SMU | Dedman School of Law

SMU Law Review

Volume 65 | Issue 1 Article 7

2012

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UNCONSTITUTIONAL CONDITIONS: THE SECOND CIRCUIT SPLITS WITH THE D.C. CIRCUIT AND ERRONEOUSLY FINDS ANTI-PROSTITUTION PLEDGE REQUIRED FOR HIV/AIDS FUNDING UNCONSTITUTIONAL

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IN *Alliance for Open Society International, Inc. v. U.S. Agency for International Development* (*AOSI v. USAID*), a divided panel of the Second Circuit affirmed a preliminary injunction barring the enforcement of a policy requirement in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act).[1] The majority held that requiring non-governmental organization (NGO) grantees to adopt the government's anti-prostitution pledge as a condition of funding "falls well beyond what the Supreme Court and this Court have upheld as permissible funding conditions," thus violating the grantees' First Amendment rights.[2] In doing so, the majority improperly blended a combination of First Amendment legal doctrines to reach its desired, policy-driven result, and, as noted by a vigorous dissent, created a circuit split with the D.C. Circuit's decision in *DKT International, Inc. v. U.S. Agency for International Development* over the constitutionality of the same pledge requirement.[3]

In 2003, Congress passed the Leadership Act to strengthen the U.S. response to the HIV/AIDS, tuberculosis, and malaria pandemics, and through the U.S. Agency for International Development (USAID), provides $48 billion of funding for the development of vaccines and public–private partnerships with NGOs.[4] As a result of a congressional finding that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the

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1. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 223–24 (2d Cir. 2011); *see also* 22 U.S.C. § 7631(f) (2008).

2. *Alliance for Open Soc'y*, 651 F.3d at 234.

3. *Id.* at 267 (Straub, J. dissenting); *see also* DKT Int'l, Inc. v. U.S. Agency for Int'l Dev., 477 F.3d 758, 761 n.1 (D.C. Cir. 2007).

4. 22 U.S.C. §§ 7603, 7671(a) (2008).

spread of the HIV/AIDS epidemic,"[5] Congress included a policy requirement that "[n]o funds made available to carry out this [Act] . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking."[6]

The plaintiffs in *AOSI v. USAID* were NGOs involved in the fight against AIDS and received funding from both the Leadership Act and private sources.[7] Although none of the plaintiffs supported prostitution, "their work d[id] involve engaging, educating, and assisting [high-risk] groups, such as prostitutes, that are vulnerable to HIV/AIDS."[8] The NGOs sued USAID on the ground that the affirmative policy requirement violated their First Amendment rights by compelling them to speak the government's viewpoint, which forced them to stigmatize and drive underground the very demographic they aimed to educate about risks and best practices within the sex industry.[9]

As a basis for granting preliminary injunctive relief, the district court reasoned that under the Supreme Court's unconstitutional conditions jurisprudence, the funding condition impaired the plaintiffs' First Amendment protected activity, was not narrowly tailored to survive a heightened scrutiny review, and did not allow for adequate alternative channels of communication.[10] During the first appeal, USAID promulgated regulations allowing grantees to establish separate affiliates to use private funding free from the Act's policy requirement,[11] thus giving the NGOs an alternative channel for speech and supposedly curing the constitutional defect.[12] On remand from the Second Circuit, the district court again granted a preliminary injunction because it found that, "[w]hile the Guidelines may or may not provide an adequate alternate channel for Plaintiffs to express their views regarding prostitution, the clause requiring Plaintiffs to adopt the Government's view regarding . . . prostitution remains intact."[13]

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[14] The Supreme Court has recognized that the right to freedom of speech includes both the right to speak freely and the right to refrain from speaking.[15] However, the Spending Clause

5. *Id.* § 7601(23).
6. *Id.* § 7631(f).
7. *Alliance for Open Soc'y*, 651 F.3d at 223–25.
8. *Id.* at 224.
9. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 430 F. Supp. 2d 222, 243, 269, 271 (S.D.N.Y. 2006).
10. *Id.* at 258–59.
11. Guidance Regarding Section 301(f) of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 [22 U.S.C. § 7631(f)], 72 Fed. Reg. 41,076, 41,076–77 (Dep't of Health & Human Servs. July 26, 2007).
12. *See* Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219, 223–24 (2d Cir. 2006).
13. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 570 F. Supp. 2d 533, 545–46 (S.D.N.Y. 2008).
14. U.S. CONST. amend. I.
15. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977).

