First Amendment — Freedom of Speech — Unconstitutional Conditions — Agency for International Development v. Alliance for Open Society International, Inc.

In its unconstitutional conditions cases, the Supreme Court has often examined the constitutionality of speech restrictions imposed as a condition of government funding. The Court has had less occasion to consider affirmative speech requirements. Last Term in *Agency for International Development v. Alliance for Open Society International, Inc.*[1] (*AID*), the Court held that the government could not condition receipt of AIDS-related funding on recipients' adoption of a policy opposing prostitution: the requirement, by its nature, violated the First Amendment by regulating private activity outside the scope of the government's program.[2] While at first glance this holding seems to apply quite broadly to affirmative speech conditions, the Court's opinion relied on several factual considerations that limit the holding and may serve to distinguish other, permissible speech requirements.

In his 2003 State of the Union address, President George W. Bush proposed an "Emergency Plan for AIDS Relief" and asked Congress to provide fifteen billion dollars in funding.[3] Congress responded by passing the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003[4] (Leadership Act). The legislation reflected Congress's view that "behavior change (including the promotion of abstinence, faithfulness, the delay of 'sexual debut,' and the effective use of condoms) [is] the foundation of efforts to fight AIDS."[5] Congress also found that prostitution was a form of "sexual victimization" contributing to the AIDS epidemic and that the United States should seek to eradicate such practices.[6] The Leadership Act therefore required that no funds be used to advocate for the legalization of prostitution.[7] It further required that groups receiving funds adopt a policy explicitly opposed to prostitution (the "policy requirement").[8]

Many nongovernmental organizations (NGOs) disliked the policy requirement, which they thought would make prostitutes less likely to

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[1] 133 S. Ct. 2321 (2013).

[2] *See id.* at 2332.

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

[4] Pub. L. No. 108-25, 117 Stat. 711 (codified in scattered sections of 22 and 26 U.S.C.).

[5] H.R. REP. NO. 108-60, at 26 (2003).

[6] 22 U.S.C. § 7601(23) (2012) (congressional findings).

[7] *Id.* § 7631(e).

[8] *Id.* § 7631(f). The provision exempted U.N. agencies, the World Health Organization, the International AIDS Vaccine Initiative, and the Global Fund to Fight AIDS, Tuberculosis and Malaria. *Id.*

trust them and have a chilling effect on their work with prostitutes.[9] One NGO, the Alliance for Open Society International, Inc. (AOSI),[10] filed a declaratory judgment suit against the U.S. Agency for International Development (USAID).[11] AOSI argued that the government could not constitutionally require it to adopt a policy opposing prostitution and sought a preliminary injunction against USAID's implementation of the policy requirement.[12] The government justified the policy requirement as a legitimate exercise of Congress's spending power and argued that AOSI was free to decline the funds if it did not want to abide by Congress's conditions.[13] Judge Marrero of the Southern District of New York agreed with AOSI and granted the preliminary injunction.[14] He observed that NGOs play an important role in the untrammeled public discourse protected by the First Amendment.[15] And unlike permissible funding conditions, the policy requirement did not provide private organizations with "alternate channels" for protected speech outside the scope of the government program.[16]

The government responded by attempting to provide such alternate channels: it issued guidelines[17] that exempted organizations affiliated with funding recipients, but remaining separate from them, from the policy requirement.[18] The Second Circuit remanded the case and ordered the district court to reconsider the preliminary injunction in light

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[9] *See, e.g.*, Letter from AIDS Law Project, Wits Univ., S. Afr. et al., to President George W. Bush (May 19, 2005), *available at* http://www.hrw.org/news/2005/05/17/us-restrictive-policies-undermine-anti-aids-efforts.

[10] AOSI belongs to a network of nonprofits founded by billionaire philanthropist George Soros. *See* Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev. (*Alliance I*), 430 F. Supp. 2d 222, 230 (S.D.N.Y. 2006). The term "Open Society" originates in the political philosophy of Karl Popper, who influenced Soros. *See* MALACHI HAIM HACOHEN, KARL POPPER — THE FORMATIVE YEARS, 1902–1945, at 548–49 (2000).

