NOTE

FAR, FREE, AWAY?

THE SUPREME COURT'S DRASTIC LIMITATIONS ON THE FIRST AMENDMENT ABROAD IN *AGENCY FOR INTERNATIONAL DEVELOPMENT V. ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC. II*

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ABSTRACT

While the First Amendment of the Constitution has strong protections within the United States, it is not always clear when these protections should apply outside of the United States. Since the 1970s, the Supreme Court has been diminishing First Amendment protections abroad, even while increasing First Amendment protections inside the United States. Most recently, in 2020, the Court held in Agency for International Development v. Alliance for Open Society International, Inc. *that organizations formed outside of the United States can be compelled to adopt the US government's ideals, even when doing so would seemingly infringe on the First Amendment rights of American organizations affiliated with those non-US organizations. This Note argues that* Alliance for Open Society International *was decided wrongly, as the Court should have held that compelling the speech of foreign organizations also affects the First Amendment rights of affiliated domestic organizations.*

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Instead of making such rulings that curtail constitutional rights abroad, the Supreme Court should be building up the First Amendment overseas, protecting American interests outside of the United States.

I. INTRODUCTION

If American organizations have First Amendment rights abroad, shouldn't those rights extend to their foreign affiliates?[1] Instead, last year the Supreme Court ruled in *Agency for International Development v. Alliance for Open Society International, Inc.* ("*AOSI II*")[2] that Congress can compel the speech[3] of international organizations abroad, even if the public reasonably misattributes the compelled speech to domestic organizations.[4] Seven years earlier, the Court had stated the opposite in a case of the same name ("*AOSI I*").[5] *AOSI I* had focused on domestic organizations,[6] holding that an act conditioning aid on disavowing prostitution violated the domestic organizations' First Amendment rights, and even compelling the speech of the domestic organization's affiliates would violate the First Amendment.[7] Yet *AOSI II* found the same act of compelling affiliates' speech constitutional if the affiliates are incorporated outside of the United States.[8]

AOSI II presented a problem for the plaintiffs, since the international organizations later had to choose between receiving funding from the United States to combat HIV/AIDS abroad, and alienating the very people the organizations intended to aid.[9]

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1. Throughout this Note, "affiliates" refers to the non-US organizations incorporated overseas to carry out the international missions of the plaintiffs in accordance with the local law of the affiliates' nationalities. *See* Brief for Respondents at 5-9, Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc. (*AOSI II*), 140 S. Ct. 2082 (2020), 2020 WL 1154731, at *6–8 (explaining the plaintiff's mission and the affiliates' role in this mission). To demonstrate the unity between the organizations, both the affiliate and its American counterpart each "uses a shared name, logo, branding, mission, and voice that conveys one unified appearance and identity." *Id.* at 7.

2. *AOSI II*, 140 S. Ct. 2082 (2020).

3. Compelled speech refers to the government dictating a person's speech or actions. *See* DANIEL A. FARBER, THE FIRST AMENDMENT 45-48 (2019). Forcing a person to adopt the government's speech generally violates the First Amendment of the US Constitution. *See id.*

4. *AOSI II*, 140 S. Ct. at 2089.

5. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc. (*AOSI I*), 570 U.S. 205 (2013).

6. This Note uses the word "domestic" to describe entities formed within the United States and uses the word "foreign" to describe entities formed outside of the United States. This is because *AOSI II* uses the words "foreign" and "domestic," focusing on the distinction between these two entity types in determining when constitutional rights should be extended beyond the borders of the United States.

7. *AOSI I*, 570 U.S. at 221.

8. *AOSI II*, 140 S. Ct. at 2089.

9. *See id.* at 2085-86.

Because of the ruling, Congress can now condition funding on compelled speech for any domestic organization working with an affiliate incorporated overseas. The First Amendment rights that the Supreme Court had protected in 2013 were then invalidated by the same Court in 2020.

This Note argues that the Supreme Court wrongly decided *AOSI II* by ignoring the very First Amendment rights set out in *AOSI I*. It asserts that the Court should grant certiorari to a case posing the same issue to protect the First Amendment rights of American organizations by disallowing the government to control the speech of the American organizations' foreign affiliates.[10] In making those assertions, this Note will examine the history of the First Amendment internationally and how the Supreme Court has tried to limit First Amendment rights abroad. It will then look at the Court's motivations and how it has gradually withdrawn First Amendment rights abroad over the past fifty years, even while promoting those same rights within the United States.[11]

Part I will examine Supreme Court cases on the extraterritoriality of the First Amendment, observing the trend in the last fifty years of diminishing the First Amendment outside of the United States. Part II will analyze two cases with opposite rulings, both named *Agency for International Development v. Alliance for Open Society International, Inc*. Part III will compare and analyze the Supreme Court's rulings in *AOSI I* and *II*, identifying the problems these contradicting decisions cause. Part IV will compare *AOSI I* and *II* to previous extraterritorial First Amendment cases, ultimately demonstrating how the Court has overlooked Americans' First Amendment rights abroad, deferring to the government on almost all overseas activities. Part IV will also explain why the Court needs to overturn *AOSI II*, and suggest a potential solution for overturning the case.

10 . *See id.* at 2090 (Breyer, J., dissenting) ("This case is not about the First Amendment rights of foreign organizations. It is about—and has always been about—the First Amendment rights of American organizations.").

11. This Note focuses on the actions of the Supreme Court, and as such, does not compare the Court's actions with those of other countries' courts. Academia would likely benefit from a study comparing different countries' extraterritorial treatment of their constitutions.

