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## Good Intentions, Bad Consequences: How Congress's Efforts to Eradicate HIV/AIDS Stifle the Speech of Humanitarian Organizations

### Cover Page Footnote

J.D. Candidate, May 2013, The Catholic University of America, Columbus School of Law; B.A., 2008, Cornell University. The author would like to thank her parents, brother, and sister-in-law for their prayer, support, and unconditional love, Professors Marshall Breger and Sarah Duggin for their guidance and expertise, and the staff of the Catholic University Law Review for their thoughtful edits. The author is also eternally grateful to her cousins, Neal and Sonia, for their mentorship and love. And, thank you, Sameer, for making every day special and for providing me with indispensable perspective.

# GOOD INTENTIONS, BAD CONSEQUENCES: HOW CONGRESS'S EFFORTS TO ERADICATE HIV/AIDS STIFLE THE SPEECH OF HUMANITARIAN ORGANIZATIONS

*Garima Malhotra*<sup>+</sup>

The HIV/AIDS epidemic affects millions of lives worldwide. In 2009, approximately 1.8 million people lost their lives to the disease.<sup>1</sup> That same year, an estimated 2.6 million people became infected with the debilitating illness, which raised the total number of people living with the illness to an astronomical 33.3 million.<sup>2</sup> Children carry an inordinate share of this burden; approximately 2.5 million children under the age of fifteen suffer from HIV/AIDS, and an estimated 16 million children have been orphaned by infected parents.<sup>3</sup> These devastating numbers prompted the United States to take action.

In his 2003 State of the Union address, President George W. Bush asked Congress to commit \$15 billion to “turn the tide against AIDS,” and noted that “history [has seldom] offered a greater opportunity to do so much for so many.”<sup>4</sup> Congress responded by enacting the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), which pledged billions of dollars to assist nonprofit organizations and foreign governments in the fight against these infectious diseases.<sup>5</sup> This enormous financial commitment under the Leadership Act has tremendous power to generate positive global change; however, this well-meaning effort has turned

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1. Joint United Nations Programme on HIV/AIDS (UNAIDS), *Global Report: UNAIDS Report on the Global AIDS Epidemic 2010*, at 19 (2010), available at [http://www.unaids.org/globalreport/documents/20101123\\_GlobalReport\\_em.pdf](http://www.unaids.org/globalreport/documents/20101123_GlobalReport_em.pdf).

2. *Id.* at 21 tbl.2.2, 23.

3. *Id.* at 23, 24 fig.2.5, 112.

4. Address Before a Joint Session of Congress on the State of the Union, 1 PUB. PAPERS 82, 85 (Jan. 28, 2003).

5. Pub. L. No. 108-25, 117 Stat. 711 (codified at 22 U.S.C. § 7601 (2006 & Supp. IV 2010)). In 2008, the Act's funding was extended by \$48 billion to be distributed over a five-year period. The Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, § 401(a), 122 Stat. 2918, 2966.

into a constitutional battleground.<sup>6</sup> Nonprofit organizations tasked with conducting HIV/AIDS prevention and treatment programs around the world have filed suit, arguing that the Leadership Act's funding provision violates their First Amendment right to free speech.<sup>7</sup>

The funding provision only permits disbursement of federal funds to organizations that have "a policy explicitly opposing prostitution."<sup>8</sup> Congress included this provision pursuant to its conditional spending power, which gives Congress the authority to condition receipt of federal grants.<sup>9</sup> However, the extent to which Congress can require federal grant recipients to surrender otherwise guaranteed constitutional rights is unclear.<sup>10</sup> The uncertain scope of Congress's spending power has generated the Leadership Act controversy.

The Leadership Act promotes HIV/AIDS prevention and preventative intervention education, treatment, and procurement and distribution of HIV/AIDS pharmaceuticals.<sup>11</sup> Although a national policy against prostitution is critically important, tying HIV/AIDS treatment and prevention funds to the promotion of this policy violates the First Amendment and severely undermines global health efforts.<sup>12</sup> Courts disagree on the constitutionality of the funding provision, section 7631(f), also known as the Policy

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6. See *infra* Part I.C.

7. See, e.g., *Alliance for Open Soc'y Int'l v. U.S. Agency of Int'l Dev. (AOSI IV)*, 651 F.3d 218, 223 (2d Cir. 2011) (holding that the provision violates the First Amendment by requiring organizations to advance the government's position), *reh'g en banc denied*, No. 08-4917-cv (2d Cir. Feb. 2, 2012); *DKT Int'l, Inc. v. U.S. Agency for Int'l Dev. (DKT II)*, 477 F.3d 758, 759-61 (D.C. Cir. 2007) (rejecting the nonprofit organization's argument that the provision forces it to perpetuate a disagreeable policy that alienates high-risk populations, such as sex workers).

8. 22 U.S.C. § 7631(f) (2006). Although the provision also prohibits assistance to organizations that do not oppose sex trafficking explicitly, this Comment focuses only on the requirement that organizations explicitly oppose prostitution. See *id.*

9. U.S. CONST. art. I, § 8, cl. 1; see *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds . . . 'to further broad policy objectives by . . . [requiring] compliance by the recipient with federal statutory and administrative directives.'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (plurality opinion))).

10. See *Rust v. Sullivan*, 500 U.S. 173, 205 (1991) (Blackmun, J., dissenting) ("[T]he extent to which the Government may attach an otherwise unconstitutional condition to the receipt of a public benefit—implicates a troubled area of our jurisprudence in which a court ought not entangle itself unnecessarily."); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1121 (1987) (noting that the Supreme Court generally approaches Conditional Spending Clause cases on a narrow "case by case" basis); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416 (1989) ("[T]he doctrine of unconstitutional conditions is riven with inconsistencies.").

11. Pub. L. No. 108-25, § 301(a)(2), 117 Stat. 711, 728 (2003) (codified at 22 U.S.C. § 2151b-2).

12. See *infra* Part II (analyzing First Amendment concerns with the anti-prostitution policy requirement); *infra* Part III (discussing U.S. policy concerns).

Requirement.<sup>13</sup> The U.S. Circuit Court of Appeals for the District of Columbia upheld the provision in 2007.<sup>14</sup> The Second Circuit recently disagreed, and held that the provision unconstitutionally conditioned receipt of federal grant money by compelling recipient organizations to oppose prostitution, thereby violating the First Amendment.<sup>15</sup>

This Comment explores the constitutionality of section 7631(f) of the Leadership Act. Part I examines foundational Supreme Court jurisprudence delineating Congress's authority to restrict or compel speech as a condition of government spending. Next, this Comment turns to the current split between the Second and D.C. Circuits, highlighting substantive differences in the two opinions. Then, through an analysis of current Spending Clause jurisprudence, Part II argues that the Second Circuit correctly determined that the Policy Requirement violates the First Amendment and is an unconstitutional condition placed on federal grant money. Finally, this Comment explores various alternatives that would allow Congress to advance its policy objectives without violating the First Amendment and the Spending Clause. This Comment ultimately concludes that the best solution would restrict organizations from spending federal funds on activities related to legalizing prostitution, but permit organizations to regulate the process through which they allocate their money.

## I. UNCONSTITUTIONAL-CONDITIONS JURISPRUDENCE

### A. *The Spending Clause and the Birth of the Unconstitutional-Conditions Doctrine*

The Spending Clause grants Congress “[p]ower [t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”<sup>16</sup> Congress may use its Spending Clause power broadly to benefit the “general welfare.”<sup>17</sup> However,

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13. Compare *DKT II*, 477 F.3d 758, 764 (D.C. Cir. 2007), with *AOSI IV*, 651 F.3d 218, 223 (2d Cir. 2011), *reh'g en banc denied*, No. 08-4917-cv (2d Cir. Feb. 2, 2012).

14. *DKT II*, 477 F.3d at 764.

15. *AOSI IV*, 651 F.3d at 223–24.

16. U.S. CONST. art. I, § 8, cl. 1.

17. *Id.*; *United States v. Butler*, 297 U.S. 1, 65 (1936). Justice Owen Roberts, writing for the Court in *United States v. Butler*, endorsed the broad Hamiltonian view that the Spending Clause gives Congress “a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.” *Butler*, 297 U.S. at 65–66. Although Justice Roberts seemingly endorsed the Hamiltonian theory, his holding arguably applied a much narrower version of the Spending Clause. ALPHEUS THOMAS MASON & DONALD GRIER STEPHENSON, JR., *AMERICAN CONSTITUTIONAL LAW: INTRODUCTORY ESSAYS AND SELECTED CASES* 281 (16th ed. 2012).

Two years after *Butler*, the Court endorsed a the generous definition of the “general welfare,” holding that Congress has discretion to determine whether spending advances the general welfare. See *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937); see also MASON &

problems may arise when Congress “attach[es] strings to its expenditures” by compelling recipients to engage in specific conduct in order to receive government funding.<sup>18</sup> When the government compels federal subsidy or grant recipients to act in a manner that invokes certain constitutional rights, the doctrine of unconstitutional conditions is implicated.<sup>19</sup> Under the doctrine, if the government chooses to grant a benefit, it may not do so in a manner that requires recipients to surrender certain constitutional protections.<sup>20</sup> In an early case, *Frost & Frost Trucking Co. v. Railroad Commission*, the Supreme Court articulated this proposition and expressed grave concern that such conditions would allow the government to eviscerate the rights and guarantees embodied in the Constitution.<sup>21</sup>

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STEPHENSON, *supra*, at 281. Some scholars argue that Congress’s broad authority under the Spending Clause is unfounded. See John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAPMAN L. REV. 63 (2001) (arguing that “general welfare” is meant as a limitation to congressional spending); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 55 (2003) (“[T]he General Welfare Clause was an *unqualified denial* of spending authority. It did not add to federal powers; it subtracted from them.”).

