.

2 As you suggest, there's nothing in
3 this Court's decision that contemplates or
4 suggests applying the -- the prohibition on
5 applying the policy requirement to foreign
6 entities overseas, so I think the Court ought to
7 simply analyze the claim under first principles.

8 And, as I said at the outset, I think
9 two simple principles resolve the case.
10 Respondents themselves are not subject to a
11 funding condition, so they can't have an
12 unconstitutional conditions claim, and the
13 foreign entities that are subject to the funding
14 condition have no constitutional rights. So
15 they can't have an unconstitutional condition
16 claim either.

17 We do think that what Respondents are
18 asking for is -- is unjustifiably bootstrapping
19 this Court's prior decision into global relief,
20 and we simply don't think there's any basis for
21 that.

22 JUSTICE THOMAS: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Ginsburg?

25 JUSTICE GINSBURG: Mr. Michel, I have

1 two questions. The first is that the statute
2 exempts certain non-domestic entities from the
3 requirement to adopt an anti-prostitution
4 policy, and those are the Global Fund to Fight
5 AIDS, Tuberculosis and Malaria, the World Health
6 Organization, International AIDS Vaccine
7 Initiative, and any U.N. agency.

8 What is the reason for the exemption?
9 Why are these organizations exempt and not the
10 organizations at issue here?

11 MR. MICHEL: Justice Ginsburg, I think
12 there are a few reasons for that. Those are in
13 the main international organizations that are
14 composed of their own separate sovereigns. And
15 so I think it makes sense that Congress would
16 have wanted to respect the sovereignty of the
17 members of those organizations in a way that
18 doesn't, of course, apply to non-profit
19 organizations receiving funds at issue here.

20 The -- the vaccine organization that
21 you mentioned as well seems to be particularly
22 unlikely to -- to bring into play the
23 considerations that motivated Congress to
24 require the anti-prostitution and sex
25 trafficking pledge because they're not operating

1 in the field. They're simply doing research on
2 -- on vaccines. But I don't take --

3 JUSTICE GINSBURG: It -- it seems to
4 me that these organizations are doing the same
5 thing.

6 But let me ask you my second question,
7 and it is: May a pledge taker -- say you're
8 right and these foreign entities have to take
9 the pledge -- may they nonetheless work with
10 prostitutes to encourage the prostitutes to take
11 preventative measures that will advance control
12 of AIDS?

13 MR. MICHEL: The answer to that
14 question --

15 JUSTICE GINSBURG: Can they do that?
16 Can they take -- they say, all right, we'll take
17 the pledge, but we're going to work with
18 prostitutes, make sure that they use
19 preventative devices?

20 MR. MICHEL: Absolutely they can,
21 Justice Ginsburg, and we encourage that. That
22 goes back to a point I was going to make
23 earlier, which is the -- the pledge that's
24 required by the statute only requires one
25 affirmative speech act, and that is submitting

1 to USAID with the grant agreement a -- a policy
2 opposing prostitution and sex trafficking.

3 But there's no requirement that
4 foreign entities that make that -- that make
5 that pledge shout it from the mountaintops or
6 get into anybody's face about it. They are
7 completely free to, and encouraged to, work with
8 prostitutes and victims of sex trafficking to
9 prevent HIV/AIDS.

10 And -- and, indeed, you know, one of
11 the reasons for including this requirement in
12 the statute and many other provisions of the
13 statute dealing with prostitution and sex
14 trafficking is that Congress recognized that
15 women who -- who are often coerced into those
16 practices are themselves at heightened risks of
17 contracting the disease, of spreading the
18 disease, and -- and, of course, of -- of losing
19 other opportunities in their lives.

20 So we certainly encourage groups to do
21 that kind of work, and it's not at all in
22 tension with the -- with the policy requirement.

23 I would also note the -- the amicus
24 brief filed in this Court's case last time by
25 the Coalition Against Trafficking at Women,

1 which made the point that many prostitutes and
2 victims of sex trafficking are themselves
3 opposed to prostitution and sex trafficking and
4 so wouldn't take offense at the statement that
5 the groups have to make.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 MR. MICHEL: But in any event --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Breyer?

12 JUSTICE BREYER: Just following up on
13 that question, some would. Some would take
14 offense. And it's -- in the last case, you said
15 that this -- we said, this Court said, this
16 organization, which takes money from the
17 government and uses it to fight AIDS, goes to
18 prostitutes as part of their effort and says use
19 safety. And that's one way of helping to fight
20 AIDS.

21 And if at the same time they have to
22 say, we're against prostitution, we don't like
23 it, we're against it, it's terrible, well, the
24 prostitutes will think they're hypocrites or
25 maybe worse and will be suspicious. That was

1 their reasoning last time.

2 Now how does that change one iota in
3 terms of their rights, which we said they had,
4 the major organizations in the United States
5 have, the right to do, how does that change one
6 iota if, instead of sending their own worker
7 there, they give the money to a foreign worker
8 in India who is associated with them and that
9 foreign worker goes and she says exactly the
10 same thing to the prostitutes?

11 Since the foreign workers are
12 identified by name, mission, logo, with the
13 domestic workers, how does it interfere one whit
14 less if we accept your argument? They will be
15 seen, domestic, as well as the foreign ones, as
16 hypocrites or, worse, interfering with their
17 mission. If we accepted that argument before,
18 why don't we accept it now?

19 MR. MICHEL: Well, a couple of quick
20 responses, Justice Breyer.

21 I -- I don't think that the Court did
22 base its prior decision on that particular
23 concern. I think it based its decision on the
24 First Amendment rights of the U.S. entities that
25 were receiving the funds.

1 And so the principal difference
2 between the case last time and the case this
3 time is not that the entities are interacting in
4 -- with prostitutes in any different manner.
5 It's that the entities that are now subject to
6 the funding condition lack constitutional rights
7 under deeply established -- you know, the deeply
8 established principle that foreign entities
9 abroad don't exercise constitutional rights and,
10 therefore, can be subject to greater speech
11 restrictions than U.S. entities at home.

12 Now I do want to reiterate that I
13 think the concerns you have raised, while
14 legitimate, are -- are not borne out in practice
15 because the policy requirement, whether applied
16 in the past to domestic groups or now to foreign
17 groups, does not require them to tell
18 prostitutes that they oppose prostitution or to
19 do anything affirmative beyond agreeing to be
20 opposed to prostitution and sex trafficking in
21 the letter.