II. HISTORY OF EXTRATERRITORIALITY WITHIN THE UNITED STATES

The First Amendment of the US Constitution protects freedom of religion, freedom of speech, and freedom of the press.[12] While the First Amendment's text is seemingly simple, courts have expanded its protection through caselaw, particularly against governmental regulation of speech.[13] The Supreme Court has decided hundreds of First Amendment cases, mostly after 1970.[14] With these cases, the Court has constructed multiple tests to determine how and when to protect speech.[15] For example, the directives regulating the content of speech are only constitutional if they pass the demanding strict scrutiny test.[16] To pass strict scrutiny, the regulation must (1) advance a compelling government interest, (2) directly and substantially relate to advancing that interest, and (3) be the least restrictive alternative to achieve the government interest.[17] Compelled speech often violates the First Amendment as speech the government has coerced the speaker into adopting.[18]

Free speech scholar Timothy Zick argues that the Court's application of First Amendment standards and requirements varies based on geography.[19] He has helpfully laid out three categories to explain the Court's different approaches to the First Amendment: the intraterritorial, which deals with speech within the United States' territory; the territorial, which affects cross-border speech and association; and the extraterritorial, which

12. The full text of the First Amendment reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

13. FARBER, *supra* note 3, at 3.

14. *Id.* at 4.

15. *Id.* at 14.

16. *Id.* at 23, 30-31.

17. R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 293-94 (2016).

18. FARBER, *supra* note 3, at 47 ("When speech is compelled, . . . individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . . [A] law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence.").

19. *See* Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1545-46 (2010).

pertains to speech solely outside of the United States' borders.[20] While the Supreme Court is resolutely and uniformly protective of First Amendment rights of Americans within the United States,[21] it is less protective in cases involving foreign parties and territories.[22] The Court treats the intraterritorial, territorial, and extraterritorial First Amendments differently, even applying different standards to each First Amendment.[23] Generally, US citizens receive full First Amendment protections intraterritorially, but Courts do not always extend the same degree of intraterritorial First Amendment protections to non-US citizens.[24] Often, similar problems face First Amendment rights territorially and extraterritorially.[25]

A. Early Extraterritorial Cases

The Court has also never extended constitutional rights to non-US citizens located outside of US-controlled territory, making clear that non-US citizens do not have First Amendment rights abroad.[26] Questions remain regarding whether, and in what contexts, US citizens have rights territorially and extraterritorially.[27] For the past half a century, the Court has given great deference to the executive and legislative branches regarding foreign or diplomatic issues at the expense of the extraterritorial First Amendment.[28] However, *AOSI II* goes further than previous rulings by refusing to even consider American organizations' First Amendment rights through the speech of the organizations' non-US affiliates.

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20. *Id.*

21. *Id.* at 1545; *see also* Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment,* 25 J. L. & POL'Y 63 (2016).

22. Zick, *supra* note 19, at 1545-46.

23. *Id.*

24. *Id.* at 1545.

25. *See generally id.*

26. Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment,* 67 VAND. L. REV. 1373, 1413 (2014).

27. *See id.* at 1373 ("An extraterritorial First Amendment right has generally been recognized by courts in the past, either explicitly or implicitly, in favor of citizens, although it is often subject to national security requirements or foreign affairs considerations"); *see also* Zick, *supra* note 19, at 1546.

28. The Court has been deferential at the expense of other Constitutional rights as well to varying degrees. However, the scope of this Note focuses on the Court's treatment of the First Amendment in international contexts.

Over the years, the Supreme Court has applied different methods and rulings to the extraterritoriality of the Constitution. In the nineteenth century, while there were conflicting rulings about whether the Constitution applied to US territories,[29] there was a consensus that the Constitution did not apply abroad.[30] In the early twentieth century, the Supreme Court clarified its position in a series of cases called the *Insular Cases*, with North American territories receiving full constitutional protection, while US territories in the Caribbean and Pacific Ocean received only select "fundamental" rights.[31]

Nonetheless, in the 1950s and 1960s, the Warren Court was much more favorable to the extraterritoriality of the Constitution, including the First Amendment. [32] The Warren Court limited governmental efforts to censor speech abroad, even to the point of concern by other US political branches.[33] During this period, the Court recognized First Amendment rights for American citizens to obtain passports to travel abroad [34] and gather news and information from outside of the United States.[35]

B. Erosion of Extraterritorial Protections under the Burger Court

Later Courts have gradually but consistently withdrawn these robust extraterritorial First Amendment protections, starting with the Burger Court in the 1970s through today.[36] In *Kleindienst v. Mandel*, [37] the Burger Court's first case involving the First

29. *See* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 24 (2009); *see, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 450 (1857) (holding that due process rights apply in US territories).

30. *See* Ross v. McIntyre, 140 U.S. 453, 464 (1891) ("The constitution can have no operation in another country.").

31. BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE 4-6 (2006); RAUSTIALA, *supra* note 29, at 26. As may be apparent to the reader, the Court's decisions were largely decided by racism; the Court was disinclined to extend Constitutional protections to people it deemed as inferior, but was motivated to protect American trade interests in US territories. SPARROW, *supra* note 31, at 10-11.

32. *See* Ronald K. Krotoszynski Jr., *Transborder Speech,* 94 NOTRE DAME L. REV. 473, 481, 483-91 (2019).

33. *See id.*

34. *See* Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964); *see also* Kent v. Dulles, 357 U.S. 116, 143 (1958).

35. *See* Lamont v. Postmaster Gen., 381 U.S. 301, 310 (1965).

36. *See* Krotoszynski, *supra* note 32, at 481-82, 491-510.

37. 408 U.S. 753 (1972).

Amendment overseas, the Court acknowledged the Warren Court's past decisions but ultimately deferred to the government.[38] In this case, several universities hired Ernest Mandel, a Belgian journalist and Marxist advocate, for a series of speaking engagements in the United States, but the government denied Mandel's visa application.[39] The State Department offered a pretextual reason, but in reality, it would not allow a communist to enter the country and publicly express his views across the United States.[40]

Mandel sued—as did several American citizens who argued they had a right to hear Mandel's views and engage in a free academic exchange.[41] The majority acknowledged that the First Amendment protects the right to "receive information and ideas" and that this right is especially important in the context of schools and universities.[42] The majority also rejected the government's argument that the First Amendment was inapplicable because the American plaintiffs could access Mandel's ideas through books, recordings, and telephone calls.[43] The Court reasoned that these alternatives are not the same as face-to-face debate and discussion.[44]