Congress’s spending power, however, does have some limitations. See *South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (“[O]ther constitutional provisions may provide an independent bar to the conditional grant of federal funds.”). For example, federal spending affecting religious organizations may violate the Establishment Clause. See, e.g., Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1839 & n.121 (2004) (discussing Establishment Clause-based challenges to the Religious Land Use and Institutionalized Persons Act, which Congress enacted to prevent religious discrimination by effectively “limiting religious congregations’ ability to build or expand places of worship”).

18. Rosenthal, *supra* note 10, at 1104 (explaining that an “[i]f you don’t like the conditions, don’t take the money,” argument must fail, given public and private entities’ dependence on federal grants).

19. Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7 (1988) (“The problem of unconstitutional conditions arises whenever a government seeks to achieve its desired result by obtaining bargained-for consent of the party whose conduct is to be restricted.”); Sullivan, *supra* note 10, at 1421–22 (describing two prerequisites necessary to invoke the unconstitutional conditions doctrine: “the conditioned government benefit on the one hand and the affected constitutional right on the other hand”).

20. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[T]his Court has made clear that even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.”); Epstein, *supra* note 19, at 6–7 (“[E]ven if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional rights.”).

21. 271 U.S. 583, 594 (1926); see also *Perry*, 408 U.S. at 597 (“For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which [it] could not command directly.’” (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))).

*B. Inconsistent First Amendment Protections Under the Unconstitutional-Conditions Doctrine*

More than a half-century of Supreme Court jurisprudence demonstrates the Court's willingness to insulate First Amendment speech rights from encroachment under the auspices of the unconstitutional conditions doctrine.<sup>22</sup> In the last few decades, however, the Supreme Court has applied the doctrine to First Amendment cases in a piecemeal fashion, creating inconsistencies and numerous exceptions.<sup>23</sup> This has made it increasingly challenging for lower courts to apply existing precedent when determining whether government conditions impinge on First Amendments rights.

*1. Denial-of-Subsidies Cases*

In some cases, the Supreme Court has upheld conditional grants as constitutional even when they compel grant recipients to forgo their First Amendment rights. In these cases, however, the grant conditions merely denied a subsidy and did not impose an impermissible condition or penalty.<sup>24</sup> In *Regan v. Taxation with Representation*, the Court declined to apply strict scrutiny and upheld the denial of tax benefits to not-for-profit organizations.<sup>25</sup> The Internal Revenue Service (IRS) denied § 501(c)(3) tax-exempt status to Taxation with Representation of Washington (TWR) because a large majority

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22. See *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (holding that states may not require motorists to display an ideological message on their license plates); *Speiser*, 357 U.S. at 518 (explaining that states may not deny tax exemptions to veterans who refuse to submit to an oath disproving of forcible government overthrow); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that states cannot compel public school children to recite the pledge of allegiance). The government may, however, use stipulations that arguably infringe on other constitutionally protected rights. See *Burgess v. Lowery*, 201 F.3d 942, 947 (7th Cir. 2000) (explaining that the government may lawfully require airline passengers to undergo reasonable security screening that might otherwise implicate their Fourth Amendment right against unreasonable search and seizures).

23. See *supra* note 10.

24. See *Sullivan*, *supra* note 10, at 1439 (noting the “penalty/nonsubsidy distinction” and explaining that “[p]enalties’ coerce; ‘nonsubsidies’ do not”).

25. 461 U.S. 540, 546 (1983) (holding that Congress is not required to fund TWR's lobbying). Although *Taxation with Representation* focuses on tax benefits rather than conditional grants, the Court clearly applies a general Spending Clause analysis. See *id.* at 540; see also Rosenthal, *supra* note 10, at 1123 (“The Court has also occasionally appeared to treat tax benefits as constitutionally equivalent to spending.” (footnote omitted)).

The Court's refusal to apply a strict-scrutiny analysis reflects its view that the government is not required to subsidize the exercise of First Amendment rights. *Taxation with Representation*, 461 U.S. at 549 (“[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.”); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 982 (4th ed. 2011). But see *Rust v. Sullivan*, 500 U.S. 173, 195 n.4 (1991) (applying strict scrutiny to find that the Title X provision at issue was narrowly tailored).

of its activities involved lobbying, which is not permitted under the section.<sup>26</sup> TWR argued that Congress's decision to deny tax-exempt status because of its lobbying activities violated its First Amendment right to free speech.<sup>27</sup> The Court disagreed with TWR, and held that Congress can choose what conduct to fund.<sup>28</sup> In a concurring opinion, Justice Harry Blackmun conceded that lobbying restrictions placed on § 501(c)(3) tax-exempt status violated TWR's freedom of speech, but that any "constitutional defect" was remedied by another statutory provision that allowed the organization to both receive a tax exemption and lobby through an affiliate organization.<sup>29</sup>

The Supreme Court similarly declined to strike down a regulation prohibiting federal funding recipients from providing certain family planning methods in the influential case *Rust v. Sullivan*.<sup>30</sup> The challenged regulation, section 1008 of the Public Health Services Act, states that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."<sup>31</sup> The regulations promulgated to implement section 1008 prohibit Title X projects from participating in acts that "encourage, promote or advocate abortion as a method of family planning"—including providing referrals to abortion providers.<sup>32</sup> The regulations also require Title X projects to maintain financial and physical independence from abortion-related services.<sup>33</sup>

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26. *Taxation with Representation*, 461 U.S. at 543–44 (noting that although TWR had a § 501(c)(4) entity through which it could lobby, it brought suit to use tax-deductible funds, which it received only through its § 501(c)(3) entity); see also 26 U.S.C. § 501(c)(3) (2006).

27. *Taxation with Representation*, 461 U.S. at 545. TWR analogized its case to *Speiser v. Randall*, in which the Court held unconstitutional a state law requiring parties seeking a property-tax exemption to advocate against the forcible overthrow of the government. *Id.*; *Speiser*, 357 U.S. at 517–19. The Court rejected the analogy and noted that, unlike the state law in *Speiser*, § 501(c)(3) does not deny TWR a right or benefit; rather, it prevents Congress from allocating public funds to lobbying. *Taxation with Representation*, 461 U.S. at 545.

28. *Taxation with Representation*, 461 U.S. at 546 ("Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying.").

29. *Id.* at 552–53 (Blackmun, J., concurring). In Justice Blackmun's view, the distinction between § 501(c)(3) and § 501(c)(4) allowed Congress to consciously limit tax benefits to non-lobbying activities only, without prohibiting organizations from lobbying with private funds. *Id.* at 553. Justice Blackmun also warned that if Congress attempted to limit the organization's control of its lobbying affiliate, "the First Amendment problems would be insurmountable." *Id.*

30. *Rust*, 500 U.S. at 196–98.

31. 42 U.S.C. § 300a-6 (2006).

32. 42 C.F.R. § 59.10(a) (1991). Although federal funds account for approximately half of a Title X program's budget, section 1008 applies to the whole program. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 684 (1992).

33. 42 C.F.R. § 59.9. Recipients of Title X funds argued that the "impermissibly burden[some]" regulation, mandating physical and financial separation, is inconsistent with the plain language of Title X. *Rust*, 500 U.S. at 187–88. The Court replied that "if one thing is clear from the legislation history, it is that Congress intended that Title X funds be kept separate and

The recipients claimed that the provision violated the First Amendment by regulating their speech on abortion advocacy as a condition for receiving government funding.<sup>34</sup> The Court analogized the case to *Taxation with Representation*, and found that the government's choice not to fund abortion-related activities did not violate the First Amendment.<sup>35</sup> In particular, the Court found that the regulation prohibiting counseling on abortion or referring to abortion providers was not impermissible viewpoint discrimination, but rather "a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded."<sup>36</sup> The Court concluded that these provisions were not unconstitutional because they merely required recipients to "keep such [abortion-related] activities separate and distinct from Title X activities."<sup>37</sup> The Court reasoned that this was a permissible restriction based on the government's determination of the statute's purpose and what activities it chose to fund.<sup>38</sup> Though the *Rust* Court did not explicitly characterize it as such, this doctrine later became known as the government speech doctrine.<sup>39</sup>

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distinct from abortion-related activities." *Id.* at 190. For a discussion on the effect of such regulations on organizations, see *infra* Part III.B–C.

34. *Rust*, 500 U.S. at 192 (arguing that the Act imposed "viewpoint-discriminatory conditions on government subsidies" by only funding programs that promoted the government's agenda).

35. *Id.* at 197–98; see also *Maier v. Roe*, 432 U.S. 464, 479–80 (1977) (holding that the government may choose not to subsidize abortion with public funds). Justice Blackmun, who concurred in *Taxation with Representation*, stated in dissent:

Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech.

*Id.* at 207 (Blackmun, J., dissenting) (citing *Speiser v. Randall*, 357 U.S. 513, 518–19 (1958)); see also *Cole*, *supra* note 32, at 684–85 ("[I]n at least one respect [*Rust*] was faithful to precedent: it reflects all the ambivalence and confusion that has long characterized the Supreme Court's adjudication . . .").

36. *Rust*, 500 U.S. at 194–95.

37. *Id.* at 196 (distinguishing Title X *projects* from *grantees* by explaining that "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized"). In a detailed analysis of the *Rust* opinion, Associate Professor David Cole noted that *Rust*'s "broad dicta" suggests that a restriction may still be unconstitutional if it is: (1) "aimed at the suppression of dangerous ideas," (2) "singl[es] out a disfavored group," and (3) is "content- or viewpoint-based in forums dedicated . . . to expressive activities." *Cole*, *supra* note 32, at 693.

38. *Rust*, 500 U.S. at 193.