[11] *See Alliance I*, 430 F. Supp. 2d at 237–38. AOSI's coplaintiffs were affiliated organizations that feared that their funding would be threatened by AOSI's activities. AOSI joined the Department of Health and Human Services and the Centers for Disease Control and Prevention as codefendants. *See id.* at 230–31, 238.

[12] *See id.* at 238. USAID initially hesitated to apply the policy requirement to U.S. NGOs because of Department of Justice (DOJ) concerns about the provision's constitutionality; however, DOJ later reversed course and allowed USAID to implement the law. *See id.* at 234.

[13] *See id.* at 251.

[14] *See id.* at 278.

[15] *See id.* at 262–63.

[16] *See id.* at 261–62.

[17] 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).

[18] As initially formulated, the guidelines required legal, physical, and financial separation. *See id.* at 41,076. Before the guidelines were codified at 45 C.F.R. § 89.3, the government softened the separateness requirement: separateness was to be decided using a multifactor test that balanced elements of the organizations' physical, financial, and structural independence instead of requiring all three. *See AID*, 133 S. Ct. at 2326–27.

of the new guidelines.[19] On remand, the government argued that the guidelines satisfied the First Amendment by giving NGOs alternate channels for their expression.[20] Judge Marrero rejected the government's arguments and extended the preliminary injunction.[21]

The Second Circuit affirmed.[22] Writing for the panel, Judge Parker[23] held that the policy requirement warranted heightened scrutiny for two reasons. First, it *compelled* funding recipients to speak against prostitution; the Supreme Court had applied rational basis review only to statutes conditioning funds on a promise *not* to speak.[24] Second, the policy requirement engaged in suspect viewpoint discrimination on a matter of international debate.[25] Judge Parker also rejected the idea that the provision was government speech: eliminating prostitution was tangential to the Act's purpose of fighting disease, and Congress could easily evade the First Amendment if it had the power to compel recipients to agree with it on every subsidiary issue.[26] Judge Straub wrote a lengthy dissent, arguing that the Leadership Act neither penalizes free speech nor suppresses pro-prostitution viewpoints,[27] but rather advances the government's message about the appropriate way to combat AIDS.[28] The Second Circuit denied rehearing en banc; Judge Cabranes dissented, arguing that the majority had inappropriately focused on the distinction between affirmative and negative speech conditions and noting that the opinion had created a split with the D.C. Circuit.[29]

The Supreme Court affirmed. Writing for the majority, the Chief Justice[30] began by noting that the policy requirement would be plainly impermissible as a direct regulation; the question was whether it could

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

20 *See* Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev. (*Alliance III*), 570 F. Supp. 2d 533, 548 (S.D.N.Y. 2008).

21 *See id.* at 550. Finding that the new guidelines "require more separation [between a recipient and its exempt affiliates] than is reasonably necessary to satisfy the Government's legitimate interest," Judge Marrero concluded that they were not narrowly tailored. *Id.* at 549.

22 Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev. (*Alliance IV*), 651 F.3d 218, 240 (2d Cir. 2011).

23 Judge Parker was joined by Judge Pooler.

24 *See Alliance IV*, 651 F.3d at 234.

25 *See id.* at 235–36.

26 *See id.* at 237–38.

27 *See id.* at 254 (Straub, J., dissenting).

28 *See id.* at 263.

29 Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev. (*Alliance V*), 678 F.3d 127, 129–30 (2d Cir. 2012) (Cabranes, J., dissenting from denial of rehearing en banc) (citing DKT Int'l, Inc. v. U.S. Agency for Int'l Dev., 477 F.3d 758 (D.C. Cir. 2007)); *see also* Recent Case, 125 HARV. L. REV. 1506, 1509–10 (2012) (arguing that the Second Circuit should not have relied on the distinction between affirmative and negative speech conditions). Judge Cabranes was joined by Judges Raggi and Livingston.