22 And we're fortunate to have a 17-year
23 track record to look at here. The foreign
24 entities have, from the very beginning and even
25 recently under stays of the -- of the district

1 court's injunction in this phase of the
2 litigation, been subject to the policy
3 requirement throughout that period. And as
4 Judge Straub noted in his dissent below, they
5 have not identified even one example of -- of
6 anybody perceiving hypocrisy in their message or
7 of -- of setting back their -- their work to
8 fight HIV/AIDS, which, of course, has been
9 historically effective.

10 CHIEF JUSTICE ROBERTS: Thank you.
11 Thank you, counsel.

12 Justice Alito?

13 JUSTICE ALITO: Counsel, as I
14 understand the government's position, it depends
15 on whether the foreign entity that ultimately
16 gets the legal -- the Leadership Act funds is a
17 separate legal entity or legally distinct from
18 the U.S. entity, is that correct?

19 MR. MICHEL: Yeah, it depends -- what
20 we look at is whether the recipient of the
21 funds, the entity subject to the condition, has
22 First Amendment rights or not. And we think
23 that turns on whether they're a U.S. entity or a
24 foreign entity.

25 JUSTICE ALITO: All right. So what do

1 you understand to be the meaning of legally
2 separate or legally distinct? And how would
3 that apply where the U.S. entity is a nonprofit
4 corporation, a trust, or an unincorporated
5 association, if there are any of those, and in
6 the situation where the foreign entity is
7 organized in one of those ways?

8 MR. MICHEL: So the sort of difficult
9 questions about how -- how to parse
10 incorporation have really not arisen in this
11 case because I think Respondents and the foreign
12 entities at issue are clearly legally separate
13 in the way that matters for the funding program,
14 which is to say they've applied separately for
15 different grants.

16 And so the easiest way to answer the
17 question, I think, is that when a U.S. entity
18 applies for a grant as its own entity, it's not
19 subject to the policy requirement. When a
20 foreign entity applies for a separate grant,
21 distinct from any affiliation it might have with
22 a U.S. entity, then it is subject to the policy
23 requirements. And the foreign --

24 JUSTICE ALITO: So the U.S. entity
25 gets the money and the U.S. entity wants to make

1 a sub-grant to a foreign entity, and as I
2 understood your -- your position, whether or not
3 the foreign entity can be required to endorse
4 the policy depends on whether it's legally
5 distinct from the U.S. entity. Is that correct?

6 MR. MICHEL: That -- that is correct.
7 So, in that sub-grant relationship, the
8 condition would then attach to the foreign
9 entity as the sub-grantee of the U.S. entity.

10 JUSTICE ALITO: All right. Well, so,
11 if the U.S. entity is a trust, what -- what --
12 what -- how would we determine what is legally
13 separate from -- what foreign entity is legally
14 separate from a trust, a U.S. trust?

15 MR. MICHEL: I have to confess,
16 Justice Alito, we haven't confronted the trust
17 question, so -- so I don't have a ready answer
18 for that. I -- I think that in the 17-year
19 history of the program, though, that there
20 really hasn't been any difficulty in telling
21 apart foreign -- foreign organizations from --
22 from domestic organizations.

23 We're happy to take a further look at
24 the -- at the trust hypothetical, but it's one
25 that just hasn't arisen.

1 JUSTICE ALITO: Well, is that because
2 until recently, the government's test was not
3 legal separation -- was not whether it was a
4 legally separate entity but a multifactor test
5 under the regulation to which Justice Thomas
6 referred?

7 MR. MICHEL: No, with respect, Justice
8 Alito, that -- that's not and -- and hasn't been
9 our position. From -- from the outset, the
10 government has applied the policy requirement to
11 foreign entities abroad, and it turns out, as a
12 result of -- of injunctions, for almost that
13 entire period, the government has not applied
14 the policy requirement to -- to domestic
15 entities. The regulations --

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Sotomayor? Justice Sotomayor?

19 JUSTICE SOTOMAYOR: I'm sorry, Chief.
20 I did it again.

21 Mr. Michel, the long and the short of
22 this is that a domestic agency that does not
23 want to adopt a policy of being opposed to
24 abortion but who is willing to not support it in
25 a program, they can't receive funds unless they

1 affiliate with someone who will make the
2 statement for them, correct?

3 MR. MICHEL: I -- I don't think so,
4 Justice Sotomayor. A U.S. entity that opposes
5 prostitution and sex trafficking, which is the
6 only requirement at issue in this case, can
7 still receive funds as a result of this Court's
8 prior decision, and they can use those funds
9 abroad without contracting or -- or otherwise
10 working through affiliates.

11 JUSTICE SOTOMAYOR: But the domestic
12 corporation who doesn't want to speak the
13 government's message but does want to do the
14 program can't, unless it finds a affiliate who
15 will speak the government's message?

16 MR. MICHEL: Well, with respect,
17 Justice Sotomayor, that -- I think that was the
18 issue in the case last time. But --

19 JUSTICE SOTOMAYOR: Exactly.

20 MR. MICHEL: -- that's no longer true.
21 Yeah.

22 JUSTICE SOTOMAYOR: Exactly. And the
23 last time when you sought for cert before us,
24 you said it was a facial -- it was tantamount or
25 amounting to a facial challenge. If we read our

1 prior decision as basically facially addressing
2 the restriction, do you win?

3 MR. MICHEL: I think if you read it as
4 truly facially invalidating the statute, then,
5 no, we couldn't win. But for the reason --

6 JUSTICE SOTOMAYOR: All right. Then I
7 move on to another question.

8 MR. MICHEL: Of course.

9 JUSTICE SOTOMAYOR: In Hobby Lobby, we
10 recognized that a closely held corporation at
11 least could be viewed as expressing the
12 religious beliefs of its owner, a person
13 independent legally. In Hurley, we said that
14 parade organizers could be identified by the
15 people who marched in their parade. And,
16 similarly, in Regan, we said that an entity
17 could speak through an affiliate who would be
18 recognized as itself because it could then do
19 lobbying that Regan couldn't do under the
20 government program.

21 So these cases seem to suggest to me
22 that at least in the First Amendment context,
23 let's put aside any other context, but in the
24 First Amendment context, we are less concerned
25 with corporate formalities than we are with

1 imputation or perception. And to the extent
2 that these corporations are closely affiliated,
3 and presuming -- I know you said before that you
4 don't think there's enough in the record; we can
5 deal with that separately -- but presuming that
6 the public does perceive these entities as one,
7 then why wouldn't the First Amendment apply to
8 the inability of the domestic corporations to
9 receive funds and partner with a closely
10 affiliated foreign entity in implementing the
11 program?

