1   IN THE SUPREME COURT OF THE UNITED STATES

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3   AGENCY FOR INTERNATIONAL   :

4   DEVELOPMENT, ET AL.   :

5   Petitioners   :   No. 12-10

6   v.   :

7   ALLIANCE FOR OPEN SOCIETY   :

8   INTERNATIONAL, INC., ET AL.   :

9   - - - - - - - - - - - - - - - - - x

10   Washington, D.C.

11   Monday, April 22, 2013

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13   The above-entitled matter came on for oral

14   argument before the Supreme Court of the United States

15   at 11:02 a.m.

16   APPEARANCES:

17   SRI SRINIVASAN, ESQ., Deputy Solicitor General,

18   Department of Justice, Washington, D.C.; on behalf of

19   Petitioners.

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

21   Respondents.

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1   C O N T E N T S

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

 2   (11:02 a.m.)

 3   CHIEF JUSTICE ROBERTS: We'll hear argument

 4   next this morning in Case 12-10, Agency for

 5   International Development v. The Alliance for Open

 6   Society International.

 7   Mr. Srinivasan.

 8   ORAL ARGUMENT OF SRI SRINIVASAN

 9   ON BEHALF OF THE PETITIONERS

10   MR. SRINIVASAN: Thank you, Mr. Chief

11   Justice, and may it please the Court:

12   Congress's comprehensive program to address

13   the worldwide problem of HIV and AIDS includes a policy

14   of opposing prostitution and sex trafficking because

15   they contribute to the diseases spread. And

16   correspondingly, Congress determined -- determined that

17   the government should partner with and should grant

18   limited competitive Federal funding to those

19   organizations that agree with the policy opposing

20   prostitution and sex trafficking, because organizations

21   that agree with that policy are most likely to carry out

22   the Federal program in conformity with the Federal

23   policy priorities.

24   Now, no organization that carries out HIV

25   programming is required to subscribe to the Federal

                              3

 1   government's views, but if an organization wants to

 2   partner with the Federal government and get Federal

 3   funds to carry out the Federal program, well, that

 4   organization --

 5   CHIEF JUSTICE ROBERTS: Well, but I guess

 6   the problem is that there are a number of different ways

 7   you could carry out the program. And let's say you have

 8   an organization that focuses on a particular -- you

 9   know, the administration of hospitals or whatever it is

10   that's covered by the program, and they regard this

11   issue as collateral to what they're concerned with.

12   There -- there have to be some limitations on what type

13   of loyalty oath you can require them to sign, isn't

14   there?

15   MR. SRINIVASAN: Well, I think, Mr. Chief

16   Justice, the way that Congress looked at this was to

17   look at -- at the organizations with which the

18   government is going to partner across the mine run of

19   situations. And I think what one can do is look at

20   Respondents' brief, because Respondents encompass a

21   variety of different types of organizations.

22   But Respondents' brief itself tells you, at

23   pages 11 to 12 and at pages 32 and 33, that there are

24   going to be situations, in their own experience, in

25   which these issues about prostitution and --

1   CHIEF JUSTICE ROBERTS: Well, what if

2   they --

3   MR. SRINIVASAN: -- and sex trafficking come

4   into issue.

5   CHIEF JUSTICE ROBERTS: All right. I

6   appreciate that.

7   What if they're not? What if the government

8   has, in addition to this policy, a strong policy in

9   promoting, you know, recycling, and so they require

10   everybody with whom they're going to do business, every

11   grantee, to adopt a policy in favor of using renewable

12   resources? Any problem with that?

13   MR. SRINIVASAN: Mr. Chief Justice, I think

14   that would present a different question. Of course, you

15   know that it presents a different question, but it would

16   be a little bit more difficult for the -- for the

17   following reason: That there is a germaneness component

18   to Congress's -- the constitutionality of Congress's

19   funding decisions in this area. And the more sweeping

20   and the less germane the condition would be, the more

21   it's open to constitutional attack.

22   Now, this condition is very, very germane,

23   because as -- because as Congress found, prostitution

24   and sex trafficking contribute to the spread of the

25   disease. And so it makes good sense that Congress would

 1   have imposed this condition.

 2   And I think it's important to understand --

 3   JUSTICE BREYER: Well -- well, it would on

 4   that particular point. What should we do -- as far as I

 5   can tell from the briefs, the people who work with the

 6   prostitutes to try to prevent AIDS uniformly tell us

 7   that if you go to those prostitutes and you try to get

 8   them to take steps to stop AIDS, it's very hard to do if

 9   at the same time you've announced you're against all

10   prostitution. So what they're saying is that the

11   condition imposed will interfere with the objective, and

12   if there is a germaneness requirement -- and nobody says

13   the opposite.

14   I mean, I've noted nobody denies what

15   they're saying in terms of the effectiveness of their

16   work, so -- I don't think. At least, I didn't read them

17   all with great care; maybe you can point to somebody who

18   does. But if everyone is telling us that this is

19   counterproductive and the exact opposite, then can we

20   say, well, it isn't germane.

21   MR. SRINIVASAN: Well, Justice Breyer, I

22   don't think so, and two responses on that score.

23   First of all, everybody is not telling you

24   that, and I'll tell you who's not telling you that in a

25   second.

6

1   But the more -- but the overarching point is

2   that this is a policy determination that Congress, of

3   course, took into account when it fashioned the statute,

4   and it concluded that it was important to have an

5   opposition to prostitution and sex trafficking.

6   Now, as far as the organizations that aren't

7   telling you that, there is an amicus brief that's filed

8   by 46 organizations that it's in our support --

9   JUSTICE BREYER: Well, that's quite a few,

10   yes. That's true.

11   MR. SRINIVASAN: -- that's in our support,

12   and the lead organization is the Coalition Against

13   Trafficking in Women, and they -- they support us. And

14   they think that the best way -- and they -- and they

15   argued this passionately in their brief -- they think

16   that the best way to provide services to the target

17   audience is under a rubric of opposition to prostitution

18   and sex trafficking. And I would urge you to take a

19   look at that brief, because it explains why the program

20   should be conducted in this fashion.

21   Now, is there a debate about --

22   JUSTICE GINSBURG: Mr. Srinivasan, there

23   isn't -- at least I'm not familiar with anything quite

24   like this where if you're not told, if you want to run a

25   government program, you have to speak the government's

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 1   speech. This doesn't require the recipient to speak to

 2   anybody at all, except to the government itself, to say,

 3   I pledge that my policy is the government's policy. So

 4   it's making somebody adopt as her own the government's

 5   policy rather than saying, I understand that I get my

 6   government money, I have to follow the government's

 7   rules about what I can say to the public.

 8   Here -- and is -- is there anything else

 9   quite like this where you make a pledge to the

10   government, but with respect to third parties doesn't

11   apply?

12   MR. SRINIVASAN: Justice Ginsburg, if I

13   could just fight the premise of your question just very

14   slightly and then explain why I think this kind of

15   requirement makes sense in this particular context.

16   The goal of this is not to persuade somebody

17   to change their view. The goal of this is to partner

18   with organizations that self-identify as organizations

19   that agree with the government's policy priorities. And

20   the reason the government has done that, and the reason

21   why Congress could -- felt that that was a good idea is

22   straightforward, and that is that those organizations

23   that agree with Congress's policy priorities are going

24   to be more likely to be reliable and effective partners

25   in carrying out the government's program.