Even though the Court reaffirmed previous holdings that a US audience has a First Amendment right to receive ideas and information from abroad, the majority decided this right was irrelevant.[45] The Court noted that, as Mandel was not a US citizen, he did not have a constitutional right to enter the United States.[46] The Court ultimately deferred to Congress's plenary power to make policies and rules excluding non-US citizens, finding the executive branch's exercise of power constitutional.[47]

Based on the majority's dicta regarding Americans' First Amendment rights, it seems clear that the Court would have

38. *Id.* at 762-63, 769-70.
39. *Id.* at 756-57.
40. *See id.* at 767 (summarizing the plaintiffs' argument that the State Department's reason for denying Mr. Mandel's visa was pretextual, and was actually denied in violation of the First Amendment).
41. *Id.* at 759-60.
42. *Id.* at 762-63.
43. *See Mandel*, 408 U.S. at 765.
44. *Id.*
45. *Id.* at 763-64 (citing Lamont v. Postmaster Gen., 381 U.S. 301 (1965)).
46. *Id.* at 762.
47. *Id.* at 769-70.

recognized a First Amendment right if Mandel had been inside the United States, even as a non-US citizen.[48] If he were inside the United States, he would have had the First Amendment right to hold his lectures, and American citizens would not have needed to sue based on their own First Amendment rights to hear him speak. However, Mandel was a non-US citizen located outside of the United States, so the case involved a party without constitutional rights.[49] The American plaintiffs' First Amendment rights were removed by a degree because they were only implicated through Mandel's speech.[50] Therefore, perhaps the Court did not have the same motivations to protect Americans' First Amendment rights, and it could instead look for reasons to defer to the government.[51] In a dissent, one justice compared the situation to a Warren Court decision which had held that Americans have a First Amendment right to receive communist political propaganda from abroad.[52] The dissent argued that the burden imposed on the American plaintiffs in *Mandel* was far greater, and with less justification.[53] But unlike the case during the Warren Court, the Burger Court used *Mandel* as an opportunity to defer to the government, giving the State Department the power to deny visas, even at the expense of Americans' First Amendment rights.[54]

Nine years later, the Court further curtailed First Amendment rights for US citizens in *Haig v. Agee*.[55] Philip Agee, a US citizen and

48. *See* Krotoszynski, *supra* note 32, at 494-95 (arguing *Mandel* reaffirmed previous holdings that the First Amendment protected US audiences from receiving information and ideas from abroad, while ultimately deferring to the State Department by allowing its pretextual reason for denying a famous Marx scholar from speaking in the United States).

49. *Mandel*, 408 U.S. at 762 ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise.").

50. *See id.* ("Indeed, the American appellees assert that 'they sue to enforce their rights, individually and as members of the American public, and assert none on the part of the invited alien.' . . . 'Dr. Mandel is in a sense made a plaintiff because he is symbolic of the problem.'").

51. *See* Krotoszynski, *supra* note 32, at 495 (calling the State Department's reasoning for denying Mr. Mandel's visa "entirely pretextual").

52. *See Mandel*, 408 U.S. at 781-83 (Marshall, J., dissenting) (citing Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965)).

53. *See id.* (citing *Lamont*, 381 U.S. at 308) ("When individual freedoms of Americans are at stake, we do not blindly defer to broad claims of the Legislative Branch or Executive Branch, but rather we consider those claims in light of the individual freedoms.").

54. *Compare Mandel*, 408 U.S. 753, *with Lamont*, 381 U.S. 301.

55. 453 U.S. 280 (1981).

disillusioned former Central Intelligence Agency employee, announced his intention to expose hundreds of active CIA agents around the world, and then he did just that.[56] The Secretary of State revoked Agee's passport because his "activities abroad [were] causing or . . . likely to cause serious damage to the national security or the foreign policy of the United States."[57] Agee sued, arguing, among other things, that the Secretary's revocation of his passport based on his speech violated his First Amendment right to free speech and his Fifth Amendment right to travel.[58]

The majority highlighted the importance of national security, stating "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."[59] Thus, the Court found the Secretary's revocation of Agee's passport constitutional,[60] agreeing that Agee's actions could harm the government and that revoking his passport was the only way the government could limit Agee's harmful actions.[61] The majority carefully highlighted that the Secretary had revoked Agee's passport because of Agee's *conduct*, not his speech.[62] Moreover, the majority stated, in dicta, that *assuming* First Amendment protections apply abroad, previous cases indicated that the government may prevent someone from obstructing military operations and recruiting personnel.[63]

Despite previous Supreme Court cases that recognized a right to travel abroad,[64] this case had a conflict between such a right and the imminent danger Agee posed to active CIA agents worldwide.[65] The Court deferred to the government.[66] Since Agee's conduct

56. *Id.* at 280, 284 n.3.

57. *Id.* at 311.

58. *Id.* at 306.

59. *Id.* at 307 (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964)).

60. *Agee,* 453 U.S. at 280-81.

61. *Id.* at 309 (citing Zemel v. Rusk, 381 U.S. 1, 16-17 (1965)) ("To the extent the revocation of his passport operates to inhibit Agee, 'it is an inhibition of *action*,' rather than of speech.").

62. Su, *supra* note 26, at 1387.

63. *Agee*, 453 U.S. at 308 (citing Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931)).

64. *See Aptheker*, 378 U.S. 500; *see also* Kent v. Dulles, 357 U.S. 116 (1958).

65. *See* Krotoszynski, *supra* note 32, at 496 ("Agee clearly presented serious First Amendment issues—at the heart of Agee's program was an effort to disclose covert CIA operations in foreign countries, activity that certainly involved public officials and matters of public concern").