12 MR. MICHEL: Justice Sotomayor, a
13 couple of points. I think Hurley and some of
14 the other cases you cited all depend on the
15 predicate of a forced affiliation between --
16 between the two groups. In Hurley, it was the
17 parade organizers and -- and the group that
18 wanted to join the parade.

19 Here, however -- and this is a
20 response, I think, to the last part of your
21 question -- no one is forcing the domestic
22 entity to affiliate with a foreign entity. The
23 domestic entity has a choice to take the money
24 and use it itself, and any hypocrisy or
25 disturbance to its message that results is a

1 result of its own choice to affiliate with a
2 group that -- a foreign entity that accepts
3 Leadership Act funds and must make the
4 statement.

5 So they're simply not being forced to
6 affiliate with anyone in the way that was at
7 issue in those cases you cited.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Gorsuch?

11 JUSTICE GORSUCH: Counsel, I'd like to
12 just follow up on that for a moment. You -- you
13 seem to rely pretty heavily on legal separation.
14 But the First Amendment, it's not clear to me
15 why that -- that -- that cares, as opposed to
16 imputation and in Hurley, as Justice Sotomayor
17 pointed out.

18 Can you speak to that a little bit
19 further for me, please?

20 MR. MICHEL: Sure. I think that the
21 critical point, as -- as I said to file -- the
22 reason to file a corporate separation here is
23 that that's how the grant program is organized.

24 And -- and this Court, you're right in
25 Hurley where there was a forced -- a forced

1 association, the Court held that attribution
2 matters. But in every one of the Court's
3 funding condition cases, the Court has looked to
4 the effect on the recipient of the funds itself.

5 And, here, Respondents and the foreign
6 entities are making a conscious choice to apply
7 for separate grants as separate entities and to
8 be subject to separate conditions.

9 JUSTICE GORSUCH: I think the argument
10 is a little -- goes a little bit beyond the
11 forced nature of -- of the association to the
12 concern about chilling of speech.

13 Can you speak to that? The First
14 Amendment doesn't care just about protecting
15 speech. It also is concerned about avoiding
16 chilling of speech.

17 MR. MICHEL: I think that -- I think
18 you're -- you're, of course, right about that,
19 but I simply don't see any chilling of speech
20 here, given that, as a result of this Court's
21 prior decision, the domestic entities are free
22 to take the money and -- and use it themselves
23 in charge of their own message.

24 And they're also free to make a
25 different choice, which is to work through a

1 foreign affiliate that, as a result of
2 Respondents' own choice, will have to make the
3 policy statement opposing prostitution and sex
4 trafficking.

5 But, even in that instance,
6 Respondents are still free to use their own
7 speech rights to explain that -- that they don't
8 share the views of the foreign affiliate on
9 prostitution and sex trafficking.

10 I -- I think ultimately what
11 Respondents are asking for is a sort of right to
12 optimal message management, which is simply not
13 what the First Amendment protects.

14 If you look at cases like *Rumsfeld*
15 versus *FAIR*, the Court explained that the law
16 schools in that case might well be concerned
17 about misattribution of their position on -- on
18 letting military recruiters onto campus, and yet
19 that concern alone was not a reason to find an
20 unconstitutional conditions violation.

21 And -- and likewise, in the Court's
22 other funding cases, like *Rust*, for example, and
23 *Regan*, the entities were ultimately not allowed
24 to operate in their preferred manner. The --
25 the abortion providers, for instance, in *Rust*,

1 you know, certainly didn't want to have to
2 separate their speech in the way that they did,
3 but the Court found that it was constitutionally
4 permissible for Congress and -- and the
5 Executive Branch to require them to separate
6 that speech because they still had an open
7 channel to express their First Amendment views.

8 And after this Court's prior decision,
9 Respondents clearly have an open channel to --
10 to express their views without chilling and
11 without having to give up the money.

12 JUSTICE GORSUCH: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Kavanaugh?

16 JUSTICE KAVANAUGH: Thank you, Chief
17 Justice.

18 Good morning, Mr. Michel. I'm
19 interested in the implications of our decision
20 in this case. In particular, if the government
21 were to lose this case, would any other programs
22 or statutes be invalidated or called into
23 question by such a decision?

24 MR. MICHEL: Well, Justice Kavanaugh,
25 I think that there would be real concerns about

1 that. Of course, I'm not here to give up any
2 other statutes, but I do think the gravamen of
3 Respondents' position is that they and their
4 foreign entities that they've chosen to keep
5 separate should somehow be treated as some kind
6 of single global unified entity.

7 And if that is the theory that they're
8 operating under, I do think it would call into
9 question a number of different statutory and
10 administrative regulations of foreign speech
11 that like -- that likely couldn't be applied
12 domestically.

13 For example, Congress has long banned
14 campaign contributions in U.S. elections by
15 foreign entities. But Congress, of course,
16 could not ban such contributions by U.S.
17 entities.

18 Yet, if a U.S. entity were able to say
19 that it shares or confers on a foreign affiliate
20 its First Amendment rights, it might well claim
21 a basis for challenging the -- that ban on -- on
22 foreign speech. And -- and there are many other
23 examples that we cite in our brief as well.

24 It's, in fact, commonplace for
25 Congress and the Executive Branch to condition

1 foreign aid to entities abroad on certain policy
2 objectives, such as opposing terrorism or
3 supporting women's rights or opposing apartheid,
4 or, in the case of the Mexico City policy,
5 taking certain positions on abortion.

6 And those content-based/
7 viewpoint-based speech restrictions might not be
8 permissible in the United States. And domestic
9 entities who were able to confer or -- or, you
10 know, unite with their foreign bodies, with
11 foreign entities to challenge those, would, I
12 think, create considerable risk of disturbing
13 long-settled -- long-settled laws.

14 JUSTICE KAVANAUGH: One other
15 question. Has the program with respect to U.S.
16 domestic organizations suffered any problems or
17 been any less successful since this Court's
18 decision in 2013 as far as you're aware?

19 MR. MICHEL: Not at all. The program,
20 with respect to both domestic and foreign
21 recipients of funds, has, as I said at the
22 outset, truly been one of the historic successes
23 in -- you know, in the history of U.S. foreign
24 aid.