39. See *infra* note 125.

## 2. Unconstitutional-Conditions Cases

In other cases, the Court has invalidated provisions that condition grant funding by restricting First Amendment rights.<sup>40</sup> Reconciling these cases with *Taxation with Representation* and *Rust* proves difficult. In *FCC v. League of Women Voters of California*, the Court held unconstitutional section 399 of the Public Broadcasting Act of 1967, which prohibited noncommercial broadcasting stations receiving federal grant money from “editorializing.”<sup>41</sup> The Court found that the ban was not narrowly tailored to achieve its policy objective,<sup>42</sup> and held that the blanket restriction impermissibly prevented broadcasting stations from editorializing—even through use of private funds.<sup>43</sup> Although the Court found that section 399 was an impermissible use of the government’s Spending Clause power, it noted that if Congress allowed stations to create two separate entities—one prohibited from editorializing, which would receive government funding, and another that could editorialize but would not benefit from public funds—the Act could be permissible.<sup>44</sup>

More recently, the Supreme Court invalidated a provision that prohibited federally funded legal-service providers from representing clients in challenges to existing welfare law.<sup>45</sup> The Court, in *Legal Services Corp. v. Velazquez*, found that this provision violated the First Amendment rights of legal-service funding recipients by creating a limited forum that regulated how legal-service providers may advocate on their client’s behalf.<sup>46</sup> Although not explicitly invoking the unconstitutional conditions doctrine, the Court found that the funding restrictions impermissibly controlled the speech of private actors<sup>47</sup> and

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40. See *infra* notes 41–49 and accompanying text.

41. 468 U.S. 364, 395 (1984); see Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 368 (1967).

42. Section 399 was intended to appease concerns that government funding could turn noncommercial broadcast stations into “propaganda organs for the government,” or lead viewers to believe the editorials were government opinions. *League of Women Voters*, 468 U.S. at 372, 395. The Court held that section 399 was both under- and over-inclusive and was not sufficiently tailored to achieve its stated goals. *Id.* at 392–94. Justice William Rehnquist, joined by Chief Justice Warren Burger and Justice Byron White, dissented. *Id.* at 405 (Rehnquist, J., dissenting) (arguing that the Act was a legitimate exercise of Congress’s spending power).

43. *Id.* at 395–96, 400 (majority opinion) (noting that only one percent of the station’s income came from the government grant).

44. *Id.* at 400.

45. See generally *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). Legal Services Corporation (LSC) is a D.C. nonprofit created by Congress to provide access to legal assistance by distributing federal funds to eligible providers. See *id.* at 536. Both LSC and the government found that “the restriction prevents an attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution.” *Id.* at 537.

46. *Id.* at 544–46. The Court noted that controlling how an LSC attorney may advocate on behalf of his or her client “threatens severe impairment of the judicial function.” *Id.* at 546.

47. *Id.* at 542; see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995) (“It does not follow . . . that viewpoint-based restrictions are proper when the University

amounted to viewpoint-based discrimination because, unlike in *Rust*, the “program was designed to facilitate private speech, not to promote a governmental message.”<sup>48</sup> Thus, the Court held that although Congress may choose not to fund all forms of legal representation, it may not “define the scope of the litigation it funds to exclude certain vital theories and ideas.”<sup>49</sup>

### 3. Viewpoint-Based Restrictions

Viewpoint-based speech restrictions and their relation to the government speech doctrine have attracted the Court’s attention on various occasions. In *Rosenberger v. Rector & Visitors of University of Virginia*, the Court held unconstitutional a University of Virginia guideline that denied organizational funding to groups that expressed religious views.<sup>50</sup> The Court noted the blurry distinction between content and viewpoint discrimination, but qualified the guidelines as viewpoint discrimination because the University disfavored student journalistic efforts with religious viewpoints, rather than excluding religion as a subject matter altogether.<sup>51</sup> The Court distinguished this case from *Rust*, noting that although the University may regulate the content of speech when it enlists private actors to convey its message as in *Rust*, it may not discriminate against private entities it subsidizes because of the entity’s viewpoint.<sup>52</sup> Thus, the Court found that because the purpose of the University’s funding regulation was not intended to convey a University message, the funding restriction was unconstitutional.<sup>53</sup>

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does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”). *But cf.* *Rumsfeld v. Forum of Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (holding that government funding restrictions that require universities to allow military recruiters onto their campuses was constitutional because the funding restriction did not discriminate based on viewpoint, as no one was required to endorse a “Government-mandated pledge” and everyone was still allowed to voice their disagreement with the government viewpoint).

48. *Velazquez*, 531 U.S. at 548.

49. *Id.* at 541.

50. 515 U.S. 819, 836–37 (1995).

51. *Id.* at 830–31.

52. *Id.* at 832–34. The Court has also invalidated viewpoint-based conditions when speech is restricted in forums that are especially designed to promote free speech. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 601–03 (1967) (finding a restriction on faculty speech at a public university to be unconstitutional); *cf.* *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108, 116 (1991) (invalidating a state law requiring a criminal to remit money earned by publishing a book describing his crimes to the state in order to compensate victims). Such viewpoint-based restrictions “raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.” *Simon & Schuster, Inc.*, 502 U.S. at 116 (citing *Leathers v. Medlock*, 499 U.S. 439, 448–49 (1991)).

53. *Rosenberger*, 515 U.S. at 834–35.

C. *The Leadership Act: Enactment, Judicial Review, and Controversy*

1. *The Purpose, History, and Original Implementation of the Leadership Act and its Policy Requirement*

In 2003, the 108th Congress enacted the Leadership Act to “authorize[] a multisectoral approach to fighting AIDS, and endorse[] education, research, prevention, treatment and care of those infected with HIV and those individuals living with AIDS.”<sup>54</sup> This historic legislation allocated \$15 billion to address both the humanitarian health crisis and a growing international security crisis<sup>55</sup> “that demand[ed] a global humanitarian response with the United States in the lead.”<sup>56</sup>

Representative Christopher Smith introduced the Policy Requirement as an amendment to the Leadership Act in the House Committee on International Relations.<sup>57</sup> The amendment became part of the Leadership Act, and states that “[n]o funds made available to carry out this chapter . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.”<sup>58</sup> A close reading of the legislative history reveals that Representative Smith introduced the Policy Requirement with the primary purpose of eradicating human trafficking and prostitution.<sup>59</sup> In his statements before the Committee, Representative Smith

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54. H.R. REP. NO. 108-60, at 23 (2005). A similar version of the bill received bipartisan support in the 107th Congress. *Id.* at 25. However, the bill was not enacted because the House and Senate could not reconcile the different versions of the bill despite agreement by both chambers on “the need for expanded assistance to fight the HIV/AIDS pandemic.” *Id.*

55. *Id.* at 24 (“The HIV/AIDS pandemic is a crisis that threatens the stability, economy and democratic institutions of many nations.”). The report also noted that HIV/AIDS threatens to undermine democracy in Africa, as military personnel in African countries have the highest risk of contracting HIV/AIDS. *Id.* at 24–25; see also *United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003: Markup Before the H. Comm. on Int’l Relations*, 108th Cong. 77 [hereinafter *Leadership Act Markup*] (statement of Rep. Henry J. Hyde, Chairman, H. Comm. on Int’l Relations).

56. *Leadership Act Markup*, *supra* note 55, at 78 (statement of Rep. Tom Lantos, Member, H. Comm. on Int’l Relations) (“For those of us who have long called for a real commitment of resources to address the HIV/AIDS crisis, our day has arrived.”). Representative Lantos also noted three important ways the Act tackles the HIV/AIDS problem: (1) providing funding for treatment and prevention, (2) allocating resources to organize an international effort, and (3) establishing strong leadership from government and nonprofit partners committed to “a long-term campaign to defeat [HIV/AIDS].” *Id.* at 79.

57. *Id.* at 148 (statement of Rep. Christopher Smith, Vice Chairman, H. Comm. on Int’l Relations). At the time the Smith Amendment was introduced, the Committee on International Relations had already approved another amendment—the Hyde Amendment—that restricted funds related to prostitution and human trafficking. *Id.* at 96 (statement of Rep. Henry J. Hyde, Chairman, H. Comm. on Int’l Relations).

58. 22 U.S.C. § 7631(f) (2006).

59. *Leadership Act Markup*, *supra* note 55, at 148 (statement of Rep. Christopher Smith, Vice Chairman, H. Comm. on Int’l Relations). Representative Smith further noted that funding an “organization that does that kind of thing” supports the oppression of sex slaves. *Id.* at 149.

briefly expressed his view that the amendment would help curtail the increase of HIV/AIDS infections.<sup>60</sup> The Committee approved the amendment by a slim margin, and the Policy Requirement subsequently became part of the Leadership Act.<sup>61</sup>

Following the enactment of the Leadership Act, U.S. Agency for International Development (USAID) began distributing grants.<sup>62</sup> Heeding a Department of Justice (DOJ) warning, the agency only applied the Policy Requirement to foreign non-governmental organizations (NGOs).<sup>63</sup> The DOJ later withdrew this warning, which prompted USAID to apply the Policy Requirement to domestic NGOs as well.<sup>64</sup> To implement the Act, USAID issued the Acquisition and Assistance Policy Directive 05-04 (AAPD 05-04) in June 2005.<sup>65</sup> Among other things, AAPD 05-04 required both foreign and domestic NGOs to comply with a provision entitled *Prohibition on the*

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To garner support for the amendment, Representative Smith highlighted many disturbing facts regarding the prevalence of human trafficking and prostitution around the world. *Id.* This suggests that Representative Smith's main goal was to organize an effort to end prostitution and human trafficking, rather than address HIV/AIDS concerns.