66. *Agee*, 453 U.S. at 308–10.

directly concerned national security and presented clear and harmful consequences,[67] the Court's reasoning for ruling with the government is plain: it was the only way to protect Americans from Agee's dangerous actions.[68] Still, the Court eschewed applying the First Amendment abroad in this context, preferring to find a loophole instead of directly addressing the extraterritorial First Amendment.[69] Scholars characterize the Burger Court's decisions as furthering the Warren Court's earlier rulings while curtailing their extension of the extraterritorial First Amendment any further.[70]

C. Devaluing the First Amendment Abroad under the Roberts Court

More recently, the Roberts Court held in *Boumediene v. Bush*[71] that the Suspension Clause of the Constitution had full effect for non-US citizens held in Guantanamo Bay, Cuba. [72] While Guantanamo Bay was outside of US territory, the area was "under the complete and total control of our Government," so the Court found that the Suspension Clause applied.[73] The Supreme Court pointed out that even though it had never extended constitutional rights to non-citizens that the US government had detained outside of the United States, precedent did not *preclude* a new ruling because the circumstances there were unprecedented.[74]

While *Boumediene* is not a First Amendment case, it is necessary to discuss this case in examining when the US

67. *Id.* at 308 ("Not only has Agee jeopardized the security of the United States, but he has also endangered the interests of countries other than the United States—thereby creating serious problems for American foreign relations and foreign policy.").

68. *Id.* ("Restricting Agee's foreign travel, although perhaps not certain to prevent all of Agee's harmful activities, is the only avenue open to the Government to limit these activities.").

69. *See id.* at 308-09 (making only a hypothetical argument about whether First Amendment protections extend beyond national boundaries).

70. Krotoszynski, *supra* note 32, at 498-99 (characterizing the Burger Court's extraterritorial First Amendment cases as deferential toward other political branches even while declining to build on or overrule the Warren Court's precedents regarding transborder speech).

71. 553 U.S. 723 (2008).

72. *Id.* at 771.

73. *Id.*

74. *Id.* at 770-71.

Constitution applies outside of the United States.[75] The Court took a functional approach in determining whether the US Constitution applied, looking at various factors, including who controlled the area, the feasibility of applying constitutional rights, and any barriers to extending constitutional rights.[76] Zick writes that *Boumediene* is ultimately territorial, as the decision turns on US control over Guantanamo Bay.[77] But the Court's functional approach in *Boumediene* supports an extraterritorial application of the First Amendment rights of speech and association for non-US citizens in US custody or located in US-controlled territory.[78]

Scholars characterize the Roberts Court as particularly protective of Americans' free speech, often restraining the government's actions in favor of Americans' First Amendment rights.[79] However, most Roberts Court First Amendment cases address intraterritorial concerns rather than extraterritorial ones.[80] One exception to the Roberts Court's strong First Amendment protections pertains to free speech abroad.[81]

In *Holder v. Humanitarian Law Project*,[82] the Court upheld the Patriot Act's provision that prohibited knowingly providing material support to an organization that the government designated a foreign terrorist organization, even for the purposes of peace and preventing terrorism.[83] In such cases involving the infringement of First Amendment rights, the Court is supposed to apply strict scrutiny, and only find measures constitutional if they are "narrowly tailored" to "further[] compelling governmental interests."[84] But the majority in *Holder* did not mention nor apply

75. *See* Su, *supra* note 26, at 1386 (characterizing the majority's analysis in *Boumediene* as a "global due process" approach).

76. *Boumediene*, 553 U.S. at 770-71.

77. Zick, *supra* note 19, at 1614.

78. *Id.*

79. *See generally* Gora, *supra* note 21; *see also* FARBER, *supra* note 3, at 14 (stating the Roberts Court has built on previous Courts' legacy in creating a strong First Amendment).

80. *See generally* Gora, *supra* note 21 (surveying a range of First Amendment cases decided by the Roberts Court, almost all of which are intraterritorial cases).

81. *Id.* at 121 (calling *Holder v. Humanitarian Law Project,* which dealt with the extraterritorial First Amendment, an "unfortunate departure[] from the Roberts Court's normally strong protection of First Amendment rights.").

82. 561 U.S. 1 (2010).

83. *Id.* at 36.

84. Ariz. Free Enter. Club's Freedom Club PAC v. Bennet, 564 U.S. 721, 734 (2011); Citizens United v. Fed. Election Com'n, 558 U.S. 310, 340 (2010); Wis. Fed. Election Com'n

strict scrutiny. The Court applied its own analysis, finding the statute "carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations,"[85] despite the broad interpretation of the term "material support." [86] This language may be similar to strict scrutiny, but it is less exacting.[87] The law in *Holder* would not have passed the standard strict scrutiny test the Court applied to intraterritorial First Amendment cases,[88] and the opinion does not explain why it implemented a new test.

Scholars have criticized *Holder's* analysis as a weak version of strict scrutiny, wondering if the case simply creates a new test that is far more deferential to the government.[89] Based on the little information available, and comparing it to other Court rulings of extraterritorial and intraterritorial cases, First Amendment scholar Ronald Krotoszynski pronounced that,

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v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007); *see* Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 16 (2012).

85. *Holder*, 561 U.S. at 26.

86. *Id.* at 30-31, 33. The Court also found that:

> Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government's interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups' nonviolent ends.

Id. at 36.

87. Contra Ariz. Free Enter. Club's Freedom Club PAC v. Bennet, 564 U.S. 721, 734 (2011) (quoting Citizens United v. Fed. Election Com'n, 558 U.S. 310, 340 (2010)) ("'Laws that burden political speech are' accordingly 'subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'").

88 . *See* David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine,* 6 HARV. L. & POL'Y REV. 147, 148 (2012) (noting that not even the government had argued that the statute would survive strict scrutiny).

89. *See id.* ("[T]he Court engaged in only the most deferential review, and upheld the law in the absence of any argument, much less evidentiary showing, that prohibiting plaintiffs' speech was necessary or narrowly tailored to further a compelling interest."); *see also* Krotoszynski, *supra* note 32, at 505 ("[T]he Supreme Court essentially applied a weak, tepid version of strict scrutiny to a content-based criminal restriction of the freedom of speech and association out of concern that more demanding judicial scrutiny would interfere with important foreign affairs and national security objectives."); *cf.* Gora, *supra* note 21, at 121 (claiming that the Court applied strict scrutiny in *Holder*, but calling the case an "unfortunate departure[] from the Roberts Court's normally strong protection of First Amendment rights.").