25 And I think, you know, we do have sort

1 of the controlled experiment over the last 15
2 years as a result of injunctions in the first
3 case and stays of the injunction in this case
4 that the current status quo, whereby U.S.
5 entities are not subject to the policy
6 requirement, but foreign entities are subject to
7 the policy requirement, has been the background
8 law in place for about 15 years.

9 And that has neither set back the
10 extraordinary success of the program, nor
11 created, as Judge Stroud noted in his -- in his
12 powerful dissent, any actual evidence of
13 hypocrisy or confusion of message for
14 Respondents themselves.

15 CHIEF JUSTICE ROBERTS: Mr. Michel,
16 take a minute to wrap up, please.

17 MR. MICHEL: Thank you, Mr. Chief
18 Justice.

19 I -- I do think this case ultimately
20 in -- in its current iteration can be resolved
21 on -- on a straightforward basis that
22 Respondents themselves long accepted, and that's
23 that the policy condition is a permissible
24 exercise of Congress's core spending power as
25 applied to foreign recipients that lack First

1 Amendment rights but not as to domestic
2 recipients that have First Amendment rights.

3 And although Respondents have -- have
4 broadened their position, they had it right the
5 first time, and nothing supports the
6 bootstrapping that they have requested.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Bowker.

10 ORAL ARGUMENT OF DAVID W. BOWKER

11 ON BEHALF OF THE RESPONDENTS

12 MR. BOWKER: Mr. Chief Justice, and
13 may it please the Court:

14 The undisputed record shows that the
15 U.S. Respondents themselves suffer First
16 Amendment harms when the policy requirement is
17 imposed on their foreign affiliate.

18 Respondents and their affiliates share
19 a name, brand, logo, mission, and voice. They
20 speak as one, make speech and policy decisions
21 together, and are indistinguishable to the
22 public.

23 As a result, the First Amendment
24 rights of U.S. Respondents are violated here in
25 two ways: first by a speech compulsion that is

1 attributed to them.

2 When CARE in Kenya takes the pledge,
3 its affirmation of belief is attributed to CARE
4 in the United States, thus putting words in the
5 mouth of the U.S. entity.

6 The second violation is from a speech
7 restriction. Under regulations that prohibit
8 any CARE entity from contradicting the pledge,
9 even on its own time and dime, thus making it
10 impossible for CARE U.S. to disavow CARE Kenya's
11 pledge without engaging in doublespeak and
12 losing U.S. funding for its global network.

13 The government says the burden is on
14 Respondents to avoid such harm by applying for
15 funding themselves, severing their connections
16 to affiliates, or disavowing the pledge. But
17 this has it backward.

18 When a statute violates the First
19 Amendment, the burden is on the government, not
20 the speaker, to give First Amendment freedoms
21 the necessary breathing space. Plus, the
22 government's proposals all fail in practice.

23 Asking Respondents to apply for funds
24 ignores that they must work through local
25 affiliates in places where local laws or the

1 U.S. government's own funding criteria require
2 it.

3 Severing ties with affiliates would
4 destroy their organization. Posing such a
5 choice demonstrates how the government continues
6 to use its vast spending power to coerce
7 Respondents' fealty.

8 Disclaimers also fail because, as this
9 Court recognized in 2013, U.S. Respondents
10 cannot credibly disavow the speech of their own
11 clearly identified affiliates.

12 The injunction affords Respondents
13 complete relief from these violations and should
14 be upheld.

15 CHIEF JUSTICE ROBERTS: Counsel, can
16 your client compel what the foreign affiliates
17 say on this question?

18 MR. BOWKER: We represent several
19 different organizations here, as Your Honor
20 knows, and I think it is correct as a factual
21 matter that in every case, the U.S. organization
22 effectively can veto the speech of a foreign
23 organization on these issues. They do speak
24 together. They make their speech choices
25 together. But the U.S. entities here, as a

1 practical matter, typically control that speech.

2 CHIEF JUSTICE ROBERTS: Can you give
3 me a citation to the record where I can look to
4 find that? Because I -- I thought that by
5 saying that there wasn't a formal affiliation,
6 but the organizations share the logo and the
7 name and so forth, that there was some absence
8 of control. And, in fact, that's what the
9 foreign governments, for example, were insisting
10 on.

11 MR. BOWKER: I think -- I think Your
12 Honor is correct that there is -- as a legal
13 matter, there may be the absence of control in
14 some cases, but in every case, there is
15 practical control. I think the best citations
16 to the record would be -- for -- for CARE, would
17 be at J.A. 389, which talks about how the CARE
18 entity speaks with a single global voice, and
19 then I think, importantly, J.A. 436 through 445,
20 which discusses CARE U.S.'s ownership of the
21 brand and licenses on the brand, which is, in
22 that case, legal control to dictate what occurs
23 under that brand.

24 CHIEF JUSTICE ROBERTS: Thank -- thank
25 you for that, counsel.

1 You -- you used the phrase "practical
2 control." And I just wonder precisely what your
3 test for that would be.

4 MR. BOWKER: I think the -- the right
5 test here is the risk of attribution. As this
6 -- as this Court recognized in 2013, there can
7 be a risk of attribution across corporate lines
8 where the entities in question are so clearly
9 identified, as they are here.

10 I think the -- the practical control
11 point is even stronger when those entities speak
12 together with one voice and make their speech
13 and policy decisions together.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 JUSTICE THOMAS: Yes, thank you, Chief
18 Justice.

19 The -- did you have an opportunity in
20 the lower courts to discuss or debate what
21 criteria would be used to determine whether or
22 not the two organizations merge or are close --
23 affiliated closely enough so that the First
24 Amendment rights applied domestically?

25 MR. BOWKER: We did, Your Honor.

1 Judge Marrero gave the parties an opportunity to
2 both submit voluminous materials into the record
3 and to explain to him the relationship between
4 these entities.

5 I think, here, what's important is
6 there is no dispute about the relationship here.
7 These entities are clearly identified with one
8 another. There's no dispute that they share a
9 name, brand, logo, mission, and voice.

10 And I think critically here there was
11 a two-year period where we worked hard to try to
12 settle this case with the government. We
13 provided extensive factual information to the
14 government during that period. We also provided
15 lists of the entities involved, and we offered
16 to stipulate to a definition, and the government
17 rejected that -- that effort by us.

18 But we -- we did make a full effort in
19 the district court and then separately with the
20 government to come to terms on this issue.

21 JUSTICE THOMAS: Well, if you went
22 that far, could you give us just -- give us a
23 recap of what the criteria would be for that
24 affiliation that would be close enough?