1   And one way to think about it is to envision

2   this: You have a circumstance in which you're down to

3   your last few dollars of a discretionary Federal funding

4   and you're looking at two different organizations that

5   are competing for that money. One of them comes to you

6   and says, we agree with your policy of an opposition to

7   prostitution and sex trafficking, and the other one

8   says, we're not going to tell you whether we agree;

9   we're going to remain studiously neutral. But we'll

10   tell you that we'll conduct our affairs in a manner

11   that's not inconsistent with your policy priorities.

12   I think it makes all the sense in the world

13   for Congress to decide that the government should

14   preferably partner with the former organization rather

15   than the latter, because they're going to be more

16   reliable and more effective at carrying out the

17   government's program.

18   And there's another aspect of this that I

19   think that is important to highlight, and that is that

20   we're not just talking about circumstances in which the

21   conduct is -- is arguably going to be neutral, so that

22   there's going to be no position taken. There's also

23   going to be occasions in which the organizations that

24   are providing services are going to have the opportunity

25   to affirmatively embrace the government's policy in

1   opposition to prostitution and sex trafficking.

2   JUSTICE ALITO: I'm not aware of any case in

3   which this Court has held that it is permissible for

4   Congress to condition Federal funding on the recipient's

5   expression of agreement with ideas with which the

6   recipient disagrees. I'm not aware of any case in which

7   that kind of compelled speech has been permitted.

8   And I would be interested in -- and it seems

9   to me like quite a -- a dangerous proposition. I would

10   be interested in whatever limitations you think there

11   might be on that rule, which seems to be the general

12   rule that you're advocating. Other than the requirement

13   of germaneness, is there anything else.

14   MR. SRINIVASAN: There -- there is

15   germaneness, Justice Alito, and I can point to a couple

16   of other limiting principles that have been noted in

17   this Court's decisions and I think that are satisfied

18   here.

19   One is that Finley talked about, and I think

20   it captures some other decisions in this -- this

21   respect, disallowing the government from leveraging its

22   control over funding conditions in a manner that

23   services a speech-suppressive objective. And so you

24   have to be careful, and I think this maps --

25   JUSTICE SCALIA: Say it again. I didn't

 1   understand the point.

 2   MR. SRINIVASAN: It -- it -- the government

 3   is limited from leveraging its control over funding

 4   conditions so that it can achieve a speech --

 5   speech-suppressive objective.

 6   And I think what the Court was getting at is

 7   that you want to be careful that the speech condition,

 8   the speech-related condition, is tightly tethered to the

 9   programmatic objective and not allow the government

10   to -- to have the program seep into other areas where it

11   doesn't have to go.

12   JUSTICE ALITO: Well, let me give you this

13   example, which is mentioned in one of the amicus briefs.

14   The government provides lots of funding to universities

15   to -- in various forms, either directly or through

16   student loans, in the form of tax exemptions, so

17   anything that would be germane to the general purpose of

18   higher education presumably could be attached as a

19   condition to those funds. Would that be correct?

20   MR. SRINIVASAN: With -- with certain

21   limitations. I mean, I think germaneness is a -- is a

22   criterion.

23   JUSTICE ALITO: With what -- with what

24   limitations?

25   MR. SRINIVASAN: Well, I think --

11

1   JUSTICE ALITO: The government could have a

2   whole list of things, of principles that it thinks

3   should be incorporated into higher education, and it

4   could require a university as a condition of receiving

5   these -- this money, let's say directed through student

6   loans, to express agreement with all of these

7   propositions. Would that be true.

8   MR. SRINIVASAN: Well, I'm not sure, Justice

9   Alito, and of course it's going to be hard for me to

10   decide that we are not going to defend something. But

11   let me just give you a limiting idea that's out there,

12   which is that I think there is an important distinction

13   between circumstances in which the government is

14   partnering with an organization to carry out a

15   government program, and circumstances in which the

16   government is extending a Federal subsidy to an

17   individual organization as kind of an across-the-board

18   entitlement.

19   So in the generally applicable

20   across-the-board --

21   JUSTICE SCALIA: What do you mean by

22   partnering? How does this partnering differ, partnering

23   differ from just giving them the money to do the job?

24   MR. SRINIVASAN: Well, I don't know that it

25   the differs from giving the money to do the job. I

12

1   guess what I'm saying is there are going to be

2   circumstances, for example, like in Speiser, where the

3   financial question doesn't have to do with the

4   expenditure of the money by the recipient in a manner

5   that's commensurate with congressional goals.

6   In that context you're giving a generally

7   applicable entitlement, and you're not so worried about

8   how the money is being spent because that person is not

9   partnering with the government in carrying out a Federal

10   program. Here the organizations are partnering with the

11   government in carrying out the Federal program, because

12   it's the Federal HIV program that's --

13   JUSTICE SCALIA: I don't know what you --

14   what do you mean by partnering? You're saying they are

15   given money to carry out a particular program. Is that

16   all --

17   MR. SRINIVASAN: Yes.

18   JUSTICE SCALIA: Is that all you mean by

19   partnering?

20   MR. SRINIVASAN: They are given money to

21   carry out --

22   JUSTICE SCALIA: To carry out a particular

23   program.

24   MR. SRINIVASAN: But in concert with Federal

25   policy priorities. So it's not just -- it's not just a

1   naked grant of money. If you had an entitlement,

2   Justice Scalia, for example, let's just consider your

3   classic entitlement --

4   JUSTICE SCALIA: I understand. It is a

5   naked grant of money to implement a particular program.

6   MR. SRINIVASAN: To implement a particular

7   program and --

8   JUSTICE SCALIA: And you call that

9   "partnering with the Federal government."

10   MR. SRINIVASAN: I do.

11   JUSTICE SCALIA: Terrible verb, anyway.

12   MR. SRINIVASAN: Okay. My apologies for

13   that, for associating with the organization recipient in

14   carrying out a Federal program.

15   JUSTICE GINSBURG: Mr. Srinivasan, on this,

16   it does seem to me unusual, as Justice Alito brought

17   out, requiring somebody to say "I believe this" or "I

18   agree with the government on that." The Rust v.

19   Sullivan, which is one of the precedents on which you

20   rely, made it a point that the doctor was not required

21   to represent as his own views, not required to represent

22   an opinion that he doesn't hold.

23   He has to adhere to the government's program

24   in his dealings with the public, but he doesn't have to

25   say "I agree with the government."

1   MR. SRINIVASAN: Yes. That's true, Justice

2   Ginsburg. But here's why --

3   JUSTICE GINSBURG: Is that just an

4   irrelevant consideration in Rust, that no one -- no one

5   was being obliged to say I believe something that they

6   don't believe.

7   MR. SRINIVASAN: Well, here's why I think it

8   makes sense in this context. It is distinct in that

9   respect, but here's why I think it makes sense in this

10   specific context. What Congress wanted to do is secure

11   an ex ante commitment from the organizations with which

12   the government works to assure that they agreed with the

13   government's policy priorities. Now, where these

14   programs are carried out is in the main in foreign

15   territory, in distant lands, and in that context I think

16   Congress would have understood that monitoring of

17   conduct can be particularly challenging.

18   And that monitoring is made all the more

19   challenging because these issues can come into play

20   through a myriad of interactions between the

21   organizations that are working with the government and

22   local communities and local officials.

23   JUSTICE BREYER: I see that, and I see you

24   have two sides to the policy question. And then it

25   seems to me that the case that Justice Ginsburg was

1   speaking of is pretty relevant. Why? Well, that case,

2   Regan and League of Women Voters, all seem quite

3   comparable. They are trying to balance the -- the

4   desire of the government to further a policy objective

5   with the undesirability of the government invading what

6   would otherwise be a constitutional protected right to

7   speech.