60. *Id.* at 148–49. *But see infra* note 160 and accompanying text (discussing studies showing that assistance to prostitutes, in all forms, helps reduce the occurrence of HIV/AIDS).

61. *Leadership Act Markup*, *supra* note 55, at 160 (passing with a vote of twenty-four for the amendment and twenty-two against); *see also* Pub. L. No. 108-25, 117 Stat. 711 (2003) (codified at 22 U.S.C. § 7631).

62. OFFICE OF PROCUREMENT, U.S. AGENCY FOR INT'L DEV., AAPD 04-04, IMPLEMENTATION OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS AND MALARIA ACT OF 2003—ELIGIBILITY FOR ASSISTANCE, LIMITATION ON THE USE OF FUNDS AND OPPOSITION TO PROSTITUTION AND SEX TRAFFICKING 2–3 (2004), *available at* [http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aapd04\\_04\\_original.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd04_04_original.pdf).

63. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev. (*AOSI I*), 430 F. Supp. 2d 222, 234 (S.D.N.Y. 2006), *aff'd*, 651 F.3d 218 (2d Cir. 2011), *reh'g en banc denied*, No. 08-4917-cv (2d Cir. Feb. 2, 2012). An undisclosed memorandum written by the DOJ's Office of Legal Counsel questioned the constitutionality of section 7631(f). Laura Abel, *Obama Administration Refuses to Release Bush-Era OLC Opinion Characterizing "Anti-Prostitution Policy Requirement" as Unconstitutional*, HILL'S CONGRESS BLOG (Oct. 20, 2009, 8:27 AM), <http://thehill.com/blogs/congress-blog/healthcare/63837-obama-administration-refuses-to-release-bush-era-olc-opinion-characterizing-anti-prostitution-policy-requirement-as-unconstitutional->.

The memorandum served as the administration's impetus for not applying section 7631(f) to domestic-based NGOs for eighteen months. *Id.* After the DOJ, the Department of Health and Human Services, and USAID refused Freedom of Information Act (FOIA) requests to produce the memo, the Brennan Center for Justice at New York University School of Law filed a lawsuit in the U.S. District Court for the Southern District of New York seeking its release. Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't. of Justice, No. 09 Civ. 8756 (VM), 2011 WL 4001146, at \*1 (S.D.N.Y. Aug. 30, 2011). Following a FOIA analysis, the court ordered the agencies to release the memorandum. *Id.* at \*7.

64. *AOSI I*, 430 F. Supp. 2d at 234–35.

65. OFFICE OF ACQUISITION & ASSISTANCE, U.S. AGENCY FOR INT'L DEV., AAPD 05-04, IMPLEMENTATION OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS AND MALARIA ACT OF 2003—ELIGIBILITY LIMITATION ON THE USE OF FUNDS AND OPPOSITION TO PROSTITUTION AND SEX TRAFFICKING 1–2 (2005) [hereinafter AAPD 05-04], *available at* [http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aapd04\\_04\\_original.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd04_04_original.pdf).

*Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking.* The provision required recipients to certify their compliance with the U.S. government's policy against prostitution and trafficking.<sup>66</sup>

## 2. *Questioning the Policy Requirement Through Judicial Review*

Following the enactment of the Leadership Act, nonprofit agencies began to question the constitutionality of the Policy Requirement.<sup>67</sup> Various NGOs brought suit in the U.S. District Courts for the District of Columbia and the Southern District of New York.<sup>68</sup> On appeal, the D.C. Circuit and the Second Circuit reached different conclusions.<sup>69</sup> Their divergent opinions reflect the tension that permeates the existing precedent on unconstitutional conditions.

### a. *The D.C. Circuit Upholds the Policy Requirement*

#### i. *The U.S. District Court for the District of Columbia Finds Section 7631(f) Unconstitutional*

DKT International is a nonprofit family planning organization that conducts HIV/AIDS prevention work in over a dozen countries.<sup>70</sup> As part of this effort, DKT distributes condoms in Vietnam.<sup>71</sup> DKT received USAID funding for such work as a sub-grantee of Family Health International (FHI).<sup>72</sup> During the summer of 2005, FHI informed DKT that its sub-grantee status required DKT to certify that it had anti-sex trafficking and anti-prostitution policies.<sup>73</sup> When

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66. *Id.* at 5–6. Under AAPD 05-04, grants and agreements were required to include the following language:

The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing . . . . Except as noted in the second sentence of this paragraph, as a condition of entering into this agreement or any subagreement, a non-governmental organization or public international organization recipient/subrecipient must have a policy explicitly opposing prostitution and sex trafficking.

*Id.* at 5. Before receiving USAID funds, each recipient must provide a certification as follows: “[Recipient’s name] certifies compliance as applicable with the standard provision[] entitled ‘Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking’ included in the reference agreement.” *Id.* at 6.

67. *See supra* note 63.

68. *DKT Int’l v. U.S. Agency for Int’l Dev. (DKT I)*, 435 F. Supp. 2d 5, 6–7 (D.D.C. 2006), *rev’d*, 477 F.3d 758 (D.C. Cir. 2007); *AOSI I*, 430 F. Supp. 2d at 228–30.

69. *AOSI IV*, 651 F.3d at 239–40 (affirming preliminary injunctions enjoining USAID from applying the Policy Requirement to plaintiff NGOs); *DKT II*, 477 F.3d 758, 764 (D.C. Cir. 2007) (reversing the district court and holding that the Leadership Act does not compel speech in violation of the First Amendment).

70. HOME, DKT INT’L, <http://www.dktinternational.org> (last visited Jan. 21, 2012).

71. *DKT I*, 435 F. Supp. 2d at 9.

72. *Id.* USAID grants funded approximately sixteen percent of the nonprofit’s budget. *Id.*

73. *Id.* (noting that FHI refused to remit unused grant money to DKT after their original grant term expired because a DKT representative refused to certify such a policy).

DKT refused to sign the certification agreement, FHI cancelled a grant that it had already agreed to fund.<sup>74</sup> DKT explained that it refused to enact such a policy because it would have “stigmatizing and alienating” effects on sex workers, thus hampering DKT’s efforts to aid those most vulnerable to HIV/AIDS.<sup>75</sup>

Following the grant cancellation, DKT promptly filed suit in the U.S. District Court for the District of Columbia against USAID and USAID Administrator, Andrew S. Natsios.<sup>76</sup> DKT challenged the constitutionality of the Policy Requirement as applied to DKT and AAPD 05-04’s requirement that DKT have a policy explicitly opposing prostitution.<sup>77</sup>

The district court held that Congress exceeded its Spending Clause authority by placing an unconstitutional condition, in the form of viewpoint-based restrictions,<sup>78</sup> on the receipt of federal funds.<sup>79</sup> Critically, the court observed that the regulations prohibited DKT from having a contrary policy or to even remain neutral to prostitution and sex trafficking.<sup>80</sup> As the Policy Requirement restricted *grantees* rather than the *grant* as in *Rust*, the court found that it could not reconcile the two cases.<sup>81</sup>

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74. *Id.* (explaining that FHI agreed to remit \$60,000 of USAID grant funds to DKT for a newly proposed condom-lubricant project, but retracted the grant after DKT refused to follow the Policy Requirement).

75. *Id.* at 10; *see also* Memorandum of Law of Aids Action and Twenty-One Other Organizations as Amici Curiae Supporting Plaintiff’s Motion for Preliminary Injunction and Summary Judgment at 12–22, *DKT I*, 435 F. Supp. 2d. 5 (D.D.C. 2006) (No. 05-01604) (“Gaining the trust and cooperation of sex workers . . . is a crucial component of the anti-HIV/AIDS programs that are implemented around the world by *amici*.”).

76. *DKT I*, 435 F. Supp. 2d. at 6–7.

77. *Id.* at 10.

78. *Id.* at 13 (“[The USAID regulations] require the grantees, such as DKT, to adopt a policy . . . thus precluding grantees from maintaining silence or neutrality, or adopting a policy explicitly favoring the organization of prostitution. As such, they are view-point based funding restrictions . . .”).

79. *Id.* at 13, 16. Because the guidelines resulted in viewpoint discrimination, they were subject to heightened scrutiny. *Id.* at 13–14. Under this stringent standard, the court held that the Policy Requirement was not narrowly tailored to achieve the agency’s goal of “having a firm, unilateral policy toward HIV/AIDS treatment and prevention.” *Id.* Viewpoint-based restrictions on speech have become paradigmatic cases for this unforgiving standard of review. *See, e.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (requiring the state to show that a viewpoint-discriminating regulation is narrowly tailored to serve the state’s compelling interest); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (describing the importance of First Amendment freedoms and the difficulty Congress faces when defending restriction of such values).

80. *See DKT I*, 435 F. Supp. 2d at 16 (explaining that DKT’s use of private funds was restricted by the policy, which prohibited DKT from “taking any other position on the issue of prostitution in any other context, even with wholly private funds”).

81. *Id.*

*ii. The D.C. Circuit Disapproves the District Court's Analysis and Upholds the Policy Requirement*

The D.C. Circuit reversed the decision less than a year later, and noted that the government not only *may* prefer certain viewpoints, but “often *must*” do so when expounding its own message.<sup>82</sup> Drawing on the rationales of *Rust* and *Valazquez*, the court found that requiring organizations to explicitly oppose prostitution was “the government’s own message . . . being delivered.”<sup>83</sup> Further, the court noted that the challenged provision did not compel recipients to advocate a certain message; rather, it chose to fund only those programs that shared the government’s message.<sup>84</sup> Thus, the court held that this exercise of the government’s Spending Clause power did not violate the First Amendment.<sup>85</sup> The court also rejected DKT’s contention that the regulations unconstitutionally prevented recipients from using private funds to engage in activity outside the program’s scope.<sup>86</sup> As in *Rust* and *Taxation with Representation*, the court noted that DKT could certify the policy by creating a subsidiary, while remaining neutral itself.<sup>87</sup>

*b. The Second Circuit Finds the Policy Requirement Unconstitutional*

*i. The Southern District of New York Grants a Preliminary Injunction to NGOs*

The Alliance for Open Society International (AOSI), Open Society Institute (OSI), and Pathfinder International all run programs that combat HIV/AIDS around the world.<sup>88</sup> These NGOs accomplish this mission by providing reproductive health assistance, family planning services, and combating intravenous drug use.<sup>89</sup> Most significantly, they provide education and assistance to groups—such as prostitutes—at high risk of contracting HIV/AIDS.<sup>90</sup>

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82. *DKT II*, 477 F.3d 58, 761 (D.C. Cir. 2007) (emphasis added) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

83. *Id.* at 762 (quoting *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001)).