30 The Chief Justice was joined by Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor. Justice Kagan had recused herself. *AID*, 133 S. Ct. at 2324.

be imposed as a funding condition.[31] While Congress may attach conditions to federal funds to ensure that the funds are spent properly, such conditions can sometimes produce "an unconstitutional burden on First Amendment rights."[32] The line separating constitutional and unconstitutional conditions "is between conditions that define the limits of the government spending program — those that specify the activities Congress wants to subsidize — and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."[33] The Court warned that the government may not manipulate this rule by merely redefining a program's scope to include a condition it seeks to uphold.[34]

The Chief Justice grounded this rule in the Court's prior cases. He relied primarily on the reasoning of *Regan v. Taxation with Representation of Washington*,[35] *FCC v. League of Women Voters of California*,[36] and *Rust v. Sullivan*.[37] In *Regan*, the Court considered a statute allowing nonprofits to receive tax-deductible contributions only if they abstained from lobbying.[38] The *Regan* Court upheld the rule as a permissible subsidy: it noted that a nonprofit could simply create a separate organization for its lobbying activities while preserving the tax benefits for its nonlobbying activities.[39] That is, Congress could benefit nonlobbying activities so long as it did not leverage those benefits to inhibit all lobbying by the nonprofit. In *League of Women Voters*, the Court held that Congress could not condition public television grants on a promise not to editorialize.[40] Such a rule would have allowed Congress to leverage its funding to prohibit all editorializing, even if federal funding represented only one percent of a station's budget.[41] In *Rust*, the Court upheld a law that prohibited doctors providing federally funded family-planning services from offering abortion advice except in physically separate clinics not funded by the

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[31] *Id.* at 2327.

[32] *Id.* at 2328.

[33] *Id.* The Court's articulation of the antileveraging principle here is more expansive than the one the Chief Justice has applied in the federalism context. *Cf.* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 864 (2013) (arguing that to be unconstitutional under Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), a condition must (1) be attached to a large spending program, (2) change the terms of an entrenched program, and (3) package separate programs in one take-it-or-leave-it deal).

[34] *See AID*, 133 S. Ct. at 2328.

[35] 461 U.S. 540 (1983).

[36] 468 U.S. 364 (1984).

[37] 500 U.S. 173 (1991).

[38] *See Regan*, 461 U.S. at 543.

[39] *See AID*, 133 S. Ct. at 2328–29 (citing *Regan*, 461 U.S. at 544).

[40] *See id.* at 2329 (citing *League of Women Voters*, 468 U.S. at 399–401).

[41] *See id.* (citing *League of Women Voters*, 468 U.S. at 400).

federal government.[42] *Rust*, the Chief Justice explained, elaborated on *Regan* and *League of Women Voters* by clarifying that Congress may impose speech limitations designed to ensure that funds are used only within the scope of a government program, but may not limit the recipient's speech outside the program.[43]

Applying this rule to the Leadership Act, the Court held that the policy requirement was unconstitutional.[44] In the Court's view, the government had conceded that the policy requirement was unnecessary to ensure that its funds were properly used.[45] The Chief Justice rejected the dissent's argument that the provision merely served to select partners who, sharing the government's goals, would most faithfully strive to achieve them. Rather, the provision was a means by which the government could compel NGOs seeking government funding to adopt its point of view.[46] Such a provision, the Court said, exceeds the scope of the government program "by its very nature" — having publicly espoused the government's position, the NGO could not then adopt a contrary position "on its own time and dime."[47] The Court rejected the government's argument that, because money is fungible, the policy requirement was necessary to ensure that recipients would not simply use government funds to free up private funds for pro-prostitution advocacy.[48] Such arguments, the Court reasoned, were inconsistent with its cases.[49]

Justice Scalia dissented.[50] He noted that government by its nature discriminates among viewpoints: it must pick and choose between competing policies.[51] And the government could, if it wanted, choose only those who agreed with its policy choices to implement those policies. For example, because one of the purposes of foreign aid is to foster goodwill, the government could lawfully decline to hire Hamas (which promotes anti-Americanism but is good at delivering welfare) to distribute U.S. food aid.[52] The First Amendment, in Justice Scalia's view, does not prohibit the government from taking sides, but from coercing

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[42] *See AID*, 133 S. Ct. at 2329 (citing *Rust*, 500 U.S. at 178).

[43] *See id.* at 2329–30.

[44] *Id.* at 2330. Unlike the Second Circuit, the Court did not discuss the level of scrutiny appropriate for analyzing the policy requirement's constitutionality.

[45] *See id.*

[46] *See id.*

[47] *Id.* The Court thus implied that the government could never condition funding on the profession of a particular belief.