25 MR. BOWKER: Yeah, absolutely. I

1 think, here, the test should be organizations
2 that are part of a global network that share
3 names, brands, logos, missions, and voices. And
4 I -- I think the reason that that's the right
5 test is because we're talking about attribution
6 by the reasonable observer.

7 As this Court has recognized in a long
8 line of cases that Justice Sotomayor mentioned
9 and that Justice -- Justices Alito and -- and
10 Breyer previously discussed, a long line of
11 cases recognized that there can be attribution
12 across corporate lines, especially with tightly
13 knit international organizations like these.

14 JUSTICE THOMAS: The -- I understand
15 that. So the one final question, and I know
16 you've covered this, but it would be helpful if
17 you would give us a recap of what precisely you
18 think your injury is.

19 MR. BOWKER: Well, I think the -- the
20 types of injuries are twofold. The first injury
21 is the compulsion of speech. And the problem
22 here is that even though the pledge is being
23 imposed on our foreign affiliate, those words
24 are effectively put into the mouths of the U.S.
25 Respondents because of the attribution problem.

1 And the government says: Well, it's no harm to
2 the U.S. organizations because, of course, they
3 can remain neutral.

4 But that's not right. Once those
5 words are put into the mouths of the U.S.
6 Respondents, they -- they -- that policy
7 position is attributed to them and the harm is
8 done from that compelled speech.

9 The second nature -- the second
10 category of harm comes from the speech
11 restrictions imposed by the regulations. What
12 those say is the foreign affiliate will lose its
13 funding unless it maintains adequate separation
14 from organizations that say or do anything
15 inconsistent with the policy.

16 So, when the government says that the
17 U.S. organization can disavow the pledge, that
18 comes at a high price, which is the loss of
19 funding for the foreign affiliate.

20 And so the -- the categories of
21 injuries are twofold, one from the speech
22 compulsion and the other from the speech
23 restriction. It's a catch 22 for these U.S.
24 organizations.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Ginsburg?

3 JUSTICE GINSBURG: Counsel, I don't
4 follow your last response because the domestic
5 organization is able to speak for itself, and as
6 far as any attribution of the foreign entity to
7 the domestic organization, AOSI can disclaim the
8 foreign entity's pledge. It says: We don't
9 take the pledge, and we disclaim any connection
10 to the pledge that's made by foreign entities.
11 It's not our pledge.

12 So they can say, and they say, that
13 pledge, by taking it by the foreign entity, was
14 the price for receiving U.S. dollars. The
15 foreign --

16 MR. BOWKER: Justice --

17 JUSTICE GINSBURG: -- organizations
18 continue to work with prostitutes; they have
19 just made a statement that, on the ground, means
20 nothing.

21 MR. BOWKER: Justice Ginsburg, I think
22 this Court had it exactly right in 2013 when it
23 recognized that an organization cannot both avow
24 the government's viewpoint and then turn around
25 and assert a contrary belief or even claim

1 neutrality without appearing hypocritical and
2 without appearing to engage in doublespeak.

3 And the problem here, of course, is
4 that the entities are indistinguishable and they
5 speak as one. And so focusing on the corporate
6 difference is a mistake. After all, it's -- it
7 would be odd that the international operating
8 arms of these U.S. organizations are treated
9 differently based on whether they operate
10 through branch offices or through separate
11 corporations.

12 And, in fact, what -- what is wrong
13 with the government's view that this is all by
14 choice is that there are certain jurisdictions
15 where local law and even the U.S. government's
16 own funding criteria require these U.S.
17 Respondents to work through local affiliates.

18 And so we're -- we're -- we're caught
19 unable to disavow, credibly disavow, the speech
20 of an entity that looks just like our client and
21 speaks as one with our client.

22 JUSTICE GINSBURG: Let me ask you a
23 question, an argument that you didn't make. You
24 concede that the foreign entity has no First
25 Amendment rights.

1 What about the First Amendment
2 obligations of the U.S. -- U.S. government? For
3 example, we can say the Eighth Amendment doesn't
4 apply abroad, but does that mean that the U.S.
5 government official operating abroad is free to
6 torture people? In other words --

7 MR. BOWKER: Justice Ginsburg --

8 JUSTICE GINSBURG: -- is there a --

9 MR. BOWKER: -- I think it's an
10 important -- sorry. I'm sorry for interrupting.

11 JUSTICE GINSBURG: And I'm asking
12 whether U.S. actors have an obligation to
13 conform their conduct to constitutional norms?

14 MR. BOWKER: The first response is I
15 don't want the Court to think that we're trying
16 to export the First Amendment. That's not what
17 we're trying to do. We're just trying to afford
18 complete relief to U.S. organizations that have
19 First Amendment rights here.

20 But, to Your Honor's good question, I
21 think, in a system with a limited government and
22 a constitution that includes a Bill of Rights, I
23 think there is a fair question about the extent
24 to which the U.S. government can go beyond what
25 it's authorized to do in the Constitution with

1 respect to speech.

2 I guess the other point I would add is
3 that even these clearly identified affiliates
4 overseas, I think the government would concede,
5 have First Amendment rights when they act here
6 in the United States, as they often do when they
7 come here for meetings or to publish papers or
8 to participate in conferences.

9 And the problem with the pledge
10 requirement, of course, is that it binds these
11 organizations forever and for all purposes, both
12 the --

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 MR. BOWKER: Yes.

16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer?

18 JUSTICE BREYER: It seems to me the
19 government is prepared to concede that you, the
20 CARE U.S.A., doesn't have to -- doesn't have to
21 oppose prostitution. But they say the First
22 Amendment doesn't prevent them from telling CARE
23 India that it has to oppose.

24 So why don't you simply write a grant
25 to get all the money yourself and then you give

1 it to CARE India? Why doesn't that work?

2 MR. BOWKER: Well, the -- the problem
3 with that, Your Honor, is that, according to the
4 government, the policy requirement still binds
5 the U.S. organization in the following way: If
6 CARE U.S. gets the money and sub-grants to CARE
7 India, it must carry the burden of the
8 government in the sense of imposing the policy
9 requirement on its own affiliates and police
10 compliance with the policy requirement, not just
11 with respect to the speech and activities of its
12 foreign affiliate but also with respect to
13 itself, lest it violate the regulations which it
14 --

15 JUSTICE BREYER: Where do I find in
16 the briefs or in the record just what you said?
17 Because it seems to me just what you said shows
18 that this case is 100 percent about the rights
19 of an American company, the parent, and the
20 question is, can they forbid -- can the
21 government require them to forbid one channel of
22 communicating the message, can it control what
23 they say in that channel?

