No. 12-10

In The
Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003), or for amici, *e.g.*, *FCC v. Fox TV*, 132 S. Ct. 2307 (2012); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). The ACLJ believes the government has the authority, within limits, to set eligibility criteria for grantees to assure that taxpayer funds are used in ways that are most effective to furthering the goals of the funding program. In particular, government can categorically prefer to give money to applicants who are willing to condemn inherently wrongful activity – such as prostitution and sex trafficking – when opposition to those activities is material to the program at issue.

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[1]The parties in this case have consented to the filing of this amicus brief. Letters of consent are being filed herewith. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

When selecting among competing applicants for discretionary funding, government can look to the relevant qualifications of the applicant to ensure the effectiveness of a government program. For example, government could disqualify tobacco merchants from an anti-smoking campaign, or require a pro-democracy policy for applicants to receive funding in a program to extend democratic principles and institutions abroad. Such criteria are not unconstitutional conditions, but rather qualifications for selection akin to an individual's qualifications to carry out a job (e.g., having a bar license to be a Department of Justice litigator).

Since the funding at stake here is competitive, discretionary, and limited to a discrete program, and because application for such funding is completely voluntary, the compelled speech doctrine is no bar to the setting of qualifications for applicants. And while the "government speech" doctrine does not cover the policy requirement here – an entity's policies are its own speech, not that of the government – the government does not need to fit under that doctrine to establish legitimate, program-related qualification criteria for applicants for taxpayer funding.

The government power to attach strings to money is potent and subject to grave abuse, and this Court should reaffirm the essential constitutional limits on that power. In the present case, however, the policy requirement is no more than a permissible eligibility qualification for competitive, discretionary government grants.

ARGUMENT

Respondents contend that the anti-prostitution policy requirement in this case violates the First Amendment. It does not. If there is a problem in this case, it is that the federal government faces almost no meaningful limits upon its spending authority outside of the political process.

Although the flow of funds from the federal government to private entities for various purposes is ever expanding, the wisdom of this development is *not* the issue before this Court. Rather, the question is whether, if Congress *can* reallocate U.S. tax money to the overseas causes of its choice, be they good (as here) or bad, Congress also can ensure that those entities accepting federal funds are the ones most likely to be qualified and effective in carrying out those programs. The answer must be "yes."

I. THE FEDERAL GOVERNMENT HAS THE POWER TO SET ELIGIBILITY CRITERIA FOR GRANTEES.

The power to set up a grant program necessarily entails the concomitant power to set up a program in a way that is effective. Eligibility criteria are part of ensuring effectiveness.

It makes no sense, for example, to say that a group like NORML (opposing bans on marijuana) has a First Amendment right to receive grants under a government program to combat the use of marijuana, or that the Communist Party USA has a First Amendment right to receive grants to implement a program extending free market capitalism. Congress thus has the power, within limits, to establish

eligibility criteria, even when those criteria touch upon an applicant's speech or viewpoint. "Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *NEA v. Finley*, 524 U.S. 569, 587-88 (1998). Would-be grantees must then satisfy those criteria in order to receive taxpayer funding as part of government programs.

The policy requirement at issue here is such an instance of government setting permissible eligibility criteria for competitive funding.

A. There is a Crucial Distinction Between Permissible Eligibility Criteria and Unconstitutional Conditions.

The "unconstitutional conditions" doctrine does not invalidate the policy requirement here.

Certainly the government cannot willy-nilly use the carrot of taxpayer funding to obtain the forfeiture of constitutional rights. While he who "pays the piper" generally gets to "call the tune," *Democratic Senatorial Comm. v. FEC*, 660 F.2d 773, 781 (D.C. Cir. 1980) (per curiam opinion of Wright and GINSBURG, JJ.), this Court has repeatedly "recognize[d] a limit on Congress' ability to place conditions on the receipt of funds," *Rumsfeld v. FAIR*, 547 U.S. 47, 59 (2006). In particular, "'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.'" *Id.* (quoting *United States v. Am. Library Ass'n*, 539 U.S. 194, 210 (2003) (plurality)). A number of this Court's cases exemplify this "unconstitutional conditions" doctrine. *E.g.*, *FCC*

v. League of Women Voters of Cal., 468 U.S. 364 (1984); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

That does not mean, however, that Congress must be indifferent to the *qualifications* of the applicants for federal grants. "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, . . ., it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). In the same way, Congress need not ignore whether applicants for funding under a government program in fact support the goals they are expected to promote. An overseas campaign *against* abortion can disqualify groups that *do* abortions, even on their own time and money, just as an overseas campaign to *increase* access to abortion could presumably disqualify groups that *oppose* abortion, even on their own time and money.