8   And the way they have done it is quite

9   technical and narrow, but it may be applicable. In

10   both, what they said was: Don't worry about your

11   protected speech as much as you are because there is

12   another way you can do it here. You go through a -- an

13   independent structured organization. And where that

14   wasn't present, namely the League of Women Voters, the

15   Court struck it down.

16   Now if that's the right framework, then here

17   I don't see how you could have an independently

18   structured organization for the reason that a group that

19   said I am -- I am opposed completely to prostitution,

20   publicly, to get the money, and then set up a structure

21   that said the opposite, would be seen as totally

22   hypocritical. They wouldn't be able to get their

23   message across.

24   They wouldn't be able to express in any way

25   what it is they think about the administration of AIDS

1   in the context -- anti-AIDS in the context of

2   prostitution.

3   That's a long question, but you see where --

4   where I've ended up.

5   MR. SRINIVASAN: I think I do.

6   JUSTICE BREYER: At the moment, for purposes

7   of the question. So why isn't this case more like

8   League of Women Voters and less like the other two?

9   MR. SRINIVASAN: For the following reasons,

10   Justice Breyer: There is an alternative affiliated

11   organizational vehicle in this case as well, and I think

12   that's constitutionally significant. Now, I'm not going

13   to quibble with Your Honor's point about how the

14   organization that's the funding recipient has made this

15   policy agreement and that that can have ripple effects,

16   but here's why that matters.

17   The point of having an alternate vehicle is

18   not that it remedies a constitutional problem that

19   already exists. The point of it is to get to this

20   leveraging purpose that I was talking about earlier, and

21   it's to show that what the government is doing is

22   keeping the condition within its appropriate confines,

23   and it's not allowing that condition to spread beyond

24   that into other realms. And that purpose is fully

25   served by the organizational affiliate alternative here.

17

 1   And I think it's important --

 2   JUSTICE GINSBURG: But, Mr. Srinivasan,

 3   there is a difference in this international setting.

 4   Most of those separate affiliates was in Taxation

 5   Without Representation and it was the cure for the Legal

 6   of Women Voters. But here, as the D.C. district court

 7   said in its opinion, which was in your favor: Oh, all

 8   you have to do is spin off a subsidiary that gets the

 9   government money; it's just a simple matter of corporate

10   reorganization.

11   But you know that getting an NGO, a new NGO,

12   recognized in dozens of foreign countries is no simple

13   thing to accomplish. I mean, to take a concrete

14   example, look what happened about a year and a half ago

15   in Egypt when the U.S. NGO's were indicted for

16   criminal -- for not complying with the permit

17   requirements of the country.

18   So it's one thing to set up a 501(c)(3) and

19   501(c)(4) operating in the United States, each does its

20   thing. But to require an NGO to then in the countries

21   where it's operating get the necessary permits is quite

22   an arduous thing.

23   MR. SRINIVASAN: Well, Justice Ginsburg, I

24   guess it depends on which direction it runs as a

25   principal point. I mean, of course, the recipient

18

1   organization that's been conducting the program to date

2   can continue to conduct the program and the affiliate

3   that's set up could be the alternate channel. And so

4   you could run in the opposite direction and I think you

5   wouldn't run into that problem.

6   But I would like to address on this score an

7   important point, which is that I think Respondents have

8   suggested that there is a material distinction between,

9   Justice Breyer, the circumstances in Rust and the

10   circumstances in this case, because Rust involves

11   separate programs within a legal entity, and this case

12   involves separate organizations.

13   And I think the point the Respondents are

14   trying to make is that there is a distinction because at

15   least there one legal entity could have multiple

16   programs, some of which are subject to the condition and

17   some of which are not, whereas here there is a

18   difference because this condition applies to an entire

19   organization. But I think that's a false premise.

20   JUSTICE BREYER: I wasn't exempting that

21   one.

22   MR. SRINIVASAN: Okay.

23   JUSTICE BREYER: The main difference it

24   seemed to me is, assuming all of that away, is that here

25   the separate structure does not fulfill the

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 1   constitutional need simply because the basic condition

 2   has to do with express speech. Because when A says "I

 3   believe in X" and then they set up a separate

 4   structure -- and every one knows they have set it up; I

 5   mean, that's the point of it -- and the structure says,

 6   "just kidding," nobody believes them from day one.

 7   And so you can't do it and if the government

 8   has its way and has awarded the thing properly,

 9   according to your criteria, the part that won't be

10   believed is the "just kidding" part. And so the

11   structure, separate structure, just doesn't work in

12   terms of communicating their belief. And I don't think

13   that's true in Rust, and I don't think it's true in

14   Regan, and I do think it's true in FCC v. League of

15   Women Voters.

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

17   points, Justice Breyer.

18   One is, as I was suggesting earlier, the

19   purpose of having this alternate channel is not to

20   remedy a constitutional violation that otherwise would

21   exist. I mean, of course, we start from the premise

22   that it's okay to require this condition at the front

23   end. It's not that it's unconstitutional, and the way

24   to compensate for that is to create this affiliate

25   alternative.

1   We think the condition's okay ab initio.

2   What the alternate vehicle does is to address this other

3   problem, that it shows that the condition is

4   appropriately tailored. It's not reaching beyond its

5   appropriate confines, because it's allowing --

6   JUSTICE BREYER: Boy, if -- if the

7   structure -- the separate structure is not really part

8   of a constitutional analysis, then the government could

9   say, why not? It's easy to find policy reasons, and

10   really find very, very decent and thoughtful people who

11   agree with the policy reason, you know? There -- there

12   are people on both sides of these questions, and they

13   come in and they say, okay, we're giving money for an

14   anti-abortion purpose or a pro-abortion purpose, you

15   know --

16   MR. SRINIVASAN: Well --

17   JUSTICE BREYER: -- and -- and suddenly

18   people can't say anything in these areas in face of such

19   a condition.

20   MR. SRINIVASAN: Well, as part of the -- as

21   part of the constitutional analysis, I guess it's just

22   addressing a different part of the constitutional

23   analysis than -- than what Your -- Your Honor is

24   addressing.

25   I guess the other points that I'd make are

 1   twofold. One is that I think there is something to the

 2   notion that if the organizations are sufficiently

 3   separate, then -- as they have to be to comply with the

 4   regulations -- then it does work that one organization

 5   can say that we have a particular policy, and the

 6   organization -- another organization -- another

 7   organization can say that we have a different policy,

 8   precisely because of the premise that they're

 9   sufficiently distinct.

10   So I'm not seeing the same degree of

11   cognitive dissonance you are --

12   JUSTICE SOTOMAYOR: But that's --

13   MR. SRINIVASAN: -- and the other point I'd

14   make --

15   JUSTICE SOTOMAYOR: I'm sorry.

16   Finish answering him and then I'll --

17   MR. SRINIVASAN: Thank you, Justice

18   Sotomayor.

19   The other point I'd make is this, that the

20   speech-related objections that Respondents levy are

21   twofold. One is, they complain about the threshold

22   condition. But the second is -- and this is -- may --

23   manifests at pages 11 to 12 and 32 and 33 of their

24   brief -- is that they want to engage in activities that

25   involve affirmative speech.