> *Holder Humanitarian Project* essentially creates an exception to the First Amendment for speech activity that takes place outside the United States. It does so to avoid the prospect of the federal judiciary applying the First Amendment in ways that would potentially interfere with foreign affairs and national security objectives that Congress and the President seek to secure.[90]

In an unprecedented move, *Holder* allowed the government to criminalize speech advocating for nonviolence.[91] Application of *Holder*'s test in all First Amendment cases would be dangerous, drastically changing the political landscape of the United States by allowing the government to criminalize a larger category of speech.[92] Even though the Court did not clarify in what contexts *Holder*'s analysis applied, scholars hypothesized that *Holder* is only logical if courts apply this looser, more deferential test solely outside of the United States, as it contradicted decades of caselaw concerning domestic matters.[93] Thus, First Amendment protections appeared to be weaker outside of the United States, even for Americans.

Finally, in *Clapper v. Amnesty International USA*,[94] the majority skipped the First Amendment question entirely to dismiss the case for lack of standing.[95] In this case, Amnesty International and similar organizations challenged the Foreign Intelligence Surveillance Act, which allows the Attorney General and National Intelligence Director to surveil individuals who are non-US residents and located outside of the United States.[96] Amnesty International argued that the statute violated multiple sections of the Constitution, including the First Amendment.[97] The majority was completely unconcerned with any unconstitutional actions by the government, instead focusing on the fact that Amnesty International did not have any specific evidence at the time of

90. Krotoszynski, *supra* note 32, at 508-09.
91. *See* Cole, *supra* note 88, at 149.
92. *Id.*
93. *Id.*; Huq, *supra* note 84, at 22.
94. 568 U.S. 398 (2013).
95. *Id.* at 418 (concluding that "respondents' self-inflicted injuries are not fairly traceable to the Government's purported activities under § 1881a, and their subjective fear of surveillance does not give rise to standing").
96. 50 U.S.C. § 1881a (2006 ed., Supp. V).
97. *Amnesty Int'l USA*, 568 U.S. at 407.

filing.[98] It is quite possible that the majority was less concerned with the government violating constitutional rights because the surveillance would target communications involving Amnesty International and one or more foreign parties, not communications between only Americans. [99] Regardless, the Court held that Amnesty International lacked standing because it could not identify any clear nonspeculative harm.[100] Three months later, former NSA contractor Edward Snowden revealed the scope of the NSA's surveillance programs occurring domestically and internationally.[101]

These cases demonstrate how the Supreme Court has undermined any supposed First Amendment protections abroad since the 1970s.[102] *Mandel* and *Haig* reduced the Warren Court's declared rights for people to obtain US passports to travel abroad and receive information from overseas.[103] Later cases that found for the government likely would have had opposite outcomes if the cases had been intraterritorial.[104] These cases show that the Court uses discretionary-merits doctrines or other devices to avoid reaching the merits of cases and instead defer to the government.[105] In cases where the First Amendment does apply, the Court applies a lower, weaker standard to protect the Bill of Rights beyond the United States' borders.[106] Based on past First Amendment claims, constitutional law scholar Anna Su writes that "the door is clearly shut" on the extraterritorial First Amendment claims of "enemy aliens," as no case has extended constitutional rights to non-US citizens beyond US-*controlled* territories. [107] However, many other questions on the extraterritoriality of the

98. *Id.* at 411.

99. Krotoszynski, *supra* note 32, at 505.

100. *Amnesty Int'l USA*, 568 U.S. at 422 ("We hold that respondents lack Article III standing because they cannot demonstrate that the future injury they purportedly fear is certainly impending and because they cannot manufacture standing by incurring costs in anticipation of non-imminent harm.").

101. Su, *supra* note 26, at 1376.

102. Krotoszynski, *supra* note 32, at 475.

103. Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972); Haig v. Agee, 453 U.S. 280, 280-81 (1981).

104. *See, e.g.,* Holder v. Humanitarian L. Project, 561 U.S. 1, 26, 20-31, 33 (2010) (applying a less exacting form of strict scrutiny than is used in intraterritorial cases).

105. *See* Krotoszynski, *supra* note 32, at 505.

106. *Id.*

107. Su, *supra* note 26, at 1413-14.

First Amendment remain.[108] Clearly, the First Amendment cannot apply to non-US citizens abroad, but it is unclear in what other contexts the First Amendment might apply extraterritorially.[109]

III. AOSI (I & II) – *CASE STUDIES ON EXTRATERRITORIAL CENSORSHIP*

AOSI I[110] and *II*[111] are the most recent cases in the line of extraterritorial First Amendment cases. Both cases have focused on these domestic organizations' First Amendment rights abroad with federal funding conditions based on compelled speech. Congress outlined a comprehensive plan to combat the spread of HIV/AIDS globally[112] through the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Act").[113] Congress authorized spending billions of dollars to fund nongovernmental organizations in their efforts to combat HIV/AIDS overseas, but Congress imposed two conditions on the funding:[114] (1) no funds provided by the Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking"[115] and (2) an organization may not use funds if the organization "does not have a policy explicitly opposing prostitution and sex trafficking."[116]

Organizations receiving funding from the Act feared that adopting Congress's required policy of denouncing prostitution would alienate persons working in the sex trade industry, isolating people who are at a high risk of contracting HIV/AIDS and whose cooperation is imperative to eliminate HIV/AIDS.[117] They feared

108. *Id.* at 1428.
109. *See id.* at 1429.
110. 570 U.S. 205 (2013).
111. 140 S. Ct. 2082 (2020).
112. *AOSI I*, 570 U.S. at 208.
113. Pub. L. No. 108-25, 117 Stat. 711 (codified as amended at 22 U.S.C. §§ 7601-7682).
114. 2 U.S.C. § 7631(e), (f).
115. Assistance to Combat HIV/AIDS, 22 U.S.C. § 7631(e). This condition, which was not at issue in the cases, is not considered unconstitutional, as it simply defines the parameters of the federal funding, and does not require anyone to adopt the government's policy. *See* Annie G. McBride, Agency for International Development v. Alliance for Open Society International, Inc.*: Balancing Congress's Spending Power Against First Amendment Liberties*, 59 LOY. L. REV. 1049, 1069-70 (2013).
116. Assistance to Combat HIV/AIDS, 22 U.S.C. § 7631(f).
117. McBride, *supra* note 115, at 1052.

the policy would also complicate work in countries with legalized prostitution, and force the organizations to censor themselves in the public debate on the relationship between prostitution and the spread of HIV/AIDS.[118] By forcing organizations to choose between adopting the government's message or not receiving federal funding, Congress is effectively silencing viewpoints it finds unfavorable. [119] Moreover, the requirement turns a statute intended to combat HIV/AIDS into Congress's personal soapbox, forcing organizations that aim to prevent the spread of HIV/AIDS to turn into mouthpieces for the government's views on prostitution.