Here, the federal program aims to fight the spread of HIV/AIDS. It is perfectly reasonable for the program to prefer, indeed to insist upon, grantees who expressly oppose sexually exploitative and irresponsible activities like prostitution and sex trafficking, which are activities that contribute to the spread of the very pathologies the government program is trying to halt.

B. Eligibility Criteria for Competitive Funding of a Discrete, Limited, Discretionary Program Do Not Compel Speech.

The compelled speech doctrine does not require a different result.

1. The compelled speech doctrine

To be sure, the government violates the First Amendment when it coerces involuntary speech from a private party, for example when the government extracts statements of points of view on ideologically contested issues. *Wooley v. Maynard*, 430 U.S. 705 (1977). And, of course, coercion need not come in the form of a gun to the head. Government may not "leverage . . . subsidies . . . into a penalty on disfavored viewpoints," *NEA v. Finley*, 524 U.S. at 587. Where the government denies generally available public benefits because the target declines to adopt a particular policy – e.g., no welfare benefits to those who do not profess to support the idea of reducing the federal budget, or no access to a forum for speech by those who refuse to take the position that all religions are equally valid – this blatantly infringes upon the First Amendment right to free speech (and freedom of thought as well). The government cannot make ideological conformity the price of the incidents of citizenship. "Authority here is to be controlled by public opinion, not public opinion by authority." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.*

2. Absence of speech compulsion here

Here, however, the government requires no speech at all – application for grants is purely voluntary. Nor

does the government engage in indirect coercion, for example by imposing conditions upon generally available public benefits like use of a park or highway, receipt of medical safety net coverage, or admission to state schools or their programs. As in the striker/food stamps case, *Lyng v. Int'l Union*, 485 U.S. 360 (1988), the government has merely adopted rules that disqualify certain applicants – in *Lyng*, individuals on strike; here, entities that refuse to declare opposition to prostitution and sex trafficking – from eligibility to receive certain government funds. Just as it was permissible for the government to require libraries to adopt Internet filters in order to receive certain government funding, *Amer. Library Ass'n*, so here it is permissible for the government to require entities to have a policy against prostitution and sex trafficking in order to receive funding to combat the very ills these behaviors help propagate.

3. Important doctrinal limits

It is important to emphasize the limited nature of the government power to attach conditions to funding. In addition to the First Amendment principles discussed elsewhere in this brief, funding conditions must at a minimum be related to the legitimate government interests that the program is intended to further. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). Excluding entities from federal funding programs just because they decline to espouse a particular viewpoint, regardless of the lack of a connection to the purposes of the particular program at issue, would fail this threshold test and thus unconstitutionally penalize those entities for their speech (or refusal to speak).

More generally, there is a difference in kind between, on the one hand, the imposition of eligibility criteria in a discretionary program affecting a small, voluntary pool of applicants, where the eligibility criteria tie directly to the program at issue, and on the other hand, the imposition of policy-linked disqualifiers upon an entire subset of the population, or upon the receipt of common or universally available benefits, or upon the disbursement of benefits having no obvious connection to the program at issue. Discretionary funding for overseas programs, for example, is not the same as entitlement to a child tax credit. Setting criteria for a small set of NGO's seeking program grants is materially distinct from imposing speech-linked requirements on parents wishing to send their children to public schools. And hinging funding for the fight against sexually transmitted diseases upon a policy against sexually irresponsible behavior is different in principle from requiring public fealty to, say, same-sex marriage as a condition of receiving a business license.

4. The need to cabin *CLS v. Martinez*

One recent decision of this Court would appear to undermine these crucial limiting principles – *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010) – but that case should not control the analysis going forward, either because it should be limited to its facts or because it should be repudiated.