1   They want to be able to participate in the

2   dialogue about prostitution and sex trafficking and

3   whether they should be legalized. And with respect to

4   that aspect of what Respondents are complaining --

5   complaining about, I think the alternate affiliated

6   organization opportunity is a perfect remedy, in the

7   same way that it was in Rust, and in the same way that

8   it -- that it was in Regan.

9   JUSTICE SOTOMAYOR: The problem that I have

10 with that answer is that it doesn't cure the

11 organization's need to stay true to its own beliefs.

12 Because if -- and I think this is what Justice Breyer is

13 trying to get to -- if it truly an independent

14 organization speaking, then that's that organization's

15 belief; it's not an alternative under Rust to the needs

16 of that organization to have its own personal views.

17   And -- and so I have that problem, which is

18 how is it an alternative for that organization to be

19 able to have its views?

20   Let me posit a hypothetical that I'm

21 actually very troubled by. Let's assume a city

22 government is undertaking a campaign to prevent teen

23 pregnancy and its associated problems, and it wants to

24 promote the use of contraceptives that protect from

25 contracting, you know, diseases, things like that.

 1   And some of its programs involve the

 2   distribution of contraceptives, but others involve

 3   parenting classes for teenage mothers and offering them

 4   free daycare. And a church seeks funds for the daycare

 5   part and the parenting part.

 6   Can the city now say because we have this

 7   really important need to avoid sexually transmitted

 8   diseases, anyone who seeks our funds also have to say

 9   they believe in the use of contraceptives?

10   MR. SRINIVASAN: Justice Sotomayor --

11   JUSTICE SOTOMAYOR: The church there would

12   say, we don't believe and why should we say we believe.

13   MR. SRINIVASAN: I -- I'd certainly

14   understand why a church would be reluctant to do that.

15   I mean, I guess, you know, one way to look

16   at it is that the city I think would have to think very

17   long and hard about whether that's a -- a desirable

18   policy objective, precisely because some of the

19   organizations with which it wants to work are going to

20   have difficulty abiding by it. And so there's going to

21   have to be a front end determination as a matter of

22   policy about whether that's an appropriate thing to

23   pursue.

24   But if the city, as Congress did in this

25   case, thought that it was an appropriate thing to do,

1 then I think I would -- I think I would defend that --

2 apart from, you know, free exercise issues of other

3 things that aren't in play here -- I think I would

4 defend it as long as it's sufficiently germane, and as

5 long as it's in furtherance of the policy objectives

6 that Congress or by, in your hypothetical, the city --

7   JUSTICE ALITO: But why don't I give you

8 another example that's along the same lines. The

9 Federal government provides lots of funds to entities

10 and individuals who are involved in the provision of

11 health care. So let's suppose Congress says that we

12 think that the issue of guns is very germane to public

13 health, and therefore, we will not allow anybody to

14 receive any of these funds directly or indirectly unless

15 that entity or person proclaims agreement with whatever

16 we happen to think at the moment about guns.

17   So they must either say we believe that guns

18 should be strictly limited -- access to them should be

19 strictly limited for public health purposes or that guns

20 should be freely available because we think that

21 promotes public health.

22   That would be permissible, wouldn't it?

23   MR. SRINIVASAN: I don't know that it would,

24 Justice Alito, on that --

25   JUSTICE ALITO: Well, why would it not?

25

1   MR. SRINIVASAN: -- because -- because I

2   think, first of all, it would depend on whether there --

3   there is the requisite germaneness. It would depend on

4   whether in fact the organizations are working with --

5   I'm trying to avoid using the word "partnering with" --

6   but are working with the -- the government in carrying

7   out the program. It would depend on those kinds of

8   considerations.

9   And whether -- another point to be made here

10   is that a limitation that's been recognized in this

11   Court's cases is that at the end of the day, the

12   government -- the government can't be seeking to

13   suppress speech, or to suppress disfavored viewpoints,

14   even in the context of subsidization.

15   And you'd have to ask the question whether

16   that scheme is designed to do that. Now, if -- if it

17   crossed all those thresholds, then I think yes, I would

18   defend that as well, but I do think that it presents

19   different and more difficult questions.

20   I would like to --

21   JUSTICE KENNEDY: One -- one thing before

22   your time is up. I have the same concerns that Justice

23   Ginsburg expressed about the difficulty of simply

24   creating structures in -- in foreign countries. If --

25   and I've looked through all of your cases. What's your

1   closest case, your best case for the fact that you

2   should get extra deference because this is the foreign

3   affairs field?

4   I mean, I think of U.S. v. Curtis Wright.

5   Anything more specific than that?

6   MR. SRINIVASAN: I don't know that I have a

7   particular case other than the doctrine generally,

8   Justice Kennedy. But I do think that the foreign

9   location of this is significant vis-à-vis the concern

10   that I think many of you have raised about why have an

11   affirmative condition that requires espousal of a

12   policy.

13   Precisely because the conduct here is

14   carried out in foreign areas, and precisely because it

15   can involve myriad interactions with local officials and

16   local policymakers, as Respondents admittedly want to

17   do, on these sensitive questions, it makes sense in this

18   context -- particular sense in this context to secure an

19   ex ante commitment of agreement with the government's

20   policy, because that will have a self-policing aspect to

21   it.

22   It will be more designed to secure conduct

23   in those areas that, in conformity with Federal policy,

24   in a realm in which that conduct is particularly --

25   particularly difficult to monitor.

1   I'd like to reserve the balance of my time

2   for rebuttal, if I might.

3   CHIEF JUSTICE ROBERTS: Thank you, counsel.

4   Mr. Bowker?

5   ORAL ARGUMENT OF DAVID W. BOWKER

6   ON BEHALF OF THE RESPONDENTS

7   MR. BOWKER: Mr. Chief Justice, and may it

8   please the Court:

9   Respondents do not dispute that the Spending

10   Clause gives the government significant authority to

11   fund the programs of its choosing and to control speech

12   and conduct within those programs.

13   The problem with the policy requirement is

14   that it aims at grantees, requiring that they profess a

15   personal belief, and refrain from certain private speech

16   outside the context of the government program.

17   In Rust v. Sullivan, the Court held that the

18   government could ban abortion-related speech in the

19   government's own family planning program, but the

20   grantees there were left unfettered in their personal

21   beliefs and in their private speech outside the program.

22   CHIEF JUSTICE ROBERTS: I don't see why this

23   is a -- you talk about banning their speech. The

24   government is just picking out who is an appropriate

25   partner to -- to assist in this project. It wants to go

1   and find people who, like them, are opposed to

2   prostitution. And all they want to do is make sure that

3   you're opposed to prostitution.

4   It's like any other sort of condition. You

5   know, we want to make sure that you haven't been

6   convicted of tax fraud over the last 10 years, so sign a

7   certification that you -- you haven't.

8   Yes, it's related to speech, but the whole

9   program is about that. Why would they want to sign up

10   with somebody who didn't share the objectives of the

11   program?

12   MR. BOWKER: Well, I think the policy

13   requirement here has been applied a little differently

14   than Mr. Chief Justice suggests.

15   It -- it is applied in a way that is a

16   funding condition, not part of the selection criteria.

17   When the government goes out to select its partners in

18   this case, it -- it goes out with requests for

19   applications, and those requests for applications

20   pertain to the particular program at issue. And they

21   are very detailed about what precisely is required for

22   that program, including --

23   CHIEF JUSTICE ROBERTS: So it would be a

24   different case, in your -- your view, as if -- when they

25   have those criteria, they have one of them is, oh, by

29

1   the way, you must agree with the objective of the

2   program, which is to eliminate to the extent possible

3   prostitution and sex trafficking?

