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Re-examining Funding and the Unconstitutional Conditions Doctrine

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Congress funds a variety of causes to the exclusion of others. That is permissible and necessary. Congress cannot, however, condition its spending on the abandonment of recipients' constitutional rights. Legislation that steps over this line implicates the Unconstitutional Conditions Doctrine. The Supreme Court will soon consider this doctrine in connection with a congressional statute requiring an organization to have a policy explicitly condemning prostitution and sex trafficking in order to receive federal funding.

Case History

When the government expressly compels speech, it treads on the thinnest of constitutional ice. The Founding Fathers enacted the First Amendment, in large part, to prevent such governmental coercion. For this reason, the Supreme Court has emphasized that, while Congress has almost limitless power to condition funding under the spending clause, "The government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit," as ruled in *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 59 (2006).

The Unconstitutional Conditions Doctrine will take center stage later this spring when the court hears oral argument in *Agency for International Development v. Alliance for Open Society International*, No. 12-10 (cert. granted Jan. 11, 2013). Several prominent nongovernmental organizations initiated this challenge to federal legislation adopted by Congress in 2003. The Leadership Act, 22 U.S.C. § 7631(f), was intended to strengthen our country's response to the global pandemics of HIV/AIDS, tuberculosis and malaria. Among other things, the act authorized federal agencies to partner with NGOs to combat these problems. The federal funding, however, had a string attached. NGOs hoping to receive aid must ensure that "no funds made available to carry out this act ... may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking."

The plaintiffs argued that this "loyalty oath" compelled them to espouse the government's viewpoint and restricted them from engaging in privately funded expression, which, they contended, infringed their freedom of speech. The U.S. District Court for the Southern District of New York sided with the plaintiffs and enjoined the government from enforcing this condition on funding. On appeal, the U.S. Court of Appeals for

the Second Circuit affirmed.

The Unconstitutional Conditions Doctrine

Both lower courts held that the act's policy requirement violated the Unconstitutional Conditions Doctrine. Three Supreme Court cases discuss the contours of this doctrine in the First Amendment context: *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), and *Rust v. Sullivan*, 500 U.S. 173 (1991).

The existence of alternative channels for expression is key to the application of the doctrine. In *Regan*, a nonprofit lobbying group — Taxation With Representation of Washington — argued that the government's refusal to permit tax deductions to any organization that engaged in substantial lobbying was unconstitutional. The Supreme Court disagreed in large part because organizations like Taxation With Representation could still receive tax deductions for their nonlobbying activities and simply continue lobbying through affiliates. This alternative channel, the court held, meant that no First Amendment rights were compromised.

In *League of Women Voters*, decided one year later, the court sided with plaintiffs challenging a provision of the Public Broadcasting Act. That provision prohibited stations receiving federal funds from "editorializing." The court held that it was unfair to prevent recipients from engaging in editorial commentary when they were financing this activity with entirely private funds. The absence of an alternative channel for the stations' editorial expressions loomed large for the court. The opinion noted that, if the statute permitted affiliation of the sort discussed in *Regan*, recipients "would be free, in the same way that [Taxation With Representation] was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities."

Seven years later, the court returned to the doctrine in *Rust*. That case presented a challenge to the Public Health Service Act, which funded family-planning projects but prohibited the use of any funds for abortion-related activities. Those activities could only be undertaken if a recipient maintained "objective integrity and independence" between the act's funds and the recipient's other funding. The court held that requiring a "wall" of this sort was constitutionally permissible, noting that "the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." ?Alliance

The Alliance case involves forcing recipients of funding to speak rather than to remain silent or abstain from certain expressive activities. The justices will need to decide whether there is a dispositive difference between (1) the government compelling speech, and (2) the government choosing to fund organizations best equipped, and that have agreed, to communicate the government's chosen message.

Both parties attempt to analogize this case to *Rust* and its predecessors described above. The government argues that the act seeks only to advance its message through recipients unlikely to dilute that message by any contrary statements/actions, as was the standard in *Rust*. By contrast, the plaintiffs note that the family clinics in *Rust* were not compelled to trumpet the government's position expressly; rather, they were simply barred from engaging in a particular type of family-planning activity. The plaintiffs hope to convince the justices — like they convinced the lower courts, and like the Supreme Court has held in the past — that the government goes too far when it compels speech. (See *Wooley v. Maynard*, 430 U.S. 705, 714-17 (1977) (invalidating requirement that cars must display state motto "live free or die" on license plates as a condition of driving); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (invalidating tax exemption conditioned upon taxpayer declaring that he does not advocate the forcible overthrow of government); and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (invalidating requirement that, as a condition of attending public school, children must salute the flag).)

The government attempts to mitigate the compulsory nature of the act by noting the plaintiffs' adequate alternative channels of communication. According to the government, any entity unwilling to state its opposition to prostitution can simply form an affiliate that does so and thereby preserve its eligibility for funding under the act. For that reason, there is no compelled speech problem. The plaintiffs respond that, affiliate or not, the government is still compelling an affirmative oath from someone, which is a per se First

Amendment violation. They note that the "alternative channels" inquiry is applicable only to constraints on speech, not to forced expressions of speech.

Last term, in *Knox v. Service Employees International Union*, 132 S. Ct. 2277 (2012), the Supreme Court expressed its disapproval of "compelled speech and compelled association" in the context of public-sector unions' mandatory assessments. *Alliance* will give the justices another opportunity to confront the issue — and in a more direct way. The court will determine in *Alliance* whether the First Amendment permits the government to condition funding on the recipients' willingness to express the government's preferred viewpoint.

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