84. *Id.* at 764.

85. *Id.*

86. *Id.* at 763.

87. *Id.* at 763 & n.4 (noting that the government stated during oral argument that DKT could comply with the regulation by creating a subsidiary).

88. *AOSI IV*, 651 F.3d 218, 233 (2d Cir. 2011), *reh'g en banc denied*, No. 08-4917-cv (2d Cir. Feb. 2, 2012); *see also Public Health Program: HIV/AIDS*, OPEN SOC'Y FOUND., <http://www.soros.org/initiatives/health/focus/hiv> (last visited Jan. 13, 2012); *What We Do: HIV/AIDS*, PATHFINDER INT'L, [http://www.pathfind.org/site/PageServer?pagename=WhatWeDo\\_AIDS](http://www.pathfind.org/site/PageServer?pagename=WhatWeDo_AIDS) (last visited Jan. 13, 2012).

89. *AOSI IV*, 651 F.3d at 224.

90. *Id.* (noting that AOSI has directed part of its efforts to high-risk groups such as young people, prostitutes, prisoners, and rural-urban migrant workers).

In 2005, USAID issued a letter to AOSI indicating that “‘advocating for the legalization of prostitution’ or ‘organizing or unionizing prostitutes for the purpose of advocating for the legalization of prostitution’” was not compliant with the Policy Requirement.<sup>91</sup> AOSI and OSI filed a complaint against USAID, which Pathfinder quickly joined based on its forced compliance with the Policy Requirement.<sup>92</sup> The plaintiffs subsequently added the Department of Health and Human Services (HHS) and the United States Centers for Disease Control and Prevention (CDC) as defendants.<sup>93</sup> The NGOs claimed that the Policy Requirement “compel[led] the organization[s] to engage in speech against [their] own will,” and barred them from engaging in activities such as “a thoughtful policy debate on the appropriate legal regime for prostitution,” and participating in conferences designed to address sexual health issues.<sup>94</sup>

In May 2006, District Judge Victor Marrero issued a preliminary injunction preventing the agencies from enforcing the Policy Requirement against the NGOs.<sup>95</sup> Applying a heightened level of scrutiny,<sup>96</sup> the district court found that the Policy Requirement was not narrowly tailored to serve the government’s goal because it created a “blanket ban on certain constitutionally protected speech.”<sup>97</sup> The district court also found that the policy impermissibly restricted the NGOs from allocating private funds to support other viewpoints.<sup>98</sup> Lastly, the court held that the Policy Requirement, as construed by the agencies, violated the First Amendment rights of AOSI and

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91. *AOSI I*, 430 F. Supp. 2d 222, 237 (S.D.N.Y. 2006) (quoting Letter from Christopher D. Crowley, USAID Mission Director, to Galina Karmanova, AOSI (Oct. 7, 2005)), *aff’d*, 657 F.3d 218 (2d Cir. 2009), *reh’g en banc denied*, No. 08-4917-cv (2d Cir. Feb. 2, 2012).

92. *Id.* at 237–38.

93. *Id.* at 238.

94. *Id.* at 238–39.

95. *Id.* at 276. The NGOs also challenged the Agencies’ interpretation of the Policy requirement, which they argued went beyond the statutory text. *Id.* at 239–40. In particular, they argued that section 7631(f) only requires a general statement of declaration against prostitution, and does not prohibit organizations from advocating for legalizing prostitution or assisting organizations with such a viewpoint if no federal funds are used for such efforts. *Id.* at 240. After a careful analysis of the purpose of the statute and the legislative history, the court rejected this argument. *Id.* at 242–46.

96. *Id.* at 267 (adopting the test articulated in *Rust*, which asks “whether the restriction, as interpreted and applied by Defendants, is ‘narrowly tailored to fit Congress’s intent’” (quoting *Rust v. United States*, 500 U.S. 173, 195 n.4 (1991))).

97. *Id.* at 270. The agencies argued that the government has an interest in ensuring that “its message (that the eradication of prostitution is part of its strategy to combat HIV/AIDS) [is not] distorted by the activities of its private partners in this fight.” *Id.* at 268 (footnote omitted). The court noted that the Policy Requirement’s explicit exemption of certain NGOs raised questions about the agencies’ interest, but “decline[d] to dwell on this debate.” *Id.* at 268–69. Ultimately, the court found that, even assuming the government had a significant interest, the Policy Requirement as construed by the government was not narrowly tailored to fit that interest. *Id.* at 269–70.

98. *Id.* at 274.

Pathfinder because it “improperly compels speech by affirmatively requiring Plaintiffs to adopt a policy espousing the government’s preferred message.”<sup>99</sup>

*ii. New Amendments to the AAPD Guidelines Result in Second Circuit Remand*

The government appealed to the Second Circuit and informed the court during oral arguments “that HHS and USAID were developing guidelines that would allow grantees to establish or work with separate affiliates that would not be subject to the Policy Requirement.”<sup>100</sup> HHS published its new guidelines the following month.<sup>101</sup> Although the guidelines still required federally funded organizations to oppose prostitution explicitly, they expressly permitted grantees to create a non-government-funded affiliate that would not be subject to the Policy Requirement.<sup>102</sup> The guidelines detailed ways grantees could establish “adequate separation” from an affiliate in order to “maintain program integrity,” including keeping all funds “physically and financially separate from the affiliated organization.”<sup>103</sup> After the new guidelines were

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99. *Id.* The court found that OSI had not sufficiently demonstrated any likelihood that it would succeed on its claim because it was not subject to the Policy Requirement. *Id.* at 277–78.

100. *AOSI IV*, 651 F.3d 218, 225–26 (2d Cir. 2011), *reh’g en banc denied*, No. 08-4917-cv (2d Cir. Feb. 2, 2012).

101. Guidance Regarding Section 301(f) of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, 72 Fed. Reg. 41,076 (July 26, 2007).

102. *Id.*; see also OFFICE OF ACQUISITION & ASSISTANCE, U.S. AGENCY FOR INTL’L DEV., AAPD 05-04 AMENDMENT 1, IMPLEMENTATION OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS AND MALARIA ACT OF 2003—ELIGIBILITY LIMITATION ON THE USE OF FUNDS AND OPPOSITION TO PROSTITUTION AND SEX TRAFFICKING 3 (2007) [hereinafter AAPD 05-04 AMENDMENT 1], available at [www.usaid.gov/business/business\\_opportunities/cib/pdf/aapd05\\_04\\_amendment.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04_amendment.pdf) (“This guidance clarifies that an independent organization affiliated with a recipient of Leadership Act funds need not have a policy explicitly opposing prostitution and sex trafficking for the recipient to maintain compliance with the policy requirement.”).

103. AAPD 05-04 AMENDMENT 1, *supra* note 102, at 2–4. The guidelines provide that: A Recipient will be found to have objective integrity and independence from such an organization if:

- (1) The affiliated organization is a legally separate entity;
- (2) The affiliated organization receives no transfer of Leadership Act funds, and Leadership Act funds do not subsidize restricted activities; and
- (3) The Recipient is physically and financially separate from the affiliated organization. Mere bookkeeping separation of Leadership Act funds from other funds is not sufficient.

*Id.* at 3–4. The guidelines list five relevant factors to determine if “such physical and financial separation exists”:

- (i) The existence of separate personnel, management, and governance;
- (ii) The existence of separate accounts, accounting records, and timekeeping records;
- (iii) The degree of separation from facilities, equipment and supplies used by the affiliated organization to conduct restricted activities, and the extent of such restricted activities by the affiliate;

implemented, the Second Circuit summarily remanded the case to the district court for reconsideration in light of the new guidelines, while leaving the preliminary injunction intact pending review.<sup>104</sup>

*iii. Second Review: Changed Guidelines, Same Result*

On remand, the district court stood by its first decision and extended the preliminary injunction to prevent the agencies from applying the Policy Requirement to two more plaintiffs.<sup>105</sup> The court noted that the alternative provided by the new guidelines did not cure the original constitutional defect as the NGOs were still required to adopt the government's views publicly to receive federal funding.<sup>106</sup> The court also found that the new guidelines were not narrowly tailored, in part because less-restrictive means to achieve the government's interests existed.<sup>107</sup>

Nearly three years after the start of litigation, the Second Circuit considered the merits of the case.<sup>108</sup> Divided two to one, the panel affirmed the district court's preliminary injunction after finding that the new USAID guidelines were an unconstitutional condition on government funding.<sup>109</sup> Applying

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(iv) The extent to which signs and other forms of identification which distinguish the Recipient from the affiliated organization are present, and signs and materials that could be associated with the affiliated organization or restricted activities are absent; and

(v) The extent to which USAID, the U.S. Government and the project name are protected from public association with the affiliated organization and its restricted activities in materials such as publications, conferences and press or public statements.

*Id.* at 4.

104. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev. (AOSI II)*, 254 F. App'x 843, 846 (2d Cir. 2007).

105. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev. (AOSI III)*, 570 F. Supp. 2d 533, 550 (S.D.N.Y. 2008), *aff'd*, 651 F.3d 218 (2d Cir. 2011), *reh'g en banc denied*, No. 08-4917-cv (2d Cir. Feb. 2, 2012). The court granted the original plaintiffs' motion to amend the complaint to add InterAction, the largest humanitarian NGO alliance, and GHC, another large alliance of international public health organizations. *Id.* at 538–45.

106. *Id.* at 545–46.

107. *Id.* at 549.

108. *AOSI IV*, 651 F.3d 218 (2d Cir. 2011), *reh'g en banc denied*, No. 08-4917-cv (2d Cir. Feb. 2, 2012).

109. *Id.* at 234–40. On February 2, 2012, the Second Circuit denied the government's petition for en banc review. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev. (AOSI V)*, No. 08-4917-cv (2d Cir. Feb. 2, 2012). While the appeal was pending, USAID and HHS again altered the guidelines to make them slightly less restrictive. *AOSI IV*, 651 F.3d at 227. The new guidelines required that a grantee "affirmatively state in the funding document that it is 'opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.'" *Id.* (quoting 45 C.F.R. § 89.1(b) (2010)); *see also* OFFICE OF ACQUISITION & ASSISTANCE, U.S. AGENCY FOR INT'L DEV., AAPD 05-04 AMENDMENT 3, IMPLEMENTATION OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS, AND MALARIA ACT OF 2003, AS AMENDED—ELIGIBILITY LIMITATION ON THE USE OF FUNDS AND OPPOSITION TO PROSTITUTION AND SEX TRAFFICKING 2 (2010) *available at* [http://www.usaid.gov/business/business-opportunities/cib/pdf/aapd05\\_04\\_](http://www.usaid.gov/business/business-opportunities/cib/pdf/aapd05_04_)

heightened scrutiny,<sup>110</sup> the court found that the Policy Requirement was an impermissible viewpoint-based restriction.<sup>111</sup> The court rejected the agencies' analogy to *Rust's* government speech doctrine, noting that "[d]efendants cannot now recast the Leadership Act's global HIV/AIDS-prevention program as an anti-prostitution messaging campaign."<sup>112</sup> Thus, the court found that the Policy Requirement violated the First Amendment because it compelled grantees to reiterate the government's message as if it were its own to receive federal funding.<sup>113</sup>

## II. THE SECOND CIRCUIT'S APPROACH SHEDS LIGHT ON INCONSISTENT DOCTRINE

The disagreement between the Second and D.C. Circuits stems from the unprecedented conditions articulated in the Leadership Act's Policy Requirement.<sup>114</sup> Without clear guidance on when a federal spending condition violates the First Amendment, courts have grappled with differentiating between conduct- and viewpoint-based conditions, and understanding government versus private speech.<sup>115</sup> This Part argues that the Second Circuit correctly applied existing Supreme Court jurisprudence when making this determination.

### A. *The New USAID Guidelines Failed to Cure the Constitutional Defect*

When the D.C. Circuit evaluated the constitutionality of the Policy Requirement, the new USAID guidelines had not been implemented.<sup>116</sup> Nonetheless, the court likened the case to *Regan v. Taxation with Representation* and *Rust v. Sullivan*, and found that "[n]othing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution."<sup>117</sup> In both *Taxation with Representation* and *Rust*, the Supreme Court found that dual organizational

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amendment3.pdf. The new guidelines also relaxed the separation requirement by eliminating the requirement that affiliates have legal and managerial separation from grantees. *Id.* at 2, 7–8.

110. *AOSI IV*, 651 F.3d at 231 (defending a heightened-scrutiny test for the Spending Clause enactment by noting that "Congress's spending power, while broad, is not unlimited").

111. *Id.* at 234–35 (reasoning that the Policy Requirement discriminated against viewpoints in part because it "requires recipients to take the government's side on a particular issue," and that "silence, or neutrality, is not an option for Plaintiffs").

112. *Id.* at 237–38.

113. *Id.* at 239.

114. *Id.* at 257 n.4 (Straub, J., dissenting) (explaining that the majority correctly noted that "none of the [previous] unconstitutional conditions cases even involved an affirmative speech condition").

115. *See supra* note 10.

116. *See supra* note 87 and text accompanying notes 100–103.

117. *DKT II*, 477 F.3d 758, 763 (D.C. Cir. 2007).

structures avoided potential constitutional problems, because the *projects*—not the *recipients*—were restricted.<sup>118</sup>

However, unlike *Taxation with Representation* and *Rust*, the Policy Requirement does not merely deny a subsidy, it actually coerces speech.<sup>119</sup> In *Taxation with Representation*, creation of a § 501(c)(4) affiliate allowed the government to restrict § 501(c)(3) organizations from lobbying.<sup>120</sup> In *Rust*, the possibility of separately funded programs allowed the federal government to prohibit Title X recipients from providing abortion services with federal money.<sup>121</sup>

The availability of an affiliate organization unbound by the Policy Requirement, alternatively, still leaves in existence an additional imposition: organizations receiving federal funds must also affirmatively oppose prostitution.<sup>122</sup> Creating a separate entity cannot alleviate this compulsion of speech.<sup>123</sup> The organization, not the program, is still burdened by its requirement to serve as the government’s parrot by portraying the government’s opinion as its own.<sup>124</sup>

### B. The Government Speech Doctrine

The government speech doctrine, first used by the Supreme Court in *Rust*,<sup>125</sup> allows the federal government to restrict speech as a condition to receiving funds if it can show that the speech was “government speech.”<sup>126</sup> As explained by the Supreme Court in *Velazquez*, “viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, . . . or

118. See *supra* Part I.B.1.

119. See *AOSI IV*, 651 F.3d at 234.

120. See *supra* text accompanying notes 29–30.

121. See *supra* text accompanying note 37.

122. If Congress were to implement only section 7631, which prohibits the use of federal funds to promote the legalization of prostitution, the facts of this case would be comparable to *Rust* and *Taxation with Representation*. See *AOSI IV*, 651 F.3d at 237 (distinguishing Title X from the Policy Requirement because Title X grantees “could remain ‘silen[t] with regard to abortion,’ and, if asked . . . w[ere] ‘free to make clear that advice regarding abortion is simply beyond the scope of the program.’ Here, on the other hand, Plaintiffs . . . must represent as their own an opinion—that they affirmatively oppose prostitution—that they might not categorically hold.” (citation omitted) (quoting *Rust v. Sullivan*, 500 U.S. 173, 200 (1991))).

123. See *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010) (concluding that even though the campaign-finance laws allowed corporations to create political action committees, it did not remedy the First Amendment restrictions on the corporations themselves).

124. *AOSI IV*, 651 F.3d at 239.

125. Andy G. Oree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 374 (2009); see *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 533–41 (2001) (“The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”).

126. CHEMERINSKY, *supra* note 25, at 1015 (noting that the First Amendment is inapplicable when the speech at issue is governmental).

instances . . . in which the government ‘used private speakers to transmit specific information pertaining to its program.’”<sup>127</sup> However, when speech is private in nature, even though expressed with government funds, viewpoint-based restrictions are presumptively unconstitutional.<sup>128</sup> Thus, in order to determine whether or not the Policy Requirement fits within the government speech doctrine, it is imperative to determine not only whether the speech was private, but also whether the restriction was viewpoint- or conduct-based.

### 1. *The Policy Requirement Is a Viewpoint-Based Restriction*

The Policy Requirement clearly regulates viewpoints, rather than conduct. If the government intended the requirement to prohibit certain conduct, it would refuse to fund activities that promote legalizing prostitution.<sup>129</sup> Instead, the Policy Requirement affirmatively requires grantees to *say* something, and discriminates against grantees that do not agree with the government’s viewpoint.<sup>130</sup> Thus, the Policy Requirement fits squarely within the purview of viewpoint-based restrictions as it not only “muzzles grant recipients from expressing any and all forbidden arguments,” but also further forces certain viewpoints on them.<sup>131</sup>

### 2. *Private Speech with Government Dollars*

Given the lack of Supreme Court guidance, differentiating government speech from private speech has proved challenging.<sup>132</sup> In *Rust*, the Court

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127. *Velazquez*, 533 U.S. at 541 (citation omitted) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)); see *Olee*, *supra* note 125, at 367–68 (noting that the government may convey its own viewpoint without commending an alternate viewpoint).

128. See, e.g., *Rosenberger*, 515 U.S. at 831 (“The University does acknowledge (as it must in light of our precedents) that ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts . . . .” (internal quotation marks omitted)).

129. See *supra* note 24 (discussing the difference between the denial of a subsidy and an impermissible condition or penalty).

130. *AOSI IV*, 651 F.3d 218, 237 (2d Cir. 2011), *reh’g en banc denied*, No. 08-4917-cv (2d Cir. Feb. 2, 2012); *DKT I*, 435 F. Supp. 2d 5, 12 (D.D.C. 2006), *rev’d*, 477 F.3d 758 (D.C. Cir. 2007).

131. *Velazquez v. Legal Servs. Corps.*, 164 F.3d 757, 772 (2d Cir. 1999) (discussing a different conditional-spending statute), *aff’d*, 531 U.S. 533 (2001).

132. See *Olee*, *supra* note 125, at 378 (observing that, in distinguishing between private and government speech, the Court’s approach has not been “unified and intentional”). Most courts have found that speech is either government speech or private speech, but cannot be both. See *id.* at 379. But see Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 671–72 (2008) (arguing that speech need not be purely governmental or private).