4   MR. BOWKER: No. I don't -- I don't think

5   that's right. I -- I think the government absolutely

6   can pick partners who are dedicated to the particular

7   program for which they are applying, but there are

8   constitutionally permissible ways to do that.

9   One of the ways to do that is to look at

10   technical capacity, past performance, references: What

11   have you done before that shows you're able to do this

12   particular program?

13   JUSTICE SCALIA: Well, it isn't just able to

14   do. Are -- are you saying that they -- they just can't

15   make it a -- a prior condition, but they can select

16   applicants on the basis of which ones they know agree

17   with the government's objectives?

18   You -- you have two equally qualified --

19   technically, two equally qualified applicants, and the

20   government intentionally picks the one whose views on --

21   on prostitution are -- are similar to the government's.

22   Is -- is that bad?

23   MR. BOWKER: Yes. And -- and the reason

24   it's bad is because the government there is focused on

25   viewpoint and not on ability to perform the program.

 1   The problem -- the problem with focusing --

 2   JUSTICE KENNEDY: But let -- let me -- let

 3   me ask you this: Suppose that you're a Congressman or a

 4   Congresswomen and you are a constitutional expert and

 5   you take your oath to uphold the Constitution very

 6   seriously. A funding bill comes before you. You're the

 7   chairman of the committee, and you decide that you're

 8   going to fund A rather than B because you like their

 9   speech much better. Is that a violation of the

10   Constitution?

11   MR. BOWKER: Well --

12   JUSTICE KENNEDY: Because you like their

13   policies much better?

14   MR. BOWKER: The -- the Congress can

15   certainly fund a particular program and not fund others.

16   And we have no -- we have no argument with that. The

17   spending condition -- the Spending Clause definitely

18   comes with that ancillary power. And in fact that's

19   what the Congress did here. It said, We want to -- We

20   want to fund a fight against HIV/AIDS. We don't want to

21   support that disease. And we want to oppose

22   prostitution. We don't want to support that practice.

23   What it cannot do, then, is take its

24   viewpoint and impose its viewpoint on the grantee and

25   make it a -- make it a condition.

1   JUSTICE KENNEDY: Well, I'm -- I'm not quite

2   sure I -- I see the difference. That the -- a

3   conscientious Congressperson cannot -- can, in your

4   view, say, I'm going to prefer organization A over

5   organization B because I like their policies better --

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

7   JUSTICE KENNEDY: -- across the board, with

8   reference to drugs, with reference to guns, with

9   reference to public health.

10   MR. BOWKER: If -- if Congress is looking at

11   the viewpoint of an organization and deciding whether to

12   fund it based on its viewpoint, I think that's

13   problematic. And the reason I think it's problematic is

14   because this Court has said to deny a subsidy or a

15   benefit on the basis of the exercise of one's First

16   Amendment rights, including holding one's own views, to

17   deny a subsidy on that ground --

18   JUSTICE SCALIA: Well, my goodness. They

19   can't --

20   MR. BOWKER: -- is problematic.

21   JUSTICE SCALIA: -- they can't fund the Boy

22   Scouts of America because they like the programs that

23   the BSA has? They -- they have to treat them

24   equivalently with the Muslim Brotherhood? Is that

25   really what you're suggesting?

32

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

2   JUSTICE SCALIA: Well, then you can take

3   into account the -- the principles and the -- and the

4   policies of -- of the organization that you're giving

5   funding to.

6   MR. BOWKER: Well, this Court has never said

7   that the Congress can make a decision based on viewpoint

8   alone.

9   JUSTICE BREYER: But there's no way to

10   separate -- with an organization in the field that does

11   things, there is no way, I don't think, to separate what

12   they do from what they say.

13   Congress has two opposite views on this in

14   front of it.

15   MR. BOWKER: Sure.

16   JUSTICE BREYER: One is the view that the

17   way to fight AIDS is consistent with and is furthered by

18   longer term efforts to abolish trafficking in women,

19   okay, prostitution. All right.

20   The other view is the better way to do it is

21   to go into the active sex worker area and -- and not

22   express views on the merits of what they are doing.

23   Okay?

24   So they have two opposite views, and -- and,

25   moreover, the groups that do this act on those views.

1   So why can't they say, we prefer view A or B, whichever

2   it is, because that's what our program is about?

3   MR. BOWKER: Congress can -- can certainly

4   decide what programs to fund and what programs not to

5   fund. But when Congress makes that decision, Congress

6   then can't take the next step to say the only people who

7   can get funds under this particular program are people

8   who agree with us and who will refrain from saying

9   anything inconsistent in their private speech.

10   JUSTICE SCALIA: But you -- you go further

11   than that. In answer to my question, you -- you go

12   further than that, and you say, Moreover, even without

13   making it a condition precedent to getting the money,

14   Congress can -- the government cannot intentionally

15   select those people that it thinks are in accord with

16   its views. Right? Isn't that what you said?

17   MR. BOWKER: The Court has never said that's

18   okay, and it's our -- and it's our --

19   JUSTICE SCALIA: I'm not asking what the

20   Court said; I'm asking what you're saying.

21   MR. BOWKER: It's our position that it is

22   constitutionally problematic to make funding decisions

23   based on the viewpoint of grantees.

24   JUSTICE SCALIA: Problematic or -- or

25   unconstitutional?

1   MR. BOWKER: Unconstitutional as applied

2   here.

3   JUSTICE SCALIA: Okay.

4   MR. BOWKER: However -- however, we are not

5   saying that there is no circumstance in which the

6   government's interest wouldn't be compelling enough to

7   override the First Amendment right.

8   Now, in our situation --

9   CHIEF JUSTICE ROBERTS: So just say the

10   government wants to have an ad campaign to discourage

11   people from smoking and they are looking for ad agencies

12   to -- to help them with it. And an ad agency comes in

13   and says, Look, we are the best ad agency there is; we

14   know exactly how to get to the markets; we know what's

15   persuasive and all of that. And yet -- and then the ad

16   agency says, you know, come work at our agency if you

17   smoke; we think smoking is okay; we have smoking breaks;

18   we do all this." The government can't take that into

19   account?

20   MR. BOWKER: I think the rules are different

21   when the government hires a spokesperson. When the

22   government hires a spokesperson, the government has the

23   right under the -- under its ancillary power under the

24   Spending Clause to control what that spokesperson says

25   for the government.

1   CHIEF JUSTICE ROBERTS: Well, isn't that

2   part of what's going on here? One of the things we want

3   to do is eradicate prostitution and sex trafficking, and

4   we want you to get that message out, and the one thing

5   we're sure of is if you're not in -- if you're in favor

6   or you're not opposed to it because you have other

7   objectives, you're not going to help get the message out

8   at all.

9   MR. BOWKER: Well, the -- the government

10   does say that. The government says, What we need to

11   prevent is the situation where the -- the government

12   spokesperson says one thing with public funds, turns

13   right around and says the opposite with private funds.

14   And what we say is this is an as-applied

15   challenge. We have -- the government concedes my

16   clients have not been enlisted as government

17   spokespersons and they are not responsible for conveying

18   any viewpoint or any message.