[48] The government cited *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), for this principle. *See AID*, 133 S. Ct. at 2331 (citing *Holder*, 130 S. Ct. at 2725–26). The Court distinguished *Holder* by observing that there, unlike in *AID*, there was evidence of the fungibility of money in the record. *See id.*

[49] *See AID*, 133 S. Ct. at 2331.

[50] Justice Scalia was joined by Justice Thomas.

[51] *AID*, 133 S. Ct. at 2332 (Scalia, J., dissenting).

[52] *Id.*

speech or silence.[53] Although Justice Scalia doubted that the constitutionality of a condition attached to a minor spending program like the Leadership Act hinges on whether the condition is relevant to the government's objectives, the condition in this case was very relevant: the government believed that prostitution contributed to the spread of HIV, and it wanted to work only with groups that opposed prostitution and thus could not undermine its objectives.[54]

Justice Scalia also took issue with the Court's handling of its precedents. He criticized the majority for seizing on *Rust*'s distinction between conditions on speech inside a program and conditions on speech outside it.[55] That distinction, Justice Scalia argued, matters only in cases where the government wants to stay neutral and ensure that its funds are not used for controversial speech. Where the government has set a particular policy objective, funding recipients who speak out against the objective frustrate the government's goals even if their speech falls outside the spending program.[56] The dissent further criticized the Court for making a "head-fake at the unconstitutional conditions doctrine"; it observed that conditions have been held unconstitutional only when they either are irrelevant to the statute's purpose or give rise to an independent constitutional violation.[57] Justice Scalia argued that when the government commands adoption of a belief as a condition of funding, it is "like King Cnut's commanding of the tides": so long as potential recipients remain free to decline government funds, the government has no more control over them than it does over the seas.[58] Because he saw no constitutional distinction between selecting recipients based on ideological criteria and requiring recipients to commit to particular viewpoints, Justice Scalia predicted that *AID* would lead to numerous challenges to existing selection criteria.[59]

Notwithstanding the dissent's dire prediction, *AID* may have only a limited impact on other spending programs requiring affirmative speech by funding recipients. The majority's reasoning depended on three important factual predicates. First, the Court interpreted the Leadership Act to require that recipients present the government's views as their own private expression, not that recipients deliver government speech. Second, the Court thought that the policy requirement, by demanding the adoption of belief, was distinct from mere selection criteria. Third, the Court found no evidence that AOSI and

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[53] *Id.* at 2333.
[54] *Id.*
[55] *See id.*
[56] *See id.*
[57] *Id.* at 2334.
[58] *Id.* at 2335.
[59] *Id.*

other NGOs would use Leadership Act funding to free up private money for activities contrary to the government's policies. The fact-intensive nature of *AID*'s holding gives the government a chance to distinguish the case and to protect its ability to impose affirmative speech requirements on funding recipients.

The policy requirement in *AID* was objectionable because it required recipients to adopt the government's beliefs "as their own"[60] — AOSI's statements about its own policy were private speech, not government speech.[61] *AID* did not hold that the government may never require recipients to make affirmative statements; such a holding would have been inconsistent with the Court's government speech cases. Under the government speech doctrine, the government may take sides on public issues even "when it receives assistance from private sources for the purpose of delivering a government-controlled message."[62] The Court has explained *Rust* using this principle[63]: In *Rust*, Congress had prohibited doctors providing federally funded family-planning services from providing abortion advice.[64] Because the doctors delivered the government's message, not their own, the condition was perfectly constitutional; Congress may "regulate the content of what is or is not expressed" when a private entity speaks for the government.[65] Congress has the power to compel its agents to stay on message.[66]

AID's holding therefore has no effect when a funding recipient speaks for the government rather than for itself. The boundary between government speech and private speech remains inexact,[67] but the Court has tended to find government speech when the government

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[60] *Id.* at 2330 (majority opinion).

[61] This point was sufficiently obvious that the Court devoted a mere three words to it. *See id.* At first glance, it is curious that the dissent did not press the idea that the policy requirement was government speech — many of Justice Scalia's policy arguments evoke the government speech cases. *Compare id.* at 2332 (Scalia, J., dissenting) ("Government must choose between rival ideas and adopt some as its own . . . ."), *with* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009) ("A government entity has the right . . . to select the views that it wants to express."). However, Justice Scalia has previously resisted the Court's attempt to explain its unconstitutional conditions cases using government speech. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 554 (2001) (Scalia, J., dissenting). Rather, his view is that any relevant, noncoercive condition is constitutional even if it affects private speech. *See AID*, 133 S. Ct. at 2334 (Scalia, J., dissenting).

