CONSTITUTIONAL LAW — FIRST AMENDMENT — SECOND CIRCUIT FINDS AFFIRMATIVE SPEECH CONDITION ON LEADERSHIP ACT FUNDS UNCONSTITUTIONAL. — *Alliance for Open Society International v. U.S. Agency for International Development*, 651 F.3d 218 (2d Cir. 2011).

Conditional speech subsidies require courts to balance Congress's broad spending power with the protection of First Amendment rights.[1] Since *Rust v. Sullivan*,[2] the Supreme Court has affirmed the government's right to fund selected viewpoints and to take appropriate steps to ensure its programmatic aims.[3] But the Court has also noted the need for limits on government's ability to condition funding, lest protections on speech become meaningless.[4] Despite inconsistent guidance,[5] lower courts have read *Rust* to sustain conditions that burden First Amendment rights if grantees are left with alternative opportunities for expression.[6] Recently, in *Alliance for Open Society International v. U.S. Agency for International Development*,[7] the Second Circuit addressed another iteration of the subsidized speech inquiry, holding that a condition in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003[8] ("Leadership Act" or "Act") that affirmatively requires grantees to condemn prostitution violated the First Amendment.[9] Though correctly decided, *Alliance*'s focus on the condition's affirmative nature departed from established precedent. The court could have instead noted that the Act impermissibly attached conditions to the recipients of funding themselves, rather than to the government's program — a distinction that not only captures *Alliance*'s normative concerns about attribution but also has a sounder basis in doctrine.

Congress passed the Leadership Act to "strengthen United States leadership" in the global effort against HIV/AIDS.[10] As part of a

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1 *Cf.* South Dakota v. Dole, 483 U.S. 203, 206–08 (1987).

2 500 U.S. 173 (1991) (upholding regulations prohibiting doctors funded by the Title X program from counseling patients about abortion).

3 *Id.* at 179–81, 192–93; *see also, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 211 (2003) (plurality opinion).

4 *See Rust*, 500 U.S. at 199–200; *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1496 (1989) (noting that free speech would be undermined if Congress "could freely use benefits to shift viewpoints").

5 *See, e.g.*, Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 152 (1996) (noting the "haphazard inconsistency" of the Court's decisions on subsidized speech); Sullivan, *supra* note 4, at 1415–16 (finding unconstitutional conditions "a minefield to be traversed gingerly").

6 *See, e.g.*, Velazquez v. Legal Servs. Corp., 164 F.3d 757, 761 (2d Cir. 1999).

7 651 F.3d 218 (2d Cir. 2011).

8 Pub. L. No. 108-25, 117 Stat. 711 (codified at 22 U.S.C. §§ 7601–7682 (2006)).

9 *Alliance*, 651 F.3d at 223–24.

10 § 4, 117 Stat. at 717.

comprehensive strategy targeting the behavioral roots of the disease, § 7631(f) of the Act prohibits funding "any group . . . that does not have a policy explicitly opposing prostitution."[11] In 2005, the U.S. Agency for International Development and the Department of Health and Human Services implemented the provision[12] by requiring recipients to include a statement that opposed prostitution in their award documents.[13] Grantees could establish affiliates that did not adopt the pledge but had to maintain "objective integrity and independence."[14]

Alliance for Open Society International and Pathfinder International, U.S.-based nonprofits, adopted clear antiprostitution policies to qualify for Leadership Act grants.[15] Concerned that the requirement threatened their AIDS outreach efforts, they filed for declaratory and injunctive relief, asserting that § 7631(f) violated their free speech rights by conditioning public funds on their adoption of the government's antiprostitution stance.[16] The district court granted the request for a preliminary injunction, finding the plaintiffs likely to succeed on the merits. It found that the provision was insufficiently tailored, compelled speech, and suppressed viewpoints without ensuring alternative outlets for expression.[17]

The Second Circuit affirmed.[18] Writing for the panel, Judge Parker[19] held that the condition violated the First Amendment by requiring plaintiffs to voice the government's views on prostitution.[20] The court reasoned that the condition's affirmative nature merited heightened scrutiny, for two reasons. First, drawing from a line of compelled speech cases, the Second Circuit reasoned that affirmative conditions are presumptively suspect because individuals are required to endorse

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[11] 22 U.S.C. § 7631(f). The provision exempted U.N. agencies and three international organizations. *Id.* An accompanying prostitution-related clause specifies: "No funds . . . may be used to promote or advocate the legalization or practice of prostitution." *Id.* § 7631(e).