19   And I'd like to talk for a moment about what

20   my clients really do. In the field, my clients provide

21   services in the fight against HIV/AIDS, things such as

22   preventing mother-to-child transmission of HIV in

23   Tanzania, caring for orphans of AIDS victims in Kenya,

24   and providing HIV/AIDS support services in places like

25   Vietnam. And -- and this is a JA88 and 89, where you

1   can see the list of things that my clients do. None of

2   those things relate to an opposition to prostitution and

3   none of those things relates to messaging.

4   JUSTICE SOTOMAYOR: Excuse me. That's my

5   problem, which is I'm trying to tease out what your

6   position is. Okay? I -- I have an understanding of

7   you're saying: You can't compel me to say I don't like

8   something. And -- and that's like a oath of loyalty.

9   That -- that's understandable.

10   But if the government said the following

11   more clearly -- this is an oddly phrased policy, okay,

12   because it seems to be requiring this oath. But if it

13   simply said, "If you're an organization that wants our

14   funds, you have to say that you're not going to promote

15   actively the contrary policy," would that be okay?

16   "You're not going to go out there and do things to

17   promote the legalization of prostitution because that's

18   going to undermined our message." Those are two

19   different positions, so tell me where you draw the line.

20   MR. BOWKER: Certainly, that would be okay

21   within the four corners of the government program. The

22   government controls speech and conduct within its

23   program. It can tell us what not to say within the

24   program. And that's Rust.

25   JUSTICE SOTOMAYOR: Yes, that's Rust.

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

2   JUSTICE SOTOMAYOR: This is a step further.

3   MR. BOWKER: And what Rust says, and I -- I

4   think we fall back on Rust, which we think is just on

5   all fours with where we are here, and that is what the

6   government cannot do -- and I think this answers your

7   question -- is outside the government program the

8   government cannot control private speech. And it was

9   critical in that case -- Justice Rehnquist, at pages 196

10   and 197, said, "The doctors there and the public health

11   organizations there are free to engage in their own

12   private speech and their own activities, and they are

13   not required to endorse any viewpoint they don't, in

14   fact, hold." And here --

15   CHIEF JUSTICE ROBERTS: But that is saying

16   this is what's happening in Rust, okay? And Rust is

17   okay. That's very different from saying it has to be

18   that way and if it's any other way it's no good. It

19   seems to me that you're just taking the limitation on

20   the facts in Rust and saying that is an absolute

21   requirement, which is a misreading of the case.

22   MR. BOWKER: Rust does not say that, to be

23   clear. But the reasoning of Rust, and the majority's

24   reasoning there, makes quite clear that the reason the

25   Court was comfortable there is that the recipient was

1   not the target of the control. The control was around

2   the program and the recipient was free outside the

3   program.

4   And -- and Respondents here have respected

5   that line. There is no question that for the past 10

6   years, even though the policy requirement has not been

7   enforced -- initially because the Department of Justice

8   concluded that it is unconstitutional, and then

9   subsequently because the district court enjoined it --

10   it has not been enforced for the last decade,

11   essentially.

12   JUSTICE SOTOMAYOR: So --

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

14   at all here, so there's none of this undercutting the

15   program that the government is alleging here. Sorry,

16   Justice.

17   JUSTICE SOTOMAYOR: No, no, no. I cut you

18   off. But -- but I guess what I'm -- I keep going

19   back -- you keep going back and forth on this it -- it's

20   not okay to tell me to take an oath of loyalty. But

21   would it be okay for you to step outside the doors of

22   this program and pass out literature that promotes the

23   legalization of prostitution?

24   Am I making my question clear?

25   MR. BOWKER: Yes.

1   JUSTICE SOTOMAYOR: Which is how do you --

2   how do you answer the question of why does the

3   Constitution bar the government from saying, look, if

4   you're going to work with me, you can't go out there and

5   promote a -- actively promote --

6   MR. BOWKER: Right.

7   JUSTICE SOTOMAYOR: -- a different message?

8   MR. BOWKER: That's not the case here, but

9   taking that case --

10   JUSTICE SOTOMAYOR: Well --

11   MR. BOWKER: Taking that case, I think the

12   government can't do that. I think the government cannot

13   gag an organization's private speech outside the

14   program.

15   Now, even the government says there has to

16   be some germaneness between what they are doing in the

17   program and what our requirement is. So I do think it

18   would be a tougher case for us and a stronger case for

19   the government if my clients were engaged in a program

20   that opposed prostitution -- we're not, but if we

21   were -- and then we went right outside and said the

22   opposite with our private funds, I think they would have

23   an easier time showing that there is some compelling

24   interest that overrides the First Amendment interest.

25   Now, I think it would depend on the facts,

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1   and those are not the facts here.

2   JUSTICE BREYER: Only because -- see, it's

3   not -- it's not, in my opinion, not a viewpoint matter

4   if they're going to fund a -- a group that wants to end

5   discrimination against women around the world because

6   they think all kinds of good things will flow from that.

7   The government wants to fund it. Of course such a group

8   has a viewpoint; that's why they're in the business.

9   So the word isn't viewpoint. And you

10   started to say something about that there is more than

11   that here, it has to do with the express nature. And

12   then, in answering Justice Sotomayor, you went a little

13   bit further on that. And what are the form of words, if

14   you were me and if I were to decide in your favor, what

15   form of words would you dictate to describe where it is

16   in your opinion that the First Amendment cuts in with a

17   preventative restriction? How do you describe it? I --

18   I don't think you can in terms of viewpoint.

19   MR. BOWKER: I don't think you can in terms

20   of viewpoint either, Justice Breyer. I do think that

21   the key, the key that this Court outlined in Rust is the

22   government's authority to control its program. And if

23   there is a threat to its program and the government

24   needs to take some action in order to protect its

25   program, prevent the message from being garbled or

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1   distorted, whatever the language is, then the

2   government's case is strongest.

3   Here, that is not at all what is happening.

4   As I described, our programs are not opposition to

5   prostitution programs. Our programs are HIV testing.

6   These are mother-to-child transmission situations where

7   we're trying to stop the disease from spreading.

8   JUSTICE SCALIA: Let me -- can I -- can I be

9   sure --

10   MR. BOWKER: Yes.

11   JUSTICE SCALIA: -- I understand what you've

12   just conceded in -- in your response to Justice Breyer.

13   The government could require as a condition to come into

14   this program and become a partner with the United

15   States, that the recipient not have the viewpoint of

16   favoring prostitution.

17   MR. BOWKER: No.

18   JUSTICE SCALIA: Well, you said it's not a

19   viewpoint thing.

20   MR. BOWKER: No. The government cannot

21   target viewpoint, and for us, that's -- that's a

22   bright-line rule.

23   JUSTICE SCALIA: I thought that's what you

24   just said to Justice Breyer.

25   JUSTICE BREYER: I did too, because I -- I

1 didn't see the reason. I thought that was -- I can

2 think of dozens and dozens of programs all over the

3 world that the government supports in some way or

4 another, and of course the people in those programs have

5 a certain viewpoint, and of course, they don't hold the

6 opposite viewpoint.

7   Otherwise, they wouldn't be in the program.

8 So -- so that's why I didn't find that useful. But now,

9 I don't think you can have it both ways between

10 answering these questions.

11   JUSTICE SCALIA: Him or me? You have to

12 choose.

13   (Laughter.)

14   MR. BOWKER: Mr. Chief Justice, I need your

15 help on --

16   CHIEF JUSTICE ROBERTS: You can always

17 choose me, too.