[62] *Summum*, 129 S. Ct. at 1131.

[63] *Velazquez*, 531 U.S. at 541–42.

[64] *See* Rust v. Sullivan, 500 U.S. 173, 178–80 (1991).

[65] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

[66] *Cf.* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . . .").

[67] *See* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 598–99 (2008) (surveying tests developed by scholars to distinguish private speech from government speech); Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 379–400 (2009) (contrasting the Sixth Circuit's "single-factor test" with the "four-factor test" applied by other circuits).

has ultimate control over the content of the message. The government's leading role is often obvious in such cases, for example when a government employee speaks within the scope of his employment,[68] or when the government selects monuments for display in a public park.[69] But the government may also operate behind the scenes: the Court found that advertisements attributed to "America's Beef Producers" were government speech because the Secretary of Agriculture had final say over the publicity campaign.[70] When the government supplies the message and oversees its delivery, funding recipients may still be required to speak that message so long as they are not forced to affirmatively misrepresent its source.

Even where a funding recipient's message is its own, and not the government's, *AID*'s holding prohibits the government only from imposing an "ongoing condition," not from employing a "selection criterion."[71] Past cases have imposed restrictions on funding selection criteria only in certain circumstances with no clear application to cases like *AID*. For example, funding programs may give rise to a limited public forum (within which the government may not discriminate by viewpoint) when the government intends to fund a diverse array of private speech.[72] The same can hardly be said where Congress has staked out a particular policy position, as it did in the Leadership Act. *National Endowment for the Arts v. Finley*,[73] in which the Court held that the National Endowment for the Arts (NEA) may consider decency in distributing federal arts grants,[74] came nearer to *AID*'s facts: Congress did not intend the NEA to fund all comers, but to provide subsidies only for aesthetically worthy projects.[75] Dictum in *Finley* did admit that denial of funding based on "invidious viewpoint discrimination" could give rise to a constitutional violation,[76] but the Court was also careful to point out that the First Amendment did not mandate viewpoint neutrality and that the government could make aesthetic judgments.[77] And in *Finley*, the Court did not have before it a case where, as in *AID*, the government had chosen to make a particular ideological statement.

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[68] *See Garcetti*, 547 U.S. at 421.

[69] *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132–34 (2009).

[70] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 561, 564–65 (2005). This tagline might have given rise to a constitutional violation if it had affirmatively attributed the advertisements to someone other than the government, but the Court found no evidence on the record that "America's Beef Producers" referred to any nongovernmental group. *See id.* at 565–66.

[71] *AID*, 133 S. Ct. at 2330.

[72] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–31 (1995).

[73] 524 U.S. 569 (1998).

[74] *See id.* at 582–83.

[75] *See id.* at 586.

[76] *Id.* at 587.

[77] *See id.* at 585.

Never has the Court struck down a selection criterion designed to ensure that private funds did not undermine a message Congress has chosen to send — and the Chief Justice explicitly distinguished the policy requirement in *AID* from such a criterion.[78] An established corollary to the government speech doctrine is that government may keep its message from being "garbled" or "distorted" by a private messenger.[79] The Court could have retreated from this principle in *AID* but instead relied on the facts of the case to sidestep the issue of selection criteria entirely.[80] Three pieces of evidence led the Court to conclude that the policy requirement was more than a selection criterion: (1) a USAID document stating that violations of the policy requirement might lead to termination of an existing award,[81] (2) the government's statement in its brief that it "wants recipients *to adopt*" its view of prostitution,[82] and (3) the government's statement that another provision of the Leadership Act sufficed to ensure that funds would not be used to promote the legalization of prostitution.[83] Had the government framed the policy requirement as a selection criterion, the Court would have had to overcome additional obstacles on the way to overturning it: not only would the Court have had to break new ground by venturing beyond *Finley*, but it would also have had to deny government the ability to choose ideologically compatible agents, making the First Amendment an impediment to effective governance.[84]

The Court also rejected on factual grounds the government's argument that, even if the policy requirement was unnecessary to ensure that recipients did not misappropriate *public* funds, it was necessary to ensure that Leadership Act funds did not merely free up *private* funds for prohibited activities.[85] The Chief Justice expressed concern that the government's argument, if it always held, would undermine cases like *League of Women Voters*.[86] The Court therefore might have rejected this argument out of hand and held that the unconstitutional conditions doctrine entitles funding recipients to "us[e] private funds in

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[78] *See AID*, 133 S. Ct. at 2332.