In the absence of clear direction from the Supreme Court, appellate courts have crafted their own approaches to determine when speech is governmental. For example, the Tenth Circuit has developed a four-pronged test, which the Fourth, Seventh, Eighth, and Ninth Circuits have

found that the restrictions on speech—although conveyed through private service providers—contributed to the government’s effort to promote its stance on certain family planning methods, and therefore fell within the government speech doctrine.<sup>133</sup> In *DKT*, the D.C. Circuit followed this analysis when it ruled that the Policy Requirement communicated the government’s message.<sup>134</sup> In contrast, the Second Circuit followed the *Velazquez* Court.<sup>135</sup> In *Velazquez*, the Court emphasized that the attorneys received federal funding for the purpose of representing their indigent clients, often in proceedings *against* the government—a function that simply could not be construed as speaking *for* the government.<sup>136</sup>

The Second Circuit asked the correct question: did Congress intend for the Leadership Act to inform the international community that it opposes prostitution?<sup>137</sup> A review of the language and legislative history of the Leadership Act reveals that the answer is no.<sup>138</sup> The Leadership Act was intended to fight HIV/AIDS, not serve as the government’s vehicle for combating prostitution around the globe.<sup>139</sup> In fact, the Policy Requirement was implemented with little explanation of how it would affect the HIV/AIDS epidemic.<sup>140</sup> Only one of forty-one congressional findings of the Leadership Act discussed eradicating prostitution,<sup>141</sup> underscoring the fact that this was not the central component of the Act.<sup>142</sup> As the Second Circuit further noted, if the government’s goal was ending prostitution, then the government would have placed a blanket restriction on funding the World Health Organization (WHO),

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since adopted, to determine whether something is government or private speech: “(1) whether the central purpose of the governmental program facilitating the message is to promote private views; (2) who exercises editorial control over the content of the message; (3) who is the literal speaker of the message; and (4) who bears ultimate responsibility for the content of the message.” Olree, *supra* note 125, at 386–95 (citing *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001)).

133. *Rust v. Sullivan*, 531 U.S. 173, 178–79 (1991) (discussing the legislative history of Title X); see Olree, *supra* note 125, at 375 (“The ‘family planning without abortion’ message was the government’s own message, crafted in advance by the government, and the funds at issue were part of a program designed to promote that kind of family planning rather than speech in general.” (footnote omitted)).

134. *DKT II*, 477 F.3d at 761.

135. *AOSI IV*, 651 F.3d at 237–38.

136. *Velazquez*, 531 U.S. at 542–43.

137. See Olree, *supra* note 125, at 411 (positing that, for the speech to qualify as governmental, the question, “did the government independently generate the idea of reaching an audience with this particular message in this medium?” must be answered in the affirmative); see also *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560–61 (2005) (qualifying congressionally mandated advertisements promoting beef as government speech, even though the speakers were private entities).

138. See *supra* Part I.C.1.

139. See *supra* notes 54–56 and accompanying text.

140. See *supra* note 60 and accompanying text.

141. See 22 U.S.C. § 7601(23) (2006).

142. See *supra* Part I.C.1.

which has a policy advocating decreasing legal penalties for prostitutes as a means of fighting HIV/AIDS.<sup>143</sup> Instead, the Policy Requirement actually exempts the WHO from the establishing a policy opposing prostitution.<sup>144</sup>

Opposition to the legalization of prostitution as a part of HIV/AIDS treatment is not typical government speech because when the government endorses a set message, that message usually plays a central part in, and directly furthers the goals of its campaign or program.<sup>145</sup> Instead, as the legislative history reveals, the addition of the Policy Requirement was ancillary to Congress's goal to provide funding for HIV/AIDS efforts.<sup>146</sup> As the Second Circuit aptly noted, "[i]f the government-speech principle allowed Congress to compel funding recipients to affirmatively espouse its viewpoint on *every* subsidiary issue subsumed within a federal spending program, the exception would swallow the rule."<sup>147</sup>

### III. THE ONLY AVAILABLE COMPROMISE: A CONSTITUTIONAL SOLUTION THAT WOULD SATISFY ALL

The U.S. Government and the NGOs battling the global HIV/AIDS epidemic share the same goal: to eradicate HIV/AIDS through prevention and treatment methods that also address the underlying causes of the illness.<sup>148</sup> However, section 7631(f), as the government currently interprets it, unconstitutionally hampers these efforts.<sup>149</sup> The statute stifles NGOs' speech at great costs to certain HIV/AIDS victims, as "[g]aining the trust and cooperation of sex workers is a crucial component of the anti-HIV/AIDS programs," and the Policy Requirement "threatens to alienate the communities with which they work."<sup>150</sup> Similarly, as *AOSI* plaintiffs stated, requiring NGOs to explicitly oppose prostitution negatively affects their "credibility and integrity as NGOs, which generally avoid taking controversial policy positions likely to offend host nations [and] partner organizations."<sup>151</sup> These concerns

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143. *AOSI IV*, 651 F.3d 218, 238 (2d Cir. 2011), *reh'g en banc denied*, No. 08-4917-cv (2d Cir. Feb. 2, 2012).

144. 22 U.S.C. § 7631(f).

145. See Olree, *supra* note 125, at 413.

146. See *Leadership Act Markup*, *supra* note 55, at 149 (statement of Rep. Christopher Smith, Vice Chairman, H. Comm. on Int'l Relations).

147. *AOSI IV*, 651 F.3d at 238 (emphasis added).

148. See *DKT II*, 477 F.3d 758, 760 (D.C. Cir. 2007) (describing DKT's efforts in HIV/AIDS relief); *supra* note 56.

149. See *supra* Part II.A–B.

150. Amicus Brief on the Behalf of Aids Action and Twenty-Five Other Public Health Organizations and Public Health Experts in Support of Plaintiffs-Appellees at 8–9, *AOSI II*, 254 F. App'x 843 (2d Cir. 2007) (No. 06-4035-cv).

151. *AOSI IV*, 651 F.3d at 236 (quoting Brief of Plaintiffs-Appellees at 11–12, *AOSI IV*, 651 F.3d 218 (No. 08-4917-cv)). The assertion that the Policy Requirement would "offend host nations" is an interesting concept with which to grapple, considering that the Policy Requirement is not clear about the role NGOs may play in nations that legalize prostitution.

have been realized in actuality. For example, Brazil, a country that has involved the sex-worker population in its anti-AIDS initiative, chose not to receive U.S. assistance for its AIDS efforts.<sup>152</sup> Pedro Chequer, Brazil's national AIDS commissioner, explained that that they "could not conduct effective outreach to and programs with sex workers if [their] NGO partners were forced to state their explicit opposition to prostitution, as USAID was requiring."<sup>153</sup>

At minimum, Congress must amend section 7631(f) to pass constitutional muster. This Part explores three alternative solutions that could survive constitutional scrutiny while striking a balance between the goals of Congress and nonprofit organizations, and discusses why only one of the solutions is correct as a matter of policy.<sup>154</sup>

*A. The Government's Message Comes From Its Own Voice, but From Another's Mouth*

One possible approach, and the most restrictive option, would allow the federal government to continue restricting organizations' speech, but would alter the content of that speech. Under such a regulation, organizations would be required to explicitly state that "the United States government opposes prostitution," but would not require grantees to declare that they themselves oppose it. This solution would allow Congress to ensure that its anti-prostitution message was not "garbled" or "distorted,"<sup>155</sup> but also ensure

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152. Amicus Brief on Behalf of AIDS Action and Twenty-Five Other Public Health Organizations, *supra* note 150, at 10-11.

153. *Id.* (internal quotation marks omitted); Esther Kaplan, *Just Say Não*, NATION, May 12, 2005, <http://www.thenation.com/article/just-say-nao>.

154. Although the alternatives suggested address actions that Congress must take, it might also be possible for USAID, under the *Chevron* doctrine, to change their regulations in a manner that conforms to the Constitution and meets policy objectives. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (stating that Congress gives agencies the responsibility to promulgate regulations based on reasonable interpretations of authorizing statutes). *Chevron* presents the administrative-law dilemma that occurs when various administrations interpret statutes differently. See PETER L. STRAUSS, ET. AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1046, 1048-49 (10th ed. 2003). A fascinating case study of such administrative-law issues can be found in the promulgation of Title X. See *id.* at 1046-48. For example, in 1993, after President William Clinton took office, his administration changed the HHS regulations that implemented Title X. *Id.* at 1048. Under the new regulations, "Title X projects would be required, in the event of an unplanned pregnancy and where the patient request such action, to provide nondirective counseling to the patient on options relating to her pregnancy, including abortion . . . ." Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993).

155. *AOSI IV*, 651 F.3d at 237 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

that NGOs would not be compelled to become the “de facto mouthpieces”<sup>156</sup> for the government’s opinion.

This solution would help ensure that partners and organizations of NGOs are aware that the message about prostitution is not their own. However, it is unclear whether requiring such a message would be constitutional.<sup>157</sup> Further, this solution would leave the concerns of many NGOs unaddressed. Vocal disapproval of prostitution can ostracize the sex-worker population,<sup>158</sup> and force humanitarian organizations to agree that prostitution and human trafficking are morally wrong and despicable practices that violate human rights—a sentiment they may share, but have purposefully chosen not to state publicly.<sup>159</sup> It is common belief among the human-rights community that “empowerment, organization, and unionization of sex workers can be an effective HIV prevention strategy and can reduce the other harms associated with sex work, including violence, police harassment, un-wanted pregnancy, and the number of underage sex workers.”<sup>160</sup> Continuing to vocalize public

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156. *AOSI I*, 430 F. Supp. 2d 222, 276 (S.D.N.Y. 2006), *aff’d*, 651 F.3d 218 (2d Cir. 2011), *reh’g en banc denied*, No. 08-4917-cv (2d Cir. Feb. 2, 2012).