of the Constitution gives Congress broad power to tax and spend for the general welfare of the United States,[16] and the Supreme Court has long recognized that Congress may attach conditions to the receipt of federal funds.[17] While the government may allocate competitive funding according to criteria that would be impermissible if direct regulation of speech or a criminal penalty were at stake,[18] the unconstitutional conditions doctrine mandates that the government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'"[19] In *AOSI v. USAID*, the Second Circuit held the affirmative anti-prostitution pledge required for Leadership Act funding was an unconstitutional condition that infringed upon the NGOs' First Amendment rights.[20]

The majority began its analysis by synthesizing three seminal Supreme Court unconstitutional conditions cases: *Regan v. Taxation with Representation of Washington*, *FCC v. League of Women Voters of California*, and *Rust v. Sullivan*.[21] *Taxation* upheld a statute that denied tax deductions to Section 501(c)(3) organizations engaged in "substantial lobbying," a First Amendment protected activity.[22] Because the statute allowed for the creation of separate, tax-exempt Section 501(c)(4) affiliates to lobby with non-federal funds, Taxation with Representation's First Amendment rights were not violated, as Congress simply chose not to pay for its lobbying activity.[23] In *League of Women Voters*, a funding condition that prohibited a public radio station from editorializing, even through wholly private funds, was held unconstitutional because there was no option to establish a separate entity to speak freely outside of the government-funded program.[24] Finally, *Rust* held that when restrictions are placed on a government *program*, such as funding family planning programs that do not involve abortions, as opposed to the *recipient* healthcare provider, and the recipient is still able to voice its opinion outside the scope of the program, Congress is allowed to "fund one activity to the exclusion of the other."[25] The majority summed up the unconstitutional conditions doctrine with a prior Second Circuit case, *Velazquez v. Legal Services Corp.*, in which it held that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate

16. *See* U.S. CONST. art. I, § 8, cl. 1.
17. *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987).
18. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998).
19. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 59 (2006) (quoting united States v. American Library Ass'n, Inc., 539 U.S. 194, 210 (2003)).
20. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 223–24 (2d Cir. 2011).
21. *See id.* at 231 (citing Rust v. Sullivan, 500 U.S. 173 (1991); FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983)).
22. *Taxation*, 461 U.S. at 542, 551.
23. *Id.* at 545–46.
24. *League of Women Voters*, 468 U.S. at 400.
25. *Rust*, 500 U.S. at 193.

alternative channels for protected expression."[26]

The majority then turned to a trio of Supreme Court cases involving compelled speech, in which an individual is required to affirmatively adopt the government's point of view or face a monetary penalty or the loss of preexisting benefits: *Wooley v. Maynard*, *Speiser v. Randall*, and *West Virginia State Board of Education v. Barnette*.[27] In *Wooley*, the Court held that a statute requiring drivers to display the New Hampshire state motto "Live Free or Die" on their license plates violated the First Amendment by forcing the drivers to adopt the government's point of view.[28] In *Speiser*, the Court held unconstitutional a California law that conditioned a veteran's right to receive a property tax exemption on signing an oath stating he did not advocate the violent overthrow of the government.[29] Finally, in *Barnette* the Court held that requiring children to recite the Pledge of Allegiance in class was an unconstitutional infringement on their First Amendment rights to refrain from speaking.[30] The majority next discussed the "government speech" doctrine of *Rust*, which says that the government may impose "viewpoint-based" restrictions only when it is the speaker or it has hired "'private speakers to transmit information'" about the government's own program,[31] and conceded that according to the Supreme Court in *Rosenberger v. Rector & Visitors of the University of Virginia*, the government "'may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee'" when it "'disburses public funds . . . to convey a governmental message.'"[32] However, the majority claimed that in this case, the Leadership Act's purpose of fighting HIV/AIDS cannot now be recast as an anti-prostitution messaging campaign, which would allow the government to impose its anti-prostitution views through private speakers.[33] Combining the unconstitutional conditions, compelled speech, and government speech doctrines, the majority asserted that "[i]t is this bold combination . . . of a speech-targeted restriction that is both affirmative and quintessentially viewpoint-based that warrants heightened scrutiny."[34] The majority concluded by rejecting the curative function of an "adequate alternative channel," which saved the statutes in *Rust* and *Taxation*, because here it merely "afford[ed] an outlet to engage in privately funded *silence*" while the affirmative pledge remained.[35]