[79] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

[80] The Court emphasized that *AID* was "not about the Government's ability to enlist the assistance of those with whom it already agrees." *AID*, 133 S. Ct. at 2330.

[81] *See id.* at 2330 (citing U.S. AGENCY FOR INT'L DEV., AAPD 12-04, IMPLEMENTATION OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS AND MALARIA ACT OF 2003, AS AMENDED 12 (2012)).

[82] *Id.* (quoting Brief for the Petitioners at 32, *AID*, 133 S. Ct. 2321 (No. 12-10) (emphasis added)).

[83] *See id.* (citing Brief for the Petitioners, *supra* note 82, at 26–27).

[84] The D.C. Circuit panel that unanimously upheld the policy requirement made the latter point. *See* DKT Int'l, Inc. v. U.S. Agency for Int'l Dev., 477 F.3d 758, 762–63 (D.C. Cir. 2007). It is telling that the Court left that aspect of the D.C. Circuit's reasoning untouched and instead abrogated the panel's view that the requirement was a selection criterion.

[85] *See AID*, 133 S. Ct. at 2331.

[86] *Id.*

a way that would undermine [a] federal program"[87] so long as they do not misuse public funds. Significantly, however, the Court found a lack of evidence on the record that Leadership Act funds tended to displace private funds[88] — suggesting that the fungibility-of-money argument remains viable when proven. In the future, the government might sidestep *AID* by introducing evidence that recipients tend to use government money to displace existing funds and to pursue improper goals.[89]

Relying on these factual considerations, the Chief Justice crafted a minimalist opinion that maintained a tight focus on the case before the Court.[90] *AID* exemplifies many of the benefits of minimalism as well as one of its drawbacks. During oral argument, the Justices considered several hypothetical funding conditions.[91] The Court's cautious approach meant that it did not have to rule on such hypotheticals, reducing the risk that the Court would reach outcomes it might later regret.[92] Such caution could better accommodate the views of *AID*'s ideologically diverse six-Justice majority.[93] It even made some room for the dissent's views: by ruling narrowly, the Court ensured that future cases might vindicate Justice Scalia's argument that the government may prefer ideologically compatible partners.[94] But as Justice Scalia pointed out, the Court's cautious decision might raise the costs for lower courts, which must decide issues that *AID* reserved.[95]

Despite a few sweeping statements about the unconstitutionality of compelled speech, the Court's opinion in *AID* hewed closely to the facts of the case in striking down the policy requirement. The Chief Justice's minimalist approach thus provides the government many opportunities to distinguish *AID* and to argue the constitutionality of other affirmative speech conditions attached to government funding.

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87 *Id.* at 2332.

88 *See id.* at 2331.

89 In *Holder*, congressional findings and an affidavit by a State Department official sufficed to establish such displacement within certain international terrorist organizations. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724–27 (2010). It seems likely that additional evidence would be required outside the national security context, where the Court has given legislative findings special deference. *See id.* at 2727.

90 *See generally* Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (providing a classic account of judicial minimalism).

91 *See, e.g.*, Transcript of Oral Argument at 25, *AID*, 133 S. Ct. 2321 (No. 12-10) (requirement that public health providers speak out on gun violence); *id.* at 46–48 (requirement that groups receiving U.S. funding in South Africa oppose apartheid).

92 *Cf.* Sunstein, *supra* note 90, at 18 (discussing error costs of broad decisions).

93 *Cf. id.* at 17 (noting that broad decisions are harder to obtain when a court's members have diverse views).

94 *See AID*, 133 S. Ct. at 2330 ("This case is not about the Government's ability to enlist the assistance of those with whom it already agrees.").

95 *See id.* at 2335 (Scalia, J., dissenting); *cf.* Sunstein, *supra* note 90, at 17 ("A court that economizes on decision costs for itself may in the process 'export' decision costs to . . . litigants and judges in subsequent cases . . . .").