24 The channel happens to be a channel
25 that goes abroad. I -- I don't know that

1 there's any precedence for the policy -- the
2 precedent that says they can. I mean, have I
3 got that right? Is that clear?

4 MR. BOWKER: Yes. I think the best
5 citations in the record, Justice Breyer, would
6 be the regulations themselves, J.A. 248 to 265.
7 And I would direct Your Honor's attention to the
8 discussion, the commentary of 45 CFR 89.3, and
9 that's at J.A. 256 through J.A. 258, where the
10 government makes very clear that not only do
11 funding recipients have to demonstrate their
12 separation from entities that speak
13 inconsistently, but they even go so far as to
14 say there has to be separation from entities
15 that do not have a policy themselves, suggesting
16 that the government's view is that the U.S.
17 Respondent itself should have a policy.

18 I also think another place to look in
19 the record is at J.A. 375 and 390, where the
20 Pathfinder organization talks about U.S. funding
21 criteria that require them to work through local
22 affiliates and locally incorporated entities.

23 JUSTICE BREYER: Thank you. Thank
24 you.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 JUSTICE ALITO: I agreed with your
2 client's position when this case was before us
3 previously. But what concerns me today is not
4 so much the immediate impact of a decision in
5 your favor but where it would lead.

6 So let me ask, because I am concerned
7 that it will force Congress either to withhold
8 foreign aid entirely or to allow foreign aid to
9 be used in ways that are contrary to the
10 interests of the people of this country. So let
11 me give you this example.

12 Excuse me. Suppose that the -- the
13 United States provides grants to domestic
14 entities and allows them -- excuse me -- to make
15 sub-grants to foreign schools for the purpose of
16 promoting education in countries with weak
17 educational systems. And suppose that Congress
18 specifies that any foreign entity that gets a
19 sub-grant must have a policy denouncing
20 terrorist attacks against American civilians.

21 Would that be unconstitutional?

22 MR. BOWKER: No, it wouldn't be, Your
23 Honor, because that requirement doesn't require
24 the affirmation of a belief and then conformity
25 with that belief and espousing it as one's own.

1 And that -- this requirement --

2 JUSTICE ALITO: Well, it doesn't
3 exactly. The school that gets the money must
4 have a policy denouncing terrorist attacks
5 against American civilians. It's compelled to
6 speak. It doesn't want to make that speech. It
7 is affiliated with an American entity.

8 Why isn't the argument exactly the
9 same in that situation?

10 MR. BOWKER: I -- I think that there's
11 a problem with germaneness in that case. The --
12 the requirement there wouldn't be related to the
13 federal program.

14 But your -- to Your Honor's, I think,
15 larger question, this doesn't turn on the
16 particular ideology.

17 I think any -- any ideological
18 commitment, any requirement of an ideological
19 commitment by grantees is problematic for the
20 same reasons as the one here. What I will --

21 JUSTICE ALITO: Yeah, exactly. That's
22 exactly right. Let me -- let me ask you one
23 more question before my time expires.

24 Why doesn't the logic of your argument
25 apply to the provision of funds to totally

1 independent foreign entities?

2 So suppose a U.S. entity gets money.
3 Under the Leadership Act, it wants to make a
4 sub-grant to a non-affiliated foreign entity,
5 but it can't do it unless the foreign entity
6 makes -- unless the U.S. entity tells the
7 foreign entity you cannot use -- you must have a
8 policy opposing prostitution.

9 The U.S. entity is compelled to make a
10 statement that it doesn't want to make. Why
11 doesn't the logic of your argument apply there?

12 MR. BOWKER: Well, in that case, the
13 entity being made to take the pledge is not
14 clearly identified with the U.S. entity and,
15 therefore, the pledge of the foreign entity
16 doesn't get attributed back to the U.S. entity.
17 And I think that's a very important difference.

18 Here, when the U.S. entity imposes the
19 requirement on its sub-grantee, on its clearly
20 identified foreign affiliate, it's as if it's
21 imposing the pledge requirement on itself,
22 because, after all, these -- these organizations
23 are indistinguishable and speak with one voice.

24 I -- I do think it's important to make
25 the point that the government still has very

1 broad authority to control what happens with its
2 funds, to put in place policies for its
3 programs, and to require that grantees fulfill
4 the requirements of the program in every
5 respect.

6 This particular requirement is unique.
7 There's no other requirement like it in U.S.
8 law. And I think a decision for Respondents can
9 be very narrow, turning on the facts of this
10 case and the prior ruling of this Court, which
11 declared the policy requirement
12 unconstitutional.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Sotomayor?

16 JUSTICE SOTOMAYOR: Counsel, there has
17 been a long history to this case. I'm not quite
18 sure what the relationship is of your clients to
19 the agency now.

20 Are your clients grant recipients who
21 currently receive grants, who currently work
22 through their foreign affiliates, and their
23 foreign affiliates have not taken this pledge,
24 or have they not received grants and want to
25 work with their foreign affiliates?

1 I'm -- I'm not quite sure what the
2 status is of what the government's been doing or
3 not doing.

4 MR. BOWKER: So these organizations
5 are the same organizations that were before the
6 Court in 2013 but a smaller group because the
7 rest of the clients are too small to have global
8 networks.

9 We now are talking about the entities
10 that were before the Court in 2013 that are the
11 -- the large international entities like CARE
12 and Save the Children and World Vision and
13 Pathfinder that are the ones with their own
14 clearly identified affiliates overseas.

15 And these organizations receive money
16 here in the United States and receive money
17 through their locally incorporated affiliates.
18 CARE, which is the example we've been using, the
19 U.S. entity receives all U.S. grant money under
20 this program and then sub-grants to its local
21 affiliates.

22 And so, in the case of CARE, it has
23 done that under objection. It -- it asserts
24 that it should be free of this policy
25 requirement. It believed that the litigation in

1 2013 would have disposed of this issue. And it
2 continues to suffer these First Amendment harms
3 and violations that we've been discussing today.

4 JUSTICE SOTOMAYOR: I don't -- I'm not
5 sure you've answered my question. They are
6 receiving the funds. Are they subcontracting
7 with affiliates or partnering with affiliates
8 and are the affiliates making the pledge and
9 they're complaining about the fact that they're
10 forced to do that? Or have they not been -- and
11 have they not been policing the foreign
12 affiliates and the government's now threatening
13 to take away the funding?