[12] The agencies were initially concerned about the constitutionality of enforcing § 7631(f) against domestic groups but reversed their stance two years later. *Alliance*, 651 F.3d at 225.

[13] 45 C.F.R. § 89.1(b) (2005).

[14] *Id.* § 89.3.

[15] Alliance for Open Soc'y Int'l v. U.S. Agency for Int'l Dev. (*Alliance III*), 570 F. Supp. 2d 533, 538–40 (S.D.N.Y. 2008). The organizations run HIV prevention programs that reduce injection drug use and provide family planning services, respectively. Neither supports prostitution, but both engage at-risk groups, such as prostitutes. *Alliance*, 651 F.3d at 224.

[16] Alliance for Open Soc'y Int'l v. U.S. Agency for Int'l Dev. (*Alliance I*), 430 F. Supp. 2d 222, 229 (S.D.N.Y. 2006). The district court granted the first request for injunctive relief, *id.* at 278, but the Second Circuit remanded for consideration of the curative effects of new agency guidelines on affiliates, Alliance for Open Soc'y Int'l v. U.S. Agency for Int'l Dev. (*Alliance II*), 254 F. App'x, 843, 846 (2d Cir. 2007). The district court again granted the preliminary injunction. *Alliance III*, 570 F. Supp. 2d at 533.

[17] *Alliance III*, 570 F. Supp. 2d at 546–49.

[18] *Alliance*, 651 F.3d at 223–24.

[19] Judge Parker was joined by Judge Pooler.

[20] *Alliance*, 651 F.3d at 223.

a specific, government-mandated position.[21] Second, the court found that the policy requirement "falls well beyond" the restrictive funding conditions previously sustained by the Supreme Court.[22] Indeed, § 7631(f)'s "bold" mandate[23] "did not merely restrict recipients from [speech], . . . but pushe[d] considerably further" by requiring them to "affirmatively *say* something."[24] Recipients could not remain neutral or silent.[25] The court noted that § 7631(f) voiced a controversial position on prostitution's role in AIDS eradication, and thus implicated "matters of public concern . . . at the heart of the First Amendment."[26]

The court then ruled that the policy requirement did not constitute government speech, distinguishing *Rust v. Sullivan*.[27] In *Rust*, the Supreme Court held that the First Amendment's general prohibition on viewpoint discrimination did not apply in the government funding context because Congress could selectively subsidize favored messages.[28] The *Alliance* court noted, however, that doctors in the Title X clinics at issue only had to remain silent, and were not compelled to voice a message antithetical to their personal views.[29] In contrast, the *Alliance* plaintiffs had to present the government's view "as if it were their own."[30] Having identified affirmative, viewpoint-specific conditions as presumptively suspect, the court noted that they might be sustained when "the government's program *is*, in effect, the message."[31] Because § 7631(f) exempted prominent international organizations, the court reasoned that the Act aimed only to fight global AIDS and not to conduct an "anti-prostitution messaging campaign"; permitting Congress to "recast" every subsidiary condition of its program would reduce the First Amendment to a "simple semantic exercise."[32]

The court then examined the availability of nonpledge affiliates and concluded that it had no curative effect, thus finding no "alternative channels for protected expression."[33] Such options are meaning-

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[21] *Id.* at 234–35 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) (invalidating legislation that expelled students who refused to salute the flag); Wooley v. Maynard, 430 U.S. 705, 714–17 (1977) (invalidating statute that required citizens to display state motto on license plates to use public roads)).

[22] *Id.* at 234; *see also, e.g.*, Rust v. Sullivan, 500 U.S. 173, 179–81, 192–93 (1991); Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983) (upholding statute that withheld tax exemptions from lobbying organizations).

[23] *Alliance*, 651 F.3d at 236.

[24] *Id.* at 234.

[25] *Id.*

[26] *Id.* at 236.

[27] *Id.* at 236–37.

[28] Rust v. Sullivan, 500 U.S. 173, 198–200 (1991).

[29] *Alliance*, 651 F.3d at 237 (citing *Rust*, 500 U.S. at 200).

[30] *Id.*

[31] *Id.*

[32] *Id.* at 238 (quoting Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547 (2001)).