A. AOSI I - *Protecting First Amendment Rights of Domestic Organizations Working Abroad*

In *AOSI I,* several domestic organizations sued the US Agency for International Development, arguing that the second condition of the Act was unconstitutional under the Free Speech Clause of the First Amendment.[120] The case focused on tensions between two parts of the US Constitution: Congress's spending power laid out in the Constitution's Spending Clause, [121] and the domestic organizations' free speech rights in the First Amendment.[122] The case focused on three other Supreme Court Cases involving this same tension between Congress's spending power and Americans' First Amendment rights: *Regan v. Taxation with Representation of Washington*,[123] *Rust v. Sullivan*,[124] and *United States v. American Library Association, Inc*.[125] Chief Justice Roberts wrote for the majority in a 6-2 decision,[126] holding that the Act was compelled

118. *Id.*

119. Brief for Respondents at 26-35, *AOSI I*, 570 U.S. 205 (No. 12-10).

120. *AOSI I*, 570 U.S. at 210-11.

121. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To 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.").

122. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

123. 461 U.S. 540 (1983).

124. 500 U.S. 173 (1991).

125. 539 U.S. 194 (2003); *see also* McBride, *supra* note 115 (showing an in-depth analysis of the Court's weighing of the Spending Clause and the First Amendment in *AOSI I*).

126. Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor joined. Justice Scalia filed a dissenting opinion, and Justice Thomas joined him. Justice Kagan did not take any

speech, which violated the First Amendment: "[b]y demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'"[127]

The government argued that the conditions did not violate the First Amendment because domestic organizations could either (1) accept funding from the Act and comply with the requirements but establish affiliates with contrary views on prostitution; or (2) decline funding, and express their own views on prostitution, but create affiliates solely to receive and administer funding.[128] But the majority found neither of the government's options acceptable to prevent First Amendment violations.[129] The Court reasoned that although an organization can use affiliates to exercise its First Amendment rights outside of a federal program's scope, such dynamic does not allow Congress to *force* an affiliate to adopt Congress's beliefs. [130] Roberts's opinion implied that an organization's affiliates also had First Amendment rights.[131] Thus, forcing any affiliate to espouse Congress's beliefs would be unconstitutional, violating not only the original organization's, but also its affiliate's First Amendment rights.[132] Further, the Court suggested that an organization's ties to an affiliate espousing the government's view on prostitution could run the risk that people would confuse the government's view with the organization's view. [133] The organization's affiliate could therefore espouse Congress's beliefs "only at the price of evident hypocrisy."[134]

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part in this case. Justice Kagan likely recused herself because she had worked on the Act as Solicitor General. Adam Liptak, *Justices Say U.S. Cannot Impose Antiprostitution Condition on AIDS Grants*, N.Y. TIMES (June 20, 2013) https://www.nytimes.com/2013/06/21/us/court-finds-aids-programs-rules-violate-free-speech.html [https://perma.cc/ZT8D-558G].

127. *AOSI I*, 570 U.S. at 218 (quoting *Rust*, 500 U.S. at 197).

128. *Id.* at 219.

129. *Id.* at 219-20.

130. *Id.* at 219.

131. *Id.* at 219-20.

132. *Id.* ("If the affiliate is distinct from the recipient, the arrangement does not afford a means for the recipient to express its beliefs.").

133. *AOSI I*, 570 U.S. at 219.

134. *Id.* at 218.

Only Justices Scalia and Thomas dissented.[135] Justice Scalia's dissent sided with the government, stating that the conditions did not violate the Free Speech Clause because the organizations could decline funding if they did not want to promote Congress's views on prostitution.[136] Justice Scalia's dissent focused on the same domestic funding issues as the majority, again working within the framework of *Taxation with Representation of Washington, Rust,* and *American Library Association*.[137]

Despite its international implications, *AOSI I* focused on domestic First Amendment rights instead of the extraterritoriality issue. As Su points out, briefs and oral arguments often referenced the international implications of the case, and the government emphasized that the program was "primarily conducted in 'foreign territory' and 'distant lands,' hence the need for the Policy Requirement to function as an ex ante commitment."[138] But the Court's opinion does not speak of extraterritorial First Amendment rights or anything other than the right of citizens and domestic organizations.

Even so, after *AOSI I*, scholars speculated how the case would affect the extraterritoriality of the First Amendment. Su was optimistic that the Court would consider an extraterritorial First Amendment in select future cases.[139] She argued that the Free Speech Doctrine should apply to American citizens everywhere and to non-US citizens when subjected to government actions, and was hopeful that future courts would decide so as well.[140]

B. AOSI II - *Declining to Extend First Amendment Rights to Domestic Organizations' Foreign Affiliates*

AOSI I made it clear that the compelled speech provision violated domestic organizations' constitutional rights. But after the ruling, the government determined that *AOSI I*'s holding did not

135. *Id.* at 221-27 (Scalia, J., dissenting).
136. *Id.* at 225-26.
137. *Id.* at 222-25.
138. Su, *supra* note 26, at 1426 (arguing that the court implicitly advocates for an extraterritorial First Amendment in *AOSI I*).
139. *Id.*
140. *Id.* at 1429.