14 MR. BOWKER: Well, it's a little bit
15 of both, Your Honor. Let me explain.

16 They are receiving the funds, and they
17 are imposing the pledge requirement under
18 objection on their clearly identified foreign
19 affiliates overseas.

20 The government has said that all these
21 years there's been no objection to this
22 practice. I -- I don't think that's exactly
23 right, with respect to my friend. In fact,
24 early in the litigation, there was a -- there
25 was a disagreement in the district court about

1 the proper scope of the injunctive relief, and
2 the Respondents wanted broader relief to include
3 sub-grantees. And the government objected on
4 the ground that those facts were not yet known.

5 And the facts now are known. That was
6 -- that was fully 12 years ago. The facts are
7 known. The record is developed. The district
8 court entered its findings. And I think there's
9 no dispute about the nature of the relationship
10 now.

11 JUSTICE SOTOMAYOR: And so are they
12 threatening to take away the funding? Why?

13 MR. BOWKER: They are now saying that
14 the policy requirement will be enforced as
15 against the clearly identified foreign
16 affiliates of the U.S. Respondents because, they
17 say, those organizations have no First Amendment
18 rights.

19 We argue that this isn't about any
20 rights of the foreign organizations. It's about
21 the First Amendment right.

22 JUSTICE SOTOMAYOR: No, no, no.
23 Counsel --

24 MR. BOWKER: Yes.

25 JUSTICE SOTOMAYOR: -- I'm sorry for

1 interrupting, but if the foreign affiliates have
2 made the policy statement, what -- so they've
3 done what the government wants. Why would the
4 government take the funding away from you or
5 them?

6 MR. BOWKER: We -- we object to that
7 policy requirement. We don't want to have to
8 impose it on our clearly identified affiliates.
9 And it's causing the U.S. Respondents to have to
10 engage in doublespeak. And if they do that, if
11 they attempt to disavow that pledge, which is
12 attributed to them, they will lose their funding
13 for the global network. And --

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Gorsuch?

17 JUSTICE GORSUCH: Counsel, in -- in
18 response to Justice Ginsburg and Justice Thomas,
19 you indicated that the primary harm your client
20 had suffered is the risk of attribution,
21 mistaken attribution, of the foreign affiliate's
22 speech to the domestic entity.

23 That sounds a bit like an alter ego
24 argument, that the ordinary listener will be
25 confused and attribute the speech of a foreign

1 affiliate to the domestic entity.

2 Yet, at the same time, I -- I assume
3 you -- you'd resist any effort to pierce the
4 corporate veil from those foreign entities and
5 impose liability on the domestic entity. So in
6 what respect is it and when should we attribute
7 speech or actions of foreign affiliates to the
8 domestic entity? Why would we pierce the
9 corporate veil sometimes but not all the time?

10 MR. BOWKER: Your Honor, we don't ask
11 the Court to pierce the veil or to treat these
12 entities as alter egos. Rather, we're focused
13 on the unique nature of speech and the way
14 speech can be attributed even when corporate
15 formalities are observed.

16 And I think the right line of case law
17 here is not just this Court's decision in 2013
18 in AOSI but also cases like Pleasant Grove City
19 v. Summum; Walker v. Texas Division, Sons --
20 Division, Sons of Confederate Veterans; Pacific
21 Gas & Electric; and, as Justice Sotomayor
22 mentioned, the Hurley parade case. All of those
23 cases recognize that legally separate entities
24 or individuals and entities can have speech
25 attributed from one to the other without

1 engaging in any kind of veil-piercing or alter
2 ego analysis, which would get the Court mired
3 into the corporate formalities, which we don't
4 advocate.

5 Rather, we think a more limited
6 holding based on the nature of speech and the
7 First Amendment would suffice.

8 JUSTICE GORSUCH: On -- on that score,
9 what evidence is there that there is this risk
10 of confusion or attribution, given that the
11 domestic entity is free to disavow the
12 statements of any foreign affiliates? What --
13 it seems to me an empirical question. Do we
14 have any empirics?

15 MR. BOWKER: Yeah, I think the best
16 evidence is -- is in the record in the
17 unrebutted sworn declarations of these
18 organizations, which talk about how they are
19 perceived in the public health community, the
20 price they are paying in the form of hypocrisy
21 and the way that they lose their integrity and
22 their reputation and their brand when they're
23 forced to speak out of two sides of their
24 mouths.

25 The -- the declarations that were --

1 JUSTICE GORSUCH: I -- I understand --
2 I understand that harm, counsel. And I'm sorry
3 to interrupt, but I -- I understand the harm
4 that -- that people will see the disavowal and
5 will -- will take cognizance of it. But is that
6 the same thing as anyone really thinking that
7 the domestic entity abides by the government
8 restrictions and endorses them? Does anyone
9 really think that when they -- when they -- when
10 they read that, or do they that this is a
11 statement made by a foreign entity in order to
12 secure U.S. dollars that obviously the U.S.
13 entity itself does not promote or agree with?
14 Why wouldn't that be the natural reading by the
15 -- by the average reader?

16 MR. BOWKER: Well, I think, when these
17 public health organizations take a pledge saying
18 that they believe something, I think people take
19 it very seriously. When they say that they
20 believe that HIV/AIDS is transmitted in a
21 certain way or when they say they believe that
22 prostitution should be dealt with in a way that
23 stops the spread of the disease, people listen
24 to them.

25 The reason they're so effective in

1 these programs --

2 JUSTICE GORSUCH: I'm sorry, counsel.

3 Counsel, I accept that, again. That's not

4 really quite my question.

5 Couldn't a reasonable person hold in
6 his or her mind two things: one, the foreign
7 entity believes X; two, the domestic entity does
8 not believe X?

9 MR. BOWKER: Well, Your Honor, I think
10 that falls apart when the organization speaks
11 with one voice, as these organizations do. They
12 -- they have a right to speak that way. They
13 have a right to -- to join with their affiliates
14 in having their -- their -- their common voice
15 and their common mission.

16 And when they're told to say one thing
17 and then disavow it in another breath, I think
18 it undercuts their reputation and brand and
19 their own speech.

20 JUSTICE GORSUCH: Well, are --

21 MR. BOWKER: I think Your Honor had it
22 exactly right.

23 JUSTICE GORSUCH: Are we back then,
24 counsel, to -- to the -- the belief that people
25 will always confuse this as one entity and it's

1 not possible for a local chapter of an
2 organization to have a different view than the
3 national organization or the international
4 organization? That people cannot hold that --
5 that concept in their heads?

