



## Agency for International Development v. Alliance for Open Society International, Inc.

570 U.S. \_\_\_\_ (2013)

**Country:** United States

**Region:** Americas

**Year:** 2013

**Court:** Supreme Court

**Health Topics:** Health systems and financing, HIV/AIDS, Sexual and reproductive health

**Human Rights:** Freedom of expression

### Facts

The United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 22 U.S.C. Â§7601 set forth a strategy to globally combat the spread of HIV/AIDS. Congress authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations working in this area.

The Leadership Act's conditions stated that: (1) No funds "may be used to promote or advocate the legalization or practice of prostitution," Â§7631(e); and (2) no funds may be used by an organization "that does not have a policy explicitly opposing prostitution," Â§7631(f). This second condition was known as the Policy Requirement.

The Respondents, a group of US organizations engaged in fighting HIV/AIDS overseas, were recipients of Leadership Act funds. Their work included programs developed to limit injection drug use in Uzbekistan, Tajikistan, and Kyrgyzstan, prevent mother-to-child HIV transmission in Kenya, and promote safer sex practices in India. The Respondents challenged the constitutionality of the Policy Requirement, arguing that adopting a policy firmly opposing prostitution would negatively affect their relationship with certain host governments, and that it would make it more challenging to engage with sex workers in combating HIV/AIDS. As sex workers were a high-risk group for HIV/AIDS, the Policy Requirement could reduce the effectiveness of some of the Respondents' programmes.

The Respondents sought a declaratory judgment that the Policy Requirement violated their First Amendment rights. The District Court issued a preliminary injunction, prohibiting the Government from barring respondents' Leadership Act funding during the litigation or from taking other action as a result of their privately funded speech. The Second Circuit affirmed the decision, holding that the Policy Requirement violated respondents' freedom of speech. The Respondents appealed to the Supreme Court.

### Decision and Reasoning

The Supreme Court affirmed the decision of the Second Circuit. It upheld the first condition of the Leadership Act in Â§7631(e), on the grounds that Congress had the authority to specify the activities it intended to fund. However, it struck down the Policy Requirement, because the Policy Requirement compelled recipients, as a condition of federal funding, to affirm a belief that by its nature could not be confined within the scope of the Government program.

In striking down the Policy Requirement, first, the Court held that the Policy Requirement prima facie violated the First Amendment. The Requirement was a direct regulation mandating that recipients explicitly agree with the Government's policy to oppose prostitution. This plainly violated the First Amendment's prohibition "the government . . . telling people what they must say." The Court relied on precedents holding that "the government may not . . . compel the endorsement of ideas that it approves, and that at the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."

The Court then determined whether or not the Government could nevertheless impose the Policy Requirement as a condition on the receipt of federal funds under the Spending Clause. It noted that the Spending Clause of the U.S. Constitution granted Congress the power to restrict the use of federal funds to ensure they would be used in the way Congress intended, and that if a party objected to limits imposed by

Congress under the Spending Clause, it could choose to decline the funds.

However, in some cases, a funding condition could result in an unconstitutional burden on First Amendment rights. The Court distinguished conditions that defined the limits of the Government's spending program by specifying activities that Congress wanted to subsidize, which were constitutional, from conditions that sought to leverage funding to regulate speech outside the boundaries of the federal program, which were unconstitutional. In this case, the Policy Requirement affected conduct outside the scope of the federally funded program by demanding that funding recipients adopt the Government's view on sex work. As such, it placed an unconstitutional burden on First Amendment rights and was struck down.

### Decision Excerpts

The Policy Requirement mandates that recipients of Leadership Act funds explicitly agree with the Government's policy to oppose prostitution and sex trafficking. It is however, a basic First Amendment principle that "freedom of speech prohibits the government from telling people what they must say." Page

The Leadership Act's other funding condition, which prohibits Leadership Act funds from being used "to promote or advocate the legalization or practice of prostitution or sex trafficking," ensures that federal funds will not be used for prohibited purposes. The Policy Requirement thus must be doing something more "and it is."

The Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government's policy of eradicating prostitution. That condition on funding violates the First Amendment.

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