apply to foreign organizations.[141] A year after *AOSI I*, the government issued guidance stating that the compelled speech provision in the Act would still apply to foreign organizations, including foreign organizations closely affiliated with American organizations.[142] The same domestic organizations that were plaintiffs in *AOSI I* sued again, arguing that the Act was still unconstitutional because it forced the organizations' foreign affiliates to adopt Congress's language as their own, violating the domestic organizations' First Amendment rights.[143]

The plaintiffs pointed out that the defendant, US Agency for International Development, actually encourages organizations to work through affiliates incorporated in the country where the organization is performing HIV/AIDS work.[144] Many of US Agency for International Development's federal funding opportunities are only available for locally incorporated foreign nongovernmental organizations.[145] Despite the almost identicality in parties and circumstances, and *AOSI I*'s language hinting otherwise,[146] in 2020 the Court made a ruling opposite to *AOSI I*, finding that the Act can compel speech of foreign organizations with domestic affiliates under the Constitution.[147]

The plaintiffs had claimed that applying the compelled speech provision of the Act to foreign affiliates of the domestic organizations violated the domestic organizations' First Amendment rights.[148] The plaintiffs argued that the public would likely incorrectly attribute the foreign organizations' required speech to its American affiliates, so even if the domestic organizations did not adopt Congress's language themselves, they would appear to adopt Congress's views.[149] Either people would misattribute the speech to the domestic organization, or the organization would appear to offer conflicting messages,

141. *AOSI II*, 140 S. Ct. at 2085-86; Brief for Respondents at 18, *AOSI II*, 140 S. Ct. 2082 (No. 19-177).

142. Brief for Respondents at 18, *AOSI II*, 140 S. Ct. 2082 (No. 19-177).

143. *Id.* at 19; *AOSI II*, 140 S. Ct. at 2085-86.

144. Brief for Respondents at 6-7, *AOSI II*, 140 S. Ct. 2082 (No. 19-177).

145. *Id.* at 7.

146. *AOSI I*, 570 U.S. at 219-20 ("If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy.").

147. *AOSI II*, 140 S. Ct. at 2089.

148. *Id*. at 2087.

149. *Id.* at 2088-89.

proffering their own beliefs and Congress's contrary beliefs.[150] The plaintiffs' argument was quite similar to the majority's reasoning in *AOSI I*, when Chief Justice Roberts refuted the government's claims that the plaintiffs could simply form affiliates to espouse Congress's views.[151] In fact, the plaintiffs claimed that the Court's 2013 decision already encompassed the plaintiffs' foreign affiliates, so the Court had already resolved this issue.[152] But the majority in *AOSI II* disagreed with both claims, finding that foreign organizations operating abroad simply do not have constitutional rights.[153]

1. The Majority's Infringement on First Amendment Rights

Justice Kavanaugh wrote for the majority for *AOSI II*,[154] arguing that Congress may impose the same stipulations on foreign organizations' stances on prostitution and sex trafficking that the Court had found to be unconstitutional for domestic organizations.[155] In his majority writing, Justice Kavanaugh made the case appear as simple as possible, writing only four pages,[156] splitting his argument into two main points based on "two bedrock principles of American law,"[157] and then distilling the plaintiffs' arguments into two main points that he rebuked.[158]

First, Justice Kavanaugh unequivocally stated that foreign citizens outside of US territories do not possess constitutional rights, drawing on multiple cases supposedly asserting this claim.[159] While he conceded that foreign citizens may have

150. *Id.*

151. *See AOSI I*, 570 U.S. at 219 ("Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own . . . If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy.").

152. *AOSI II*, 140 S. Ct. at 2089.

153. *Id.*

154. *Id.* at 2085-89. Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch joined the majority. Justice Thomas wrote a concurring opinion, advocating for the same stance as Justice Scalia had made in his dissent in *AOSI I*. *Id.* at 2089-90 (Thomas, J., concurring). Justice Breyer filed a dissenting opinion, and Justices Ginsburg and Sotomayor joined him. Justice Kagan did not take any part in this case.

155. *Id.* at 2089 (Kavanaugh, J., majority).

156. *See id.* at 2085-89.

157. *Id.* at 2086.

158. *AOSI II*, 140 S. Ct. at 2088.

159. *Id.* at 2086-87.

constitutional rights within the United States,[160] and may even possess some constitutional rights within US territories or an area where the United States has control,[161] Justice Kavanaugh was firm: the Court has never allowed non-US citizens to assert constitutional rights outside of the United States or its territories.[162] Justice Kavanaugh emphasized the necessity in allowing the government to carry out actions abroad that the Court would find unconstitutional if carried out on American soil.[163] While the majority did note that Congress may enact laws to give foreign citizens statutory rights to regulate US officials' conduct abroad, this was not the case here.[164]

Second, the majority asserted that separately incorporated organizations are considered separate legal entities with separate legal obligations.[165] Based on these two principles, the majority explicitly stated: "As foreign organizations operating abroad, plaintiffs' foreign affiliates possess no rights under the First Amendment."[166] According to the majority, if the Court did not draw this clear line, lower courts would be unable to determine if a foreign affiliate was closely related enough to interfere with a domestic organization's First Amendment rights.[167] Lower courts would apparently be too confused without a "principled basis" to determine the scope of a domestic organization's First Amendment rights .[168]

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160. *Id.* at 2086 ("As the Court has recognized, foreign citizens in the United States may enjoy certain constitutional rights—to take just one example, the right to due process in a criminal trial.").

161. *Id.* (citing Boumediene v. Bush, 553 U.S. 723, 755-71 (2008)).

162. *Id.* at 2086. *But see* Nicholas Romanoff, Note, *The "Bedrock Principle that Wasn't:* Alliance for Open Society II *and the Future of the Noncitizens' Extraterritorial Constitution,* 53 COLUM. HUM. RTS. L. REV. 345, 353-72 (2021) (refuting Justice Kavanaugh's so-called "bedrock principle" that non-US citizens outside of the United States do not have constitutional rights).

163. *AOSI II*, 140 S. Ct. at 2086-87 ("If the rule were otherwise, actions by American military, intelligence, and law enforcement personnel against foreign organizations or foreign citizens in foreign countries would be constrained by the foreign citizens' purported rights under the U. S. Constitution.").