[33] *Id.* at 239 (internal quotation mark omitted).

less as long as the affirmative requirement remains intact: in prior cases, the existence of alternative channels allowed a silenced group to voice its true opinions outside the scope of the government's program; here, the ability to form nonpledge affiliates merely "provid[ed] an outlet to do nothing at all."[34] Indeed, it "simply does not make sense" to remedy a compelled speech condition with an "outlet to engage in privately funded *silence*."[35]

Judge Straub dissented, finding heightened scrutiny unwarranted and arguing that the majority misapplied the unconstitutional conditions doctrine.[36] A funding condition is impermissible when it imposes one of two burdens: first, when it penalizes the exercise of First Amendment rights, and second, when it aims to suppress certain viewpoints.[37] The policy requirement in this case, he maintained, does neither. First, Congress did not penalize plaintiffs' speech by withholding preexisting benefits, but rather created specific grants integral to a government program.[38] Second, the condition is noncoercive: plaintiffs could have declined the grant, but instead chose to adopt the pledge in "voluntary receipt" of funds.[39] The dissent further questioned the court's reliance on the condition's affirmative nature, finding no constitutional distinction between coerced and restrained speech.[40] Rather, Judge Straub argued, the policy requirement was a simple case of government speech. The condition advanced the substantive goals of the Act, as Congress aimed to fight AIDS "in a particular way" by partnering with antiprostitution groups.[41] The availability of nonpledge affiliates also enabled grantees to air their own views with private funds.[42] Thus, Judge Straub found § 7631(f) patently constitutional: the government conveyed its own message and restricted views only within the parameters of its defined program.[43]

The *Alliance* court's rationale for applying heightened scrutiny rested on a problematic distinction between affirmative and negative speech conditions, a construct that has limited foundation in doctrine. Rather, the court could have premised its decision on the fact that the Leadership Act regulated recipients themselves, and not merely the efficacy of Congress's program. Because this distinction is grounded in established precedent, reliance on it would have avoided further com-

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[34] *Id.*
[35] *Id.*
[36] *Id.* at 240 (Straub, J., dissenting).
[37] *Id.* at 246 (citing Regan v. Taxation With Representation, 461 U.S. 540, 545, 548 (1983)).
[38] *Id.* at 260.
[39] *Id.* at 254.
[40] *Id.* at 255–58.
[41] *Id.* at 263.
[42] *Id.*
[43] *Id.*

plicating the difficult inquiry associated with subsidized speech cases.[44] Further, the approach would have captured the *Alliance* court's central concern — that the government's message, implemented through an affirmative speech condition, would be perceived mistakenly as an individual's speech.

In dismissing the minimal review of funding conditions applied in *Rust*, the court relied on the normative intuition that positive requirements are more intrusive, "push[ing] considerably further" than targeted prohibitions. But the doctrinal basis for this argument in First Amendment jurisprudence is tenuous at best. Though the Supreme Court has sometimes hinted at a difference between compulsion and silence,[45] its actual holdings do not bear out such a distinction.[46] Indeed, in recent cases, the Supreme Court has found that, in the context of protected speech, the "difference between compelled speech and compelled silence . . . is without constitutional significance."[47] Because positive and negative mandates equally offend the First Amendment, *Alliance*'s introduction of this distinction into the subsidy context has questionable doctrinal foundation.

The court's attempt to recharacterize the coercive requirements invalidated in *Wooley v. Maynard*[48] and *West Virginia State Board of Education v. Barnette*[49] as funding conditions is similarly inapposite. In both cases, the government conditioned the receipt of vital public benefits (access to public roads and public education) on speech (displaying the state motto and saluting the flag).[50] Given the necessity of these services, the state used its monopoly over public benefits to coercive effect, as individuals had no realistic alternative but to relinquish their First Amendment rights.[51] In contrast, the funding at issue in *Alliance*, though helpful, did not threaten grantees' operations if withheld.[52] Because § 7631(f) offered nonprofits a realistic opportunity to

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[44] The program-grantee test is useful across multiple contexts, while *Alliance*'s construct is limited to speech. Given the inconsistency of current doctrine, *see* sources cited *supra* note 5, the fact that *Alliance*'s test adds a new analytical element makes the task of creating a coherent unconstitutional conditions jurisprudence, applicable across different clauses, even more difficult.

[45] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) (finding that compulsion requires "more immediate and urgent grounds than silence").

[46] *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components . . . ."); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (equating both compelled speech and forced silence as impermissible regulations of speech).