6 CHIEF JUSTICE ROBERTS: Briefly,
7 counsel.

8 MR. BOWKER: Yes, briefly. I think
9 the public doesn't know that these are separate
10 corporations. The problem is they're -- they
11 are indistinguishable and they -- they look to
12 the public to be exactly the same.

13 And so it really would be more like
14 Your Honor's case in Masterpiece Cake Shop,
15 making the baker say one thing and then attempt
16 to disavow it in the next breath.

17 CHIEF JUSTICE ROBERTS: Thank you.
18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: Thank you, Chief
20 Justice.

21 Good morning, counsel. I want to
22 clarify, first, one thing from your colloquy
23 with Justice Ginsburg. You agree, I assume,
24 that unaffiliated foreign entities acting abroad
25 have no constitutional rights under this Court's

1 precedents?

2 MR. BOWKER: We do, Your Honor.

3 JUSTICE KAVANAUGH: Okay. And then I
4 want to pick up on Justice Alito's concern or
5 question about the foreign policy effects of
6 your approach, and I have a hypothetical as
7 well.

8 Suppose the U.S. government wants to
9 fund foreign NGOs that support peace in the
10 Middle East but only if the NGOs explicitly
11 recognize Israel as a legitimate state. Are you
12 saying the U.S. can't impose that kind of speech
13 restriction on foreign NGOs that are affiliated
14 with U.S. organizations?

15 MR. BOWKER: I think that's a -- a
16 harder case, because I don't -- I don't hear
17 that as requiring affirmation of a belief.
18 Rather, it is in recognizing a fact that the
19 U.S. has established a certain diplomatic
20 relationship with -- with Israel. And the U.S.
21 government gets to say what that relationship is
22 for the United States.

23 I don't think that's making the
24 entities espouse that view as their own. And so
25 I think that's different. I think that would be

1 acceptable.

2 JUSTICE KAVANAUGH: That would be
3 acceptable in your view?

4 MR. BOWKER: I -- I think it would be.

5 JUSTICE KAVANAUGH: Okay. And then
6 the government says that your position would
7 unleash foreign affiliates of U.S. corporations
8 to pump money into the U.S. election process.
9 And I wanted to give you a chance to respond to
10 that claim, which was in the government's reply
11 brief and then repeated here today.

12 MR. BOWKER: Yeah, I -- I disagree
13 with that. That's a very different case. That
14 is a -- that is a speech restriction. It is not
15 speech compulsion. And that restriction doesn't
16 apply to the U.S. organizations.

17 And so -- and I think this Court dealt
18 with that the right way in Citizens United and
19 distinguished the foreign organizations from the
20 U.S. organizations and it's a different case.

21 JUSTICE KAVANAUGH: Thank you,
22 counsel.

23 CHIEF JUSTICE ROBERTS: One minute to
24 wrap up, Mr. Bowker.

25 MR. BOWKER: Thank you, Your Honor.

1 Applying the Policy Requirement to
2 foreign members of these tight-knit
3 international entities fighting HIV/AIDS
4 overseas puts words in the mouths of the U.S.
5 members of those entities. And the program
6 regulations effectively prevent the U.S. members
7 from even disavowing what the foreign members
8 are compelled to say.

9 The injunction should be upheld.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Michel, three minutes for
13 rebuttal.

14 REBUTTAL ARGUMENT OF CHRISTOPHER G. MICHEL
15 ON BEHALF OF THE PETITIONERS

16 MR. MICHEL: Thank you, Mr. Chief
17 Justice.

18 Just a few points in rebuttal.

19 First, to respond to Justice
20 Sotomayor's question about facial invalidity,
21 footnote 1 of our reply brief explains the
22 government's prior submission was clear that the
23 statute was -- it was being challenged only with
24 respect to domestic entities and, in fact, a
25 true facial invalidation would invalidate the

1 statute even as applied to foreign entities that
2 have no connection to the United States, which I
3 take it my friend has just conceded is not his
4 position.

5 Second, my friend concedes -- my
6 friend stated that the U.S. entity truly is in
7 control. And I think that's exactly right. But
8 that ultimately underscores that it's the U.S.
9 entity, the holder of the First Amendment
10 rights, that is making a choice to affiliate
11 with a foreign entity that accepts Leadership
12 Act funds.

13 Unlike in this case last time, and
14 unlike in cases like Hurley and Masterpiece, the
15 U.S. entity has not required to make that
16 choice. The U.S. entity has a separate choice
17 to accept Leadership Act funds itself and
18 operate itself without -- in -- in foreign
19 countries without any risk of hypocrisy or -- or
20 a mixed message.

21 As Justice Gorsuch says, you have to
22 take the sweet with the sour when you decide to
23 set up a separate corporate entity.

24 Now, my friend suggests that either
25 U.S. funding conditions or foreign law somehow

1 give an incentive for -- for U.S. entities to
2 use foreign affiliates, but they're not
3 challenging any U.S. funding decisions, which
4 would, we believe, beyond -- be beyond challenge
5 anyway.

6 And foreign law certainly cannot
7 change the scope of a U.S. entity's First
8 Amendment rights.

9 My -- my friend's position ultimately
10 rests on what he frames as a risk of attribution
11 test. But I think Judge Straub got it right
12 below when he called that position startling.

13 As Justice Kavanaugh and Justice Alito
14 both, I think, alluded to, that test would be
15 unworkable and it would call into question all
16 manner of U.S. speech restrictions on foreign
17 entities abroad.

18 Now, my friend says there's a
19 distinction between speech restrictions and
20 speech compulsions, but the risk of attribution
21 test that he has outlined, where you simply
22 compare names, logos, and brands, has nothing to
23 do with the distinction between speech
24 attribution and speech compulsion.

25 And in all events, the foreign

1 entities here are only, if the -- if the U.S.
2 entities choose, required to make the statement
3 in a -- in a letter to USAID, not to shout it
4 from the mountaintops and not to say anything
5 that will ultimately interfere with the U.S.
6 recipient's message.

7 Finally, I want to note Respondents
8 never made this argument for more than a decade
9 of the litigation. I think what happened is
10 that having secured rights for U.S. entities,
11 they decided to ask for the world.

12 But there's no basis in this Court's
13 prior decision or in any other source of law for
14 that -- for that holding. It would invalidate a
15 provision that Congress has adopted and
16 reauthorized and that is working.

17 The decision below should be reversed.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, at 11:09 a.m., the case
21 was submitted.)

22

23

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