18   MR. BOWKER: Well, our position here is that

19 viewpoint is not the basis on which a decision can be

20 made. That is our position. We think the government

21 has a multitude of permissible grounds on which to make

22 these types of decisions, and they do it every day in

23 every other program where they don't have this odd

24 policy requirement. They do it every day.

25   CHIEF JUSTICE ROBERTS: Your approach, it

1   seems to me, is just dealing with the breadth of the

2   program. If the program here solely concerned

3   prostitution and sex trafficking and not other areas

4   where you say, look, we do a great job in these other

5   areas, we just don't get involved in that area. But if

6   the sole program was on prostitution and sex

7   trafficking, you -- you wouldn't have a leg to stand on,

8   would you?

9   MR. BOWKER: We absolutely would have a leg

10   to stand on, and let me just explain --

11   CHIEF JUSTICE ROBERTS: So you're an

12   organization --

13   MR. BOWKER: -- what I attempted to concede

14   before, and that is, if -- if the government -- in that

15   narrow case where the government is hiring a

16   spokesperson, which is what they've focused on, saying

17   one thing with public funds and turning right around and

18   saying another with private funds, there is no case that

19   says they can gag the private speech of that

20   spokesperson.

21   But what we're saying is it is certainly

22   possible that they would have a stronger case in that

23   particular circumstance; however, this is an as-applied

24   challenge, my clients are not spokespersons, they

25   concede that. My clients are not delivering a message

1   or any particular viewpoint on behalf of the government

2   and they concede that.

3   JUSTICE KENNEDY: Let me -- let me just

4   ask -- ask this one more time. It seems -- because it

5   seems to me that when you get into the details of your

6   answer, you indicate, oh, well, the government has lots

7   of other criteria it could use, which seems to me just

8   an invitation to disguise what the government's real

9   motive is.

10   Suppose the government's interested in

11   preventing and stopping the spread of malaria. And

12   there's an organization that's marvelous at delivering

13   the proper message for this, but they criticize the

14   United States often. So they choose an organization

15   that's not quite as good but is quiet on these other

16   issues.

17   Is that permissible for the Congress to do?

18   MR. BOWKER: No, I don't think it is. To

19   the extent the -- the criteria used by the Congress are

20   merely pretext to --

21   JUSTICE KENNEDY: Well, this isn't -- no.

22   My concern was that your position was pretext. Here the

23   Congress is right upfront.

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

25   JUSTICE KENNEDY: And they say the reason

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1   we're not giving to organization A is because it's

2   always critical of the United States; even though its

3   technical skills are better, we prefer organization B.

4   Congress cannot do that?

5   MR. BOWKER: Congress cannot do that.

6   JUSTICE KENNEDY: And your best case for

7   that proposition is what?

8   MR. BOWKER: Well, even the government

9   concedes that -- that they can't do that. What they say

10   is that in -- it must be germane. That's their limiting

11   principle.

12   JUSTICE KENNEDY: Well, I'm -- I'm not sure

13   they should if they're going to -- if they're going to

14   be able to establish the principle that allows them to

15   prevail in this case and that's why I'm asking.

16   MR. BOWKER: I -- I don't think that that's

17   permissible, because all that is, is penalizing a

18   particular viewpoint and withholding a subsidy or

19   benefit based on viewpoint.

20   CHIEF JUSTICE ROBERTS: I just want to make

21   sure I -- the government has a program to develop water

22   resources. And let's say it's in South Africa before

23   the abolition of apartheid. And there's a pro-apartheid

24   group and an anti-apartheid group, and you're saying the

25   government can only decide which one is better at

1   digging wells, and it can't say we're going to prefer

2   the anti-apartheid group.

3   MR. BOWKER: Well, that -- I don't think it

4   can make that decision based on viewpoint. However --

5   CHIEF JUSTICE ROBERTS: Viewpoint on

6   apartheid. It can't say, so, the other one shows we've

7   got a better record, we dig the wells quicker.

8   MR. BOWKER: I mean, the -- the reason that

9   that case is so much tougher than this one is because in

10   this one, they're not attempting to select organizations

11   that will do the best job by using the policy

12   requirement. The policy requirement is being used after

13   the organization has been selected to say, now that

14   you've been selected, we want you to toe the line. We

15   want you to profess your belief in our viewpoint and not

16   to say anything with your private funds outside the

17   program.

18   So it is so far beyond this -- this weighing

19   in a selection situation.

20   CHIEF JUSTICE ROBERTS: It goes to the

21   effectiveness of the program. It's related to it. The

22   United States doesn't want the company or the

23   organization that goes into a village and says we're

24   going to bring -- you know, this is from the United

25   States, we're bringing you fresh water and it's a

 1   pro-apartheid group.

 2   That does undermine what they are trying to

 3   do, just as in this case to have the organization

 4   providing the services that your organization provides

 5   be identified as as an organization that doesn't want to

 6   abolish prostitution.

 7   MR. BOWKER: Yes, I understand.

 8   I -- I think the government could -- if it

 9   could make the case that an organization will be unable

10   to do this effectively because of what it has said in

11   the past, or what it has done in the past, or how -- how

12   the population associates -- what the population

13   associates with that organization.

14   But here -- here -- and the government even

15   concedes -- there would -- there has to be some -- I

16   think the word was, it has to be tightly tethered to the

17   programmatic objective. Now, we think that's -- that's

18   way too easy to fulfill; that should not be the

19   standard. But that's what they say the limiting

20   principle is, is germaneness, tightly tethered.

21   In -- in your example, I think that probably

22   doesn't even meet their limiting principle. But in our

23   case -- in our case, there is no tethering at all. We

24   are out testing for the disease by extracting blood and

25   running tests. We're out caring for orphans. We are

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1 out improving public health services that NGOs deliver,

2 and they're saying now you have to profess your belief

3 in our particular viewpoint.

4   JUSTICE SCALIA: It doesn't say, "profess

5 belief." I was going to ask you about that. That's not

6 what the statute says. It just says they have to have a

7 policy.

8   MR. BOWKER: Well --

9   JUSTICE SCALIA: A policy. Which means I

10 suppose they have to tell their employees don't do

11 anything to -- to foster prostitution. But they don't

12 have to get up -- get up and announce publicly, we

13 oppose prostitution, do they?

14   MS. GOLDENBERG: Well, as it's been applied

15 to us, it's more than just have a policy. It's have a

16 policy and then tell us you agree with our policy, and

17 we want to make sure that you believe it so we know that

18 you will do a good job in the program.

19   So the purpose here is to police --

20   JUSTICE SCALIA: They can get all that

21 without making you profess it, unless -- unless you

22 consider the only profession to be the assurance to the

23 -- to your partner, the United States government, that

24 you -- that you in fact oppose prostitution.

25   MR. BOWKER: Well, that's -- that's

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1   precisely it, Justice Scalia, is we are required to

2   profess our allegiance to the government.

3   JUSTICE SCALIA: To tell the government.

4   That's -- that's the only profession you're

5   talking about.

6   MR. BOWKER: That's the profession that

7   we're required to --

8   JUSTICE SCALIA: Oh. Okay.

9   MR. BOWKER: -- that's the pledge. As -- as

10   the author of -- of the provision called it, it was the

11   pledge. That's the pledge to the government.

12   Now --

13   JUSTICE BREYER: And then they're doing

14   that, they say, because we're part of the belief as a

15   matter of policy that the best way to go about this,

16   whether you think so or not, is to restrict the grants

17   to those people who will oppose the long-term extension

18   of prostitution expressly.