[47] Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796 (1988).

[48] 430 U.S. 705.

[49] 319 U.S. 624.

[50] *See Wooley*, 430 U.S. at 715; *Barnette*, 319 U.S. at 639.

[51] *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557 (2005) (describing *Barnette* as a case that involved the "outright compulsion of speech").

[52] Indeed, neither the majority nor the dissent contended that the condition was coercive. *Compare Alliance*, 651 F.3d at 234 n.3, *with id.* at 248–49 (Straub, J., dissenting).

refuse government funds, it did not rise to the level of coercion that constitutes a direct regulation of speech.

The Second Circuit's approach not only struggles to find solid doctrinal footing, but also conflicts with established precedent on government speech. Indeed, despite holding that affirmative funding conditions triggered heightened scrutiny, the *Alliance* court created an exception for government messages, asserting that affirmative, viewpoint-targeted conditions could be permitted when "the government's program *is* . . . the message."[53] It is possible that the court intended to articulate a strict nexus analysis,[54] mandating a perfect correlation between the affirmative condition and the government's purpose. In the subsidy context, however, the Supreme Court has resisted such least-restrictive-means analyses as inappropriately limiting Congress's wide latitude to set spending priorities.[55] One could also interpret the statement as an exception to a general rule, exempting the sphere of programmatic messages from an otherwise categorical ban against affirmative conditions. But the *Alliance* court offered no justification for such an exemption, and its qualification seemed born of convenience rather than of clear purpose.

Instead of constructing a new test, the court could have adopted the framework outlined in *Rust v. Sullivan*, which articulated a distinction between permissible restrictions on "programs" and impermissible conditions on "grantee[s]."[56] *Rust*'s test set clear principles: Congress could legitimately design conditions to ensure the integrity of its programs; those conditions, however, could not prohibit a grantee from engaging in protected conduct outside the program's scope.[57] By inference, Congress similarly could not condition a government benefit on a grantee's own ideological views.[58] In subsequent cases, the Supreme Court has underscored the program-grantee distinction by basing the permissibility of speech-restrictive funding conditions on the government's intent.[59] For example, if the government intended to foster a diversity of views by private speakers, it could protect its programmatic aims only by policing the boundaries of its created forum,

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[53] *Id.* at 237 (majority opinion).

[54] *See* South Dakota v. Dole, 483 U.S. 203, 207–09 (1987) (articulating the nexus prong).

[55] *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 211–12 (2003); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998); *Dole*, 483 U.S. at 208–09.

[56] *See* 500 U.S. 173, 196 (1991).

[57] *Id.* at 193–94. The "adequate alternative channels" test also captures this principle.

[58] *See id.*; *cf.* Elrod v. Burns, 427 U.S. 347, 349–50 (1976) (holding that the benefit of public employment cannot be withheld based on political affiliation).

[59] *See, e.g.*, *Am. Library Ass'n*, 539 U.S. at 211 (noting that the condition merely defined a government program's limits); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–30 (1995).

and not by selecting the forum's speakers.[60] With this test, the Court gave Congress almost absolute deference within the bounds of its programs, respecting Congress's broad spending powers, and it also defined a clear limit to government's regulation of speech.

The program-grantee test also captures the *Alliance* court's intuition that affirmative speech conditions may improperly cause a government message to be attributed to a private speaker. Indeed, the distinction provides greater administrative ease in determining attribution[61]: by permitting conditions only on programs but not on recipients, the analysis clarifies *whose* message is transmitted. As such, the distinction addresses the two normative concerns of government subsidy cases. First, when a message is recognized as government speech and not attributed to the individual, it is hard for a recipient to argue that her First Amendment rights have been impinged. Second, when the public recognizes that it is the government speaking, that message will have less of a distorting effect on the "marketplace of ideas,"[62] and the government can be held accountable for its message.[63]

Had the *Alliance* court adopted the program-grantee framework, it would have found strong arguments for applying heightened scrutiny. Indeed, § 7631(f)'s policy requirement fails both formal and functional aspects of the test. Formally, § 7631(f) conditions government funds on the recipient itself, prohibiting support for "any *group* . . . [without] a policy explicitly opposing prostitution."[64] Grant recipients had to adopt clear antiprostitution policies in their funding documents — materials distributed to potential donors — and in doing so, changed how they represented themselves to the public.[65] By turning receipt on the grantee's ideological status, the condition reaches outside the scope of the Leadership Act's program, rendering it impossible for recipients to separate privately funded from publicly funded activities.