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26. Velazquez v. Legal Servs. Corp., 164 F.3d 757, 766 (2d Cir. 1999).

27. *See* Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 234 (2d Cir. 2011) (citing Wooley v. Maynard, 430 U.S. 705 (1977); Speiser v. Randall, 357 U.S. 513 (1958); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

28. *Wooley*, 430 U.S. at 706–07, 717.

29. *Speiser*, 357 U.S. at 514–15, 519.

30. *Barnette*, 319 U.S. at 642.

31. *Alliance for Open Soc'y*, 651 F.3d at 236 (quoting Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001)).

32. *Id.* at 237 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)).

33. *Id.* at 237–38.

34. *Id.* at 236.

35. *Id.* at 239.

In a lengthy and persuasive dissent, Judge Straub dissected the flaws in the majority's argument and concluded that the policy requirement is not subject to heightened scrutiny and is a rational exercise of Congress's Spending Clause power.[36] His main contention with the majority was that when the government does not directly regulate speech, but instead implicates First Amendment issues through conditions on federal spending, the only doctrine applicable is the unconstitutional conditions doctrine seen in *Taxation*, *League of Women Voters*, *Speiser*, and *Rust*—and none of those cases "turned on whether the alleged speech restriction was affirmative or negative."[37] He grouped relevant unconstitutional conditions cases into two categories in which a First Amendment violation occurs: (1) those where the funding condition operates as a penalty on free speech, and (2) those that are aimed to suppress certain viewpoints.[38] As for the "penalty" category, he synthesized *Taxation*, *League of Women Voters*, and *Rust* to say that Congress is free to limit funding recipients' First Amendment rights if the conditions "do not limit free speech outside of the scope of the government program," "do not deny independent benefits to which recipients are otherwise entitled," and "are meant only to ensure that government funds are used for the purposes for which they were authorized."[39] Judge Straub concluded that the Leadership Act's pledge requirement does not violate any of these principles because the NGOs are able to form affiliates to use private funds free of the pledge requirement; the funding condition is not a preexisting benefit to which the NGOs are already constitutionally entitled; and the anti-prostitution stance is central to the Leadership Act's authorized purpose to partner with like-minded private entities to fight HIV/AIDS.[40]

As for the "viewpoint suppression" category, he noted how *Rust* allows Congress to fund one activity to the exclusion of another without invidiously discriminating.[41] Further, Judge Straub engaged in a much more thorough analysis than the majority to conclude that viewpoint discrimination should give rise to strict scrutiny only if the funding condition (a) is "'aimed at the suppression of dangerous ideas,'"[42] (b) "encourage[s] a diversity of views" in areas normally open to the public or creates a "quasi-public forum," and then censors one viewpoint,[43] or (c) facilitates private speech and then censors the content.[44] Judge Straub then made clear that Congress did not intend to suppress pro-prostitution views by

36. *Id.* at 240 (Straub, J., dissenting).
37. *Id.* at 240, 255–57 (Straub, J., dissenting).
38. *Id.* at 246 (Straub, J., dissenting).
39. *Id.* at 246, 248 (Straub, J., dissenting).
40. *See id.* at 258–59, 262 (Straub, J., dissenting).
41. *Id.* at 246, 249 (Straub, J., dissenting).
42. *Id.* at 261 (Straub, J., dissenting) (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958)).
43. *Id.* (Straub, J., dissenting) (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995)).
44. *See id.* at 262 (Straub, J., dissenting) (citing Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001)).

funding select NGOs in the fight against HIV/AIDS, and certainly did not try to encourage a diversity of views from NGOs with various stances on prostitution and then censor a particular viewpoint.[45]

