

A state statute provided state monetary grants to private dance, theater, and opera groups located in that state. The statute required recipients of such grants to use the granted monies for the acquisition, construction, and maintenance of appropriate facilities for the public performance of their performing arts. The last section of the statute conditioned the award of each such grant on the recipient's agreement to refrain from all kinds of political lobbying calculated to secure additional tax support for the performing arts.

Which of the following provides the strongest constitutional basis to attack the validity of the last section of the statute?

- A. Commerce clause.
- B. Fifth Amendment.
- C. First and Fourteenth Amendments.
- D. Obligation of contracts clause.

Explanation:

Conditions on government funding

Funded activities	Government can restrict use of funds to authorized purposes	"Grant monies must be used for the acquisition, construction, and maintenance of appropriate performance facilities"
Funding recipients	Government cannot restrict protected conduct unrelated to funding's purpose	"Recipient must agree to refrain from all kinds of political lobbying calculated to secure additional tax support for the performing arts"

The last section of the statute **conditions state funding** on a recipient's agreement to refrain from certain political lobbying efforts. Since this condition interferes with the First Amendment **right to free expression**—which is applied to the states through the Fourteenth Amendment—the section can be challenged on that basis. But due to the government's countervailing right to decide how to spend its funds, the success of this attack depends on whether the **condition is placed on:**

- **funded activities** – in which case, the **government can insist** that the funds be used for authorized purposes *or*
- **funding recipients** – in which case, the **government cannot restrict** the recipient's right to engage in protected conduct that falls outside the funding's purpose or scope (as seen here).

Political lobbying is protected First Amendment conduct that is unrelated to the activities—acquiring, constructing, and maintaining performing arts facilities—that are funded by the statute. And since the statute conditions the award of such grants on the *recipient's* agreement to refrain from such conduct, the First and Fourteenth Amendments provide the strongest constitutional basis to attack this section of the statute.

(Choice A) The **commerce clause** bars states from discriminating against interstate commerce by favoring in-state over out-of-state economic interests *unless* the state acts as a market participant (eg, by providing grants—as seen here). Therefore, this is a weak basis to attack the last section's constitutionality.

(Choice B) The **Fifth Amendment** does not, by itself, provide a basis to attack the last section since the Fifth Amendment only applies to the states through the Fourteenth Amendment.

(Choice D) The **contracts clause** restricts state legislatures' ability to substantially impair existing contracts. But since no existing contracts are at issue here, this clause does not apply.

Educational objective:

The government *can* condition funding on the promise that the funds be used for a particular purpose. But it *cannot* condition funding on a recipient's promise to refrain from engaging in protected First Amendment conduct if that conduct is unrelated to the funding's purpose or scope.

References

- Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 221 (2013) (holding that a state funding program violated the First Amendment by conditioning funds on requirements unrelated to the program's purpose).
- Rust v. Sullivan, 500 U.S. 173, 192–200 (1991) (upholding a federal funding program that limited fund recipients' ability to provide abortion-related services that were outside the program's scope).

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