Functionally, § 7631(f)'s mandate not only has minimal effect on the government's ability to control public funds, but also raises serious attributional concerns. To the first, Congress could have policed the

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[60] *See Rosenberger*, 515 U.S. at 834 (invalidating a public university's decision to withhold funds meant to support student publications from religious, but not secular, groups).

[61] *See, e.g.*, Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1480–85 (2001) (identifying attribution as the most relevant inquiry in unconstitutional conditions analysis); Post, *supra* note 5, at 152–53 (distinguishing conditions that affect the "democratic social domain" from those that implicate the "managerial domain").

[62] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) (fearing that "[g]overnment may effectively drive certain ideas or viewpoints from the marketplace").

[63] *See, e.g.*, Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132 (2009).

[64] 22 U.S.C. § 7631(f) (2006) (emphasis added). In contrast, *Rust*'s funding restriction was placed on the program, not the recipient. *See* 42 U.S.C. § 300a-6 (2006). Doctors could not offer counsel on abortion in Title X clinics, but could do so elsewhere. *See Rust*, 500 U.S. at 194.

[65] *See* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) (finding that charitable solicitation involves communication and advocacy protected by the First Amendment).

efficacy of its antiprostitution message using the programmatic restrictions in § 7631(e), which prohibit the use of funds to "promote or advocate the legalization or practice of prostitution."[66] *Alliance*'s plaintiffs did not condone prostitution;[67] moreover, while they did adopt the policy requirement two years after the Leadership Act's enactment, their previous noncompliance had not caused demonstrable harm.[68] To the concern about attribution, the Leadership Act repeatedly recognizes the involvement of "private sector efforts" as critical to its objectives.[69] Though Congress may have intended, as the *Alliance* dissent noted, to fight AIDS "in a particular way,"[70] § 7631(f) nonetheless arrogated the voices of organizations ordinarily understood to speak on their own behalf.[71] Thus, when a nonprofit speaks without reference to the Leadership Act, it would be difficult for a reasonable observer to properly attribute that speech to the government. By hiding the government's hand from the public, § 7631(f) undermines accountability in a way that is at odds with Supreme Court authority.[72]

The *Alliance* court's preoccupation with § 7631(f)'s affirmative nature may well have been a misguided attempt to find a framework that would capture its well-founded concerns about attribution. To that end, the court's decision may have turned less on the fact that § 7631(f) required that plaintiffs "*affirmatively* say something,"[73] and more on the fact that grantees had to represent the government's view "as if it were their own."[74] Indeed, *Alliance*'s distinction between affirmative and negative conditions may often overlap with the program-grantee framework: because individuals are judged by what they say, an affirmative speech condition can brand a grant recipient in a way that a restrictive condition cannot. But the *Alliance* court's approach was unnecessary in light of its normative aims, and its experiment confounds, rather than clarifies, the doctrine on subsidized speech.

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[66] 22 U.S.C. § 7631(e).

[67] *Alliance*, 651 F.3d at 224.

[68] The agencies failed to argue that nonenforcement of § 7631(f) had threatened the Act's efficacy, an omission noted by the plaintiffs. *See* Brief for Petitioner-Appellant at 40, *Alliance*, 651 F.3d 218 (No. 08-4917-cv).

[69] 22 U.S.C. § 7603(4); *see also id.* §§ 7601(18), 7601(22)(F), 7621(b)(1), 7654(b)(7).

[70] *Alliance*, 651 F.3d at 263 (Straub, J., dissenting).

[71] *Cf.* Legal Servs. Corp. v. Velazquez, 531 U.S. 535, 544 (2001) (rejecting restrictive conditions when the program presumes private, nongovernmental speech). *But see* DKT Int'l v. U.S. Agency for Int'l Dev., 477 F.3d 758, 763 (D.C. Cir. 2007) (sustaining § 7631(f)'s affirmative condition as a valid exercise of government speech).

[72] In *Rust*, patients knew that Title X clinics offered only preventative care. Doctors thus not only acted as the government's agents, but also were viewed as such. *See* Rust v. Sullivan, 500 U.S. 173, 200 (1991).

[73] *Alliance*, 651 F.3d at 234 (emphasis altered).

[74] *Id.* at 237.