The majority's holding was erroneous because it improperly blended several doctrines to create the court's own version of the unconstitutional conditions doctrine; disregarded the safety provision that allows NGOs to establish subsidiaries to accept federal funds subject to the pledge but leaves the parent organization free to speak its own views on prostitution; and overemphasized the affirmative nature of the pledge requirement. As the dissent pointed out, the unconstitutional conditions doctrine as applied in a federal funding situation has a direct line of Supreme Court precedent from *Speiser* to *Taxation* and its progeny.[46] Instead of following these decisions, the majority resorted to importing a heightened standard of review from compelled speech cases like *Wooley* and *Barnette*, in which the government directly infringed upon a person's First Amendment rights, rather than analyzing this Spending Clause case under a traditional rational basis review. While *Speiser*'s unconstitutional affirmative pledge not to overthrow the government appears similar to the Leadership Act's pledge to oppose prostitution, it must be noted that the *Speiser* pledge was wholly unrelated to the underlying property tax exemption benefit, whereas the anti-prostitution pledge is central to Congress's purpose in creating the Leadership Act.[47] Additionally, even if the majority's hybrid unconstitutional conditions doctrine is applied, the recipients are free to form subsidiaries to accept the funds and adopt the anti-prostitution pledge, while at the same time the parent organization may maintain its neutral or even pro-prostitution views. The Act's guidelines are the same as those that saved the restrictions in *Rust* and *Regan*.

As the dissent emphasized, none of the "true" unconstitutional conditions cases turned on a distinction between a negative restraint on speech and an affirmative requirement to speak. The majority blended doctrines involving viewpoint-based discrimination and compelled speech in order to conclude that it is the combination of all these doctrines that "pushes considerably further" than the restrictions in *Taxation* ("lobbying"), *League of Women Voters* ("editorializing"), and *Rust* ("abortion-related speech").[48] However, the majority conceded that the government would be entitled to require funding recipients of a "Just Say No" to drugs campaign to state that they oppose drug use by children, which is both viewpoint-based and affirmative.[49]

By upholding the preliminary injunction, the Second Circuit arguably decided the case correctly from a human rights perspective, considering

45. *Id.* at 263 (Straub, J., dissenting).
46. *See id.* at 255–57 (Straub, J., dissenting).
47. *See* 22 U.S.C. § 7601(23) (2008).
48. *Alliance for Open Soc'y*, 651 F.3d at 234.
49. *See id.* at 237–38.

recommended best practices and empirical data.[50] However, at the same time it did little to clarify the "blurred and shifting line" between Congress's Spending Clause authority and an unconstitutional condition.[51] Moreover, it has created a circuit split with the D.C. Circuit, which found that compelled speech cases were inapplicable to an unconstitutional conditions analysis and that Leadership Act recipients were free to establish affiliates to keep restricted public funds and unrestricted private funds separate, the so-called adequate alternative channel for free speech.[52]

In *AOSI v. USAID*, the Second Circuit improperly held that the affirmative anti-prostitution pledge required for funding under the Leadership Act was an unconstitutional condition infringing upon the NGOs' protected speech. Instead of determining whether Congress had a rational basis for including the policy requirement, the majority enjoined its enforcement by unnecessarily requiring a compelling interest under a heightened standard of review. Indeed, as Judge Straub concluded in his dissent, the unconstitutional conditions doctrine is a "'troubled area of [Supreme Court] jurisprudence,' and .... the Supreme Court may wish to grant certiorari to set us straight."[53]

50. *See, e.g.*, Erica Tracy Kagan, Note, *Morality v. Reality: The Struggle to Effectively Fight HIV/AIDS and Respect Human Rights*, 32 BROOK. J. INT'L L. 1201, 1212–25 (2007).

51. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 430 F. Supp. 2d 222, 253 (S.D.N.Y. 2006).

52. DKT Int'l, Inc. v. U.S. Agency for Int'l Dev., 477 F.3d 758, 763–64 (D.C. Cir. 2007).

53. *Alliance for Open Soc'y*, 651 F.3d at 268 (Straub, J., dissenting) (alteration in original) (quoting Rust v. Sullivan, 500 U.S. 173, 205 (1991)).