157. *See* *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 459, 471 (D. Md. 2011) (noting that a resolution requiring limited pregnancy centers—those that provide information to pregnant women but have no physicians on staff—to post a waiting-room sign that states, among other things, “the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider” was unlikely to withstand scrutiny); *see also* *Evergreen Ass’n, Inc. v. City of New York*, 801 F. Supp. 2d 197, 209 (S.D.N.Y. 2011) (finding a likelihood of success on claims against a substantially identical provision aimed at pregnancy centers).

158. Aziza Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women’s Health*, 34 HARV. J.L. & GENDER 225, 235 (2011) (noting that “coercive public measures” have “pushed sex workers underground” (footnote omitted)). *See generally* Amicus Brief on Behalf of AIDS Action and Twenty-Five Other Public Health Organizations, *supra* note 150 (discussing evidence of horrifying violence toward sex-workers by law enforcement in developing countries and explaining how it affects access to HIV-related services for sex-worker communities).

159. *See* Nicole Franck Masenior & Chris Beyrer, *The US Anti-Prostitution Pledge: First Amendment Challenges and Public Health Priorities*, 4 PLoS Med. 1158, 1159 (2007) (noting that child prostitution and sex trafficking are universally opposed but that some entities may differentiate between sex trafficking and sex work, and seek to empower rather than shame sex workers).

160. *Id.* (footnotes omitted); *see also* Alan Berkman et al., *A Critical Analysis of the Brazilian Response to HIV/AIDS: Lessons Learned for Controlling and Mitigating the Epidemic in Developing Countries*, 95 AM. J. PUB. HEALTH 1162, 1168 (2005) (providing a case study of Brazil’s successful efforts to reduce HIV/AIDS and noting that Brazil successfully sustained “a consistent commitment to strengthen[] previously marginalized communities,” including the sex-worker population); LORI BOLLINGER & JOHN STOVER, THE POTENTIAL IMPACT OF HIV/AIDS INTERVENTIONS ON THE HIV/AIDS EPIDEMIC IN AFRICA: A SIMULATION EXERCISE FOR THE WORLD BANK 21–22 (Mar. 3, 2007), available at <http://sitesources.worldbank.org/INT/HIV/AIDS/Resources/375798-1103037153392/ThePotentialImpactofHIV3March2007.pdf> (noting that “interventions targeting [sex workers] across all of sub-Saharan Africa are very cost-effective” and have been shown to avert the number of infections).

opposition to the activities of sex-workers, albeit on behalf of the government, would still brand sex workers and lessen the effects of meaningful humanitarian efforts.<sup>161</sup>

Additionally, to successfully carry out their humanitarian efforts, NGOs must remain impartial and far removed from government ideology and politics.<sup>162</sup> Requiring NGOs to share the government's message gives the impression that the organizations are government agents.<sup>163</sup> Because much of the sex-worker population experiences violence from state actors, which may cause them to distrust government, this solution would negatively affect NGOs that wanted to work with and in the sex-worker community.<sup>164</sup>

### B. Follow *Rust Verbatim*: Restrict Activities, Not Speech

Conversely, Congress could follow *Rust* and amend the statute by removing the coerced-speech requirement altogether. This would convert the impermissible viewpoint-based restriction to a permissible conduct-based restriction, under which Congress chooses to fund only certain activities.<sup>165</sup> Under this scenario, Congress would discard section 7631(f) in its entirety and rely primarily on section 7631(e), which provides that, “[n]o funds made available to carry out this chapter . . . may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.”<sup>166</sup> This approach would be constitutional, as it is well established that the government may

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161. As Ban Ki-moon, Secretary General of the United Nations, poignantly stated, stopping discrimination against vulnerable groups such as sex workers would lead to “fewer infections, less demand for antiretroviral treatment, and fewer deaths. Not only is it unethical not to protect these groups: it makes no sense from a public health perspective. It hurts all of us.” Ban Ki-moon, Sec’y Gen. of the United Nations, Address to the International AIDS Conference (Aug. 3, 2008), available at [http://www.un.org/apps/news/infocus/sgspeeches/statements\\_fall.asp?statID=297](http://www.un.org/apps/news/infocus/sgspeeches/statements_fall.asp?statID=297).

162. LARRY MINEAR, THE HUMANITARIAN ENTERPRISE: DILEMMAS AND DISCOVERIES 76–80 (2002) (“[T]he proposition that relief and rights groups should embrace political agendas seems dangerous and diversionary.”). Many organizations find insulation from politics essential in their efforts, such as the International Committee of the Red Cross, which remains neutral on political issues so as to focus on “matters of ‘charity’ rather than of ‘justice.’” *Id.* at 78.

The policy shift of the Bush administration’s HIV prevention efforts led to the “outright disapproval” of many public-health professionals. J. Blake Scott, *The Rhetoric of Science Versus Politics in U.S. HIV Testing and Prevention Policy*, in COMMUNICATION PERSPECTIVES ON HIV/AIDS FOR THE 21ST CENTURY 297, 309 (Timothy Edgar et al. eds., 2008). In 2003, Joe McIlhany, president of a medical institute receiving federal funds and appointee to the CDC director’s Advisory Committee, published an article titled *AIDS a Disease, Not a Political Issue*, in which he criticized the use of politics in guiding public-health efforts. *See id.* at 309–10 (internal quotation marks omitted).

163. *See* MINEAR, *supra* note 162, at 115.

164. *See* Ahmed, *supra* note 158, at 252–56.

165. *See supra* Part I.B.1.

166. 22 U.S.C. § 7631(e) (2006).

choose which activities to fund.<sup>167</sup> It would also promote congressional efforts to reduce prostitution, while recognizing the importance of neutrality by international public-health organizations on policy matters.

If Congress were to amend the statute in this manner, USAID could require regulated organizations to create two separate entities to manage their funds, as HHS did in *Rust*.<sup>168</sup> Although this approach would be constitutional, it would still have devastating effects on public-health organizations by adding enormous administrative costs to their already low budgets.<sup>169</sup>

*C. Allow Organizations to Determine the Best Manner to Use and Regulate Their Funds*

As a matter of law and policy, the most reasonable alternative to the current Policy Requirement is to continue to honor the government's policy of denying funds to efforts that promote or advocate the legalization of prostitution, but do so in a manner that respects humanitarian organizations' legitimate wish to refrain from taking a political stance on an issue that affects a population they serve. Although the Supreme Court in *Rust* held that agency regulations requiring financial and physical separation are valid, such restrictions in the context of public-health organizations are a budgetary nightmare.<sup>170</sup> Thus, Congress's best alternative is to take this option one step further: eliminate the physical separation requirement for funds.<sup>171</sup>

Under this approach, NGOs would still be required to use government funds to finance only the conduct for which the funds were granted; however, organizations would have the ability to create a structure through which they

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167. See *supra* Part I.B.1–2. But see Sung Chang, *Prostitutes + Condoms = AIDS?: The Leadership Act, USAID, and the HHS Guidelines' Failure to Define "Promoting Prostitution"*, 19 AM. U. J. GENDER SOC. POL'Y & L. 373, 385 (2011) (discussing how the definition of "promoting" is ambiguous and unconstitutionally vague).

168. See *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

169. See Andrew Haber, Note, *Rethinking the Legal Services Corporation's Program Integrity Rules*, 17 VA. J. SOC. POL'Y & L. 404, 436 (2010) (discussing how the LSC rules requiring grantee organizations to create an affiliate for its non-federally funded activities challenges the work of nonprofits "as resources remain scarce"); see also David S. Udell, *Implications of the Legal Services Struggle for Other Government Grants for Lawyering for the Poor*, 25 FORDHAM URB. L.J. 895, 919 (1998) (noting that requiring separate funds for LSC-funded organizations was so burdensome and unmanageable that only one such organization had created an affiliate for that purpose by 1998).

170. See *Rust*, 500 U.S. at 196. It is clear that all government programs increase management and bureaucratization of the public sector. LESTER M. SALAMON, PARTNERS IN PUBLIC SERVICE: GOVERNMENT-NONPROFIT RELATIONS IN THE MODERN WELFARE STATE 107 (1995) ("Government programs therefore often involve more red tape, cumbersome applications requirements, and regulatory control than is common with other forms of financial support."). What is troublesome about requiring recipients to keep their federal funds "physically and financially separate" from their private funds, is that it only *further* increases the bureaucratic burden for the public sector. See 42 C.F.R. § 54.9 (2010).

171. See *supra* note 103 and accompanying text.

could regulate their own funds. As a result, the heavy burden created by requiring organizations to form two separate entities to manage their finances would dissipate. The government would be satisfied knowing that its funds were being used for permitted conduct only, and organizations would rejoice in having the ability to dictate the management of their own budgets.

#### IV. CONCLUSION

The fractured Spending Clause jurisprudence provides little assistance to courts in determining whether a government condition on the receipt of federal funds is unconstitutional. The dissonant conclusions of the courts in *DKT International v. United States Agency for International Development* and *Alliance for Open Society International v. United States Agency for International Development* highlight the inadequacies of the Supreme Court's jurisprudence in this area. Both courts arrived at different conclusions on a seemingly similar question: whether the Policy Requirement of the Leadership Act, which requires organizations to explicitly oppose prostitution to receive federal funds for HIV/AIDS programs, impermissibly violates the First Amendment, and thus, qualifies as an unconstitutional condition. The D.C. Circuit found that the Policy Requirement was not an unconstitutional condition. The Second Circuit disagreed. A careful examination of the legislative history of the Leadership Act demonstrates the strengths of the Second Circuit's holding. As the Supreme Court considers whether or not to accept the case, it would be well advised to uphold the Second Circuit's panel decision. The best fix, however, would be a legislative one—satisfying both Congress and NGOs, while honoring the Constitution and addressing policy concerns.