19   Now, that's their view of how to get rid of

20   AIDS, you say. Might disagree with it, but there are

21   plenty of people who think the opposite. So they're

22   saying we're not doing it for any reason other than to

23   further our policy.

24   MR. BOWKER: The government no doubt has a

25   good reason for putting it there. The problem is the

 1   First Amendment, and where does that -- where does that

 2   end? What is the limiting principle? If all that's

 3   required here is germaneness and then you give a dollar

 4   and you own the viewpoint and you own the private

 5   speech, where does that end?

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

 7   theory, the government can give you -- can give anyone

 8   in the country a dollar in Medicare funds and say, okay,

 9   now that you've taken a dollar of our money, we want you

10   to profess your agreement with the Affordable Care Act,

11   and we want you to never say anything inconsistent with

12   that in your private speech.

13   That is -- that is wildly inconsistent with

14   the First Amendment. That's exactly what's happening

15   here. The only difference is the subject of

16   prostitution. That's what makes it less palatable.

17   But for us --

18   JUSTICE GINSBURG: Are you -- what -- are

19   you saying that you can -- within the government

20   program, within the government program, the government

21   can specify whatever it wants, including this -- this

22   policy, but it can't then say and the organization

23   outside the program is also bound by this profession?

24   MR. BOWKER: Within the program, they can

25   tell us, if we are speaking for them, what to say,

1   and -- on their behalf, not ours. And they can tell us

2   what not to say, which is Rust. They cannot command

3   fealty to their viewpoint and they certainly cannot

4   control our private speech outside the program.

5   Now, to be clear, I just want to address one

6   last thing before my time runs. To be clear,

7   Respondents here do not promote prostitution nor do they

8   approve of it. They merely want to be free in their own

9   private programs to operate those programs as they see

10   fit, consistent with public health objectives, and they

11   want to be able to participate in the policy

12   conferences.

13   They want to be able to publish papers, and

14   they want to be able to be a part of the discussion in

15   the marketplace of ideas right here in the United

16   States, not in the -- in the nether reaches of the

17   world -- right here in the United States.

18   They would like to be free to engage in this

19   important discussion and to be unfettered by a policy

20   requirement that demands fealty to the government's

21   viewpoint.

22   Now, the First Amendment gives Respondents

23   that right, and -- and that's why we are here.

24   So unless the Court has further questions --

25   CHIEF JUSTICE ROBERTS: Thank you, counsel.

1   Mr. Srinivasan, you have 4 minutes

2   remaining.

3   REBUTTAL ARGUMENT OF SRI SRINIVASAN

4   ON BEHALF OF THE PETITIONERS

5   MR. SRINIVASAN: Thank you, Mr. Chief

6   Justice.

7   Just a -- a few points in rebuttal.

8   First, by -- by way of characterizing this

9   requirement, I think there has been a suggestion made

10   that what we are trying to do is impose a viewpoint on

11   organizations. This is not a matter of imposing a

12   viewpoint on somebody. It's a matter of picking

13   organizations with which to work who self-identify as

14   having views that are commensurate with the government's

15   views, so that they will be reliable in carrying out the

16   government's program.

17   Now, Justice Kennedy, you'd asked about

18   why -- whether the foreign context of the case--

19   JUSTICE ALITO: I don't want to interrupt

20   your rebuttal, but I don't see the difference between

21   those two, those two things that you just tried to

22   distinguish.

23   MR. SRINIVASAN: Because it goes to the

24   limitation that the Court has imposed in its decisions

25   about leveraging funding so as to suppress viewpoints.

1   That's not what's going on here. This is not a case in

2   which funding is being leveraged to suppress a

3   viewpoint. It's a case in which we are trying to get an

4   ex ante determination of whether the organizations that

5   are going to carry out the Federal program agree with

6   our policies.

7   If they do, they can participate --

8   JUSTICE ALITO: Well, suppose you have an

9   organization that previously has expressed support for

10   the legalization of -- of prostitution. Then when you

11   tell them, well, if that's your policy you can't get our

12   money, they say, well, we need your money, so we're

13   going to have to say uncle and now we are opposed to the

14   legalization of prostitution. That then -- that isn't

15   trying to change people's viewpoint?

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

17   JUSTICE ALITO: -- to change the viewpoint

18   that they are expressing?

19   MR. SRINIVASAN: It's not -- Justice Alito,

20   with all respect, I don't think it's trying to change

21   their viewpoint. I think if they decide later on that

22   they would affirm to us that they agree with the policy

23   at that point in time, well, we may -- we may take that

24   observation and engage them.

25   But I don't think that effort is to try to

1   change their viewpoint. It's to try to get them to

2   self -- self-identify that they are going to be reliable

3   in carrying out the government program.

4   Justice Kennedy, you'd asked the question

5   about whether the foreign context matters, and I talked

6   about why it matters in the sense that monitoring can be

7   challenging in this context. It also matters in another

8   sense that I should add, which is that when the

9   organizations are doing this work in those areas, they

10   are identified as working with the United States

11   government.

12   There is a statutory provision at 291(a) of

13   the petition appendix, which is 22 U.S.C. 7611(h), and

14   that requires the global AIDS coordinator to develop a

15   message that enhances awareness by program recipients

16   that the program is an effort on behalf of the citizens

17   of the United States.

18   So there is a real perception out there that

19   when the organization is carrying out its functions,

20   it's doing so at the behest of the United States

21   citizens. And part of what Congress wanted to do was to

22   avoid a misimpression about why -- about what the United

23   States' policy priorities are.

24   And one way to do that is to assure that the

25   organizations with which the United States works share

1   the United States' policy commitment against

2   prostitution and sex trafficking.

3   JUSTICE SOTOMAYOR: I would have less

4   problem accepting your message if there weren't four

5   major organizations who were exempted from the policy

6   requirement and -- medical science -- vaccinators are

7   exempted.

8   There seems to be a bit of selection on the

9   part of the government in terms of who it wants to work

10   with. It would seem to me that if you really wanted to

11   protect the U.S., you wouldn't exempt anybody from this.

12   MR. SRINIVASAN: Justice Sotomayor, Congress

13   is not required to -- to pursue every objective no

14   matter what the cost may be. The Court confronted a

15   similar situation in Regan. That case involved an

16   exemption for veterans. The Court applied a rationality

17   standard and said -- said that was fine. And there's

18   certainly a rationale here.

19   JUSTICE GINSBURG: Mr. Srinivasan, that was

20   one, veterans. Everybody else was subject to the

21   lobbying restriction. Here it's 20 percent of the funds

22   go to the organizations that are free from this pledge.

23   MR. SRINIVASAN: Justice Ginsburg, I think

24   the exemption for these organizations makes good sense

25   if you consider the character of the organizations.

1   Three of the four are -- have members that are sovereign

2   entities. And so one can understand --

3   CHIEF JUSTICE ROBERTS: Mr. Srinivasan --

4   MR. SRINIVASAN: Can I just finish this

5   thought?

6   One can understand why Congress would have

7   wanted to tread with sensitivity when -- when we are

8   dealing with foreign countries, especially foreign

9   countries that have different views about prostitution.

10   And there's less of a danger -- and this is

11   the final point -- there's less of a danger in that

12   context that those entities' views are going to be

13   misattributed to the United States precisely because

14   they are foreign countries.

15   CHIEF JUSTICE ROBERTS: Thank you, counsel,

16   counsel.

17   The case is submitted.

18   (Whereupon, at 12:00 p.m., the case in the

19   above-entitled matter was submitted.)

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