In *CLS*, a government entity imposed the requirement that, as a condition of the benefits available to student clubs, every club must adopt a policy of indifferentism regarding religion and sexual behavior. *Id.* at 2979-81. In other words, student

groups were relegated to second-class status unless they in effect professed that a member's religious beliefs were irrelevant to the identity and effectiveness of a religious club, and that one's departure from traditional Christian sexual norms – and the consequent scandal – was irrelevant to the mission integrity of a Christian group.

Contrary to the principles described above, the policy requirement in *CLS* was not limited to participation in a particular, discretionary program – e.g., a student workcamp project aimed at helping AIDS victims. Nor was the requirement limited to a small subset of the population – e.g., those applying for an assistantship position in the "diversity office" or campus chaplaincy. Instead, the rule was imposed upon the entire relevant universe – all students attending the state law school – as a condition of a standard, generally available benefit – forming a recognized club. Furthermore, the requirement was not directly linked to the program at issue: a policy on religion or sexual behavior generally has nothing to do with student club activities, and where such a policy might be relevant, it could as easily be completely counterproductive, indeed nonsensical – e.g., forcing a Jewish club to allow Muslim or Christian officers.

To the extent that *CLS* stands for the proposition that the above-described essential limits on governmental power to impose ideological strings on benefits are in fact no limits at all, it should be overruled. To the extent that *CLS* says a government body – in that case, a law school, but by parity of reasoning also a municipality, a state, or the federal government – can extract a pledge of submission to the currently regnant ideology or else impose second-class status upon the population it governs, the *CLS* decision

is deeply and fundamentally inconsistent with liberty in general and free speech in particular, and should be overruled.

At a minimum, *CLS* must be read as limited to its peculiar facts. The *CLS* Court observed that, while a Christian group bizarrely had to agree that its officers need not be Christian and need not profess to follow Christian norms, such a group could nevertheless adopt "generally applicable membership requirements unrelated to status or beliefs." *Id*. at 2979 n.2 (internal quotation marks omitted). If these permissible "good-behavior," "attendance, [and] skill measurements" requirements, *id*., allow a club to maintain its identity and integrity – e.g., by treating profound ignorance or disregard of the club's Christianity-derived norms as a disqualifier – then *CLS* would stand only for the dangerous, but more narrow, proposition that clubs must *profess* indifference to their identity but may nevertheless *maintain* group mission coherence through conduct and skill requirements.

In sum, if *CLS* is taken at face value, the present case is easy indeed. Obviously, if a government body can relegate to second-class status those who do not profess adherence to a deeply controversial policy position, even in the context of access to a speech forum, then *a fortiori* the government can require espousal of a policy condemning activities traditionally regarded as evil, as a condition of receipt of special discretionary funding in a program addressing the consequences of that evil. But because *CLS* is so profoundly inconsistent with broader, preexisting First Amendment principles – principles *CLS* did not purport to overturn – this Court should not rely upon *CLS* here, but rather should disavow its pernicious holding.

The government does not need *CLS* to prevail in this case.

II. THE POLICY REQUIREMENT IS CONSTITUTIONAL INDEPENDENT OF THE "GOVERNMENT SPEECH" DOCTRINE.

Nor does the government need the "government speech" doctrine to prevail here.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Here, however, the anti-prostitution and anti-sex trafficking policy the government requires of grantees is not *government* speech, but rather a policy *the grantee itself* must have. Nor is this a case where the government is dictating the parameters of an entity's speech within the four corners of the government program, as in *Rust v. Sullivan*, 500 U.S. 173 (1991). Hence, the "government speech" doctrine is not controlling here.

The government speech doctrine, however, does not exhaust the government's authority to set rules for grantees. The government can constitutionally require that a grantee, for example, be a tax-exempt entity, or certify its compliance with Title VII or OSHA obligations, or have the necessary plant facilities to complete a certain government project. Eligibility criteria of these sorts are part and parcel of the government's ability to negotiate work bids, or allocate competitive grants. And as already discussed, *supra* § I, the policy requirement here is a permissible eligibility requirement.

CONCLUSION

This Court should reverse the judgment of the Second Circuit.

Respectfully submitted,

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