164. *Id.* at 2087.

165. *Id.*

166. *Id.*

167 . *Id.* ("Plaintiffs' carve-out not only would deviate from that fundamental principle, but also would enmesh the courts in difficult line-drawing exercises—how closely identified is close enough?—and leave courts without any principled basis for making those judgments.").

168. *AOSI II*, 140 S. Ct. at 2087.

2. The Dissent's Focus on American Organizations' Rights

Justice Breyer's dissent asserted that *AOSI II* had the same subject matter as *AOSI I*: American organizations' First Amendment rights.[169] Justice Breyer condensed the dissent into three principles: (1) the messages at issue belong to American speakers, (2) foreign affiliates are critical for conveying the American organizations' messages abroad, and (3) forcing the foreign affiliates to espouse Congress's beliefs distorts the American organizations' speech.[170] Breyer started with a history of *AOSI I*, followed by the history of *AOSI II* in the lower courts, demonstrating that the two cases essentially asked the same question: whether the provision under the Act requiring an organization or its affiliate to adopt Congress's speech violates the *domestic organization*'s First Amendment rights.[171] Domestic organizations often create foreign affiliates to operate abroad, and sometimes foreign governments even require it.[172]

Justice Breyer highlighted one of the plaintiffs' arguments: people will misattribute the foreign affiliate's compelled speech to its domestic organization.[173] In a strategy to show a consistent message to the populations they want to protect, the plaintiffs and their affiliates do their best to appear as a single cohesive unit despite having several affiliates, even going so far as to have the same fonts and logos.[174] Therefore, Justice Breyer's dissent reasoned that when an affiliate is forced to spout Congress's harmful beliefs, all of the affiliates also appear to spout Congress's harmful beliefs, including those in the United States.[175]

The dissent pointed out that *AOSI II* is a speech misattribution case, as anything Congress forces a foreign affiliate to assert would

169. *Id.* at 2090 (Breyer, J., dissenting).
170. *Id.* at 2099.
171. *Id.* at 2090-95.
172. *Id.* at 2094.
173. *Id.* at 2094.
174. *AOSI II*, 140 S. Ct. at 2094 ("Respondents, together with their affiliates, convey a clear, consistent message to high-risk populations, government officials, healthcare professionals, prospective employees, and private donors across the globe . . . To an outside observer, respondents and their affiliates are a single, cohesive unit. They speak as one.").
175. *Id.* at 2094-95 ("Audiences everywhere attribute speech based on whom they perceive to be speaking, not on corporate paperwork they will never see.").

undoubtedly be misattributed to all its affiliates.[176] The domestic organizations have a right to not have the Act's compelled language attributed to them: "The First Amendment question therefore hinges, as it did before, on what an objective observer sees, hears, and understands when respondents speak through their foreign affiliates."[177] The Court's decision in *AOSI I* may have helped the plaintiffs avoid adopting Congress's views on prostitution, but the plaintiffs will suffer just as much if people misattribute their affiliates' forced speech to them.[178]

Justice Breyer also pointed out that American courts have strong and uniform speech misattribution caselaw.[179] Going over Supreme Court caselaw, Justice Breyer found that *AOSI II* was very similar to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,[180] a case about whether a group organizing a local parade in Boston had to allow an affinity group to march in the parade.[181] In that case, the Court held that forcing the parade organizers to allow the affinity group to march in the parade distorted the organizers' speech, "alter[ing] the expressive content of the parade," and therefore violated the First Amendment.[182] Breyer described the plaintiffs in *AOSI II* as similar in crafting their message to the plaintiffs in *Hurley*, except on an international platform.[183] Based on the Court's ruling in *Hurley*, forcing foreign affiliates to adopt Congress's stance on prostitution would also violate the First Amendment, as observers would misattribute the

176. *Id.* at 2095 ("What mattered in *AOSI I* was thus how 'clearly identified' the affiliates were with respondents. . . . And what matters now is once again how 'clearly identified' the affiliates are with respondents, not the fact that the affiliates were incorporated as foreign legal entities.").

177. *Id*.

178. *Id.* ("[I]n the wake of our ruling, respondents have continued to suffer the exact same First Amendment harm.").

179. *AOSI II*, 140 S. Ct. at 2095-96 ("[I]n the First Amendment context, the corporate veil is not an iron curtain. Just the opposite. We attribute speech across corporate lines all the time.").

180. 515 U.S. 557 (1995).

181. *Id.* at 561-62.

182. *Id.* at 572-73.

183. *AOSI II*, 140 S. Ct. at 2097-98 (Breyer, J., dissenting) ("Respondents in this case have done the Veterans Council one better. They have carefully constructed a cogent message and marshaled their clearly identified foreign affiliates to express it across the globe.").

compelled speech to domestic organizations with First Amendment rights.[184]

Further refuting the majority, Justice Breyer stated that the majority's claim that foreign citizens outside of US territories do not have First Amendment rights was irrelevant to the matter at hand in *AOSI II*.[185] The plaintiffs are domestic organizations, and their speech is at issue in the case.[186] He also mentioned that Justice Kavanaugh's principles are not as deeply entrenched in the law as Justice Kavanaugh attested.[187] Even *Boumediene*, which the majority cited to demonstrate that non-US citizens do not have constitutional protections outside of US-controlled territory,[188] actually speaks against instituting a formalistic approach like the one the majority applied.[189] *Boumediene* had looked at objective factors in making its decisions, such as the level of US control of the territory, the nature of the constitutional protection, and the foreign citizen's status in relation to the United States.[190] While Justice Breyer acknowledged that a cautious attitude toward applying the Constitution abroad was prudent,[191] he asserted that *AOSI II* is first and foremost addresses the right of domestic organizations.[192]And while the majority may have claimed that its ruling drew a firm line and made clear who has First Amendment rights abroad,[193] Justice Breyer pointed out that the majority's ruling still left many constitutional issues unresolved.[194]

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184. *See id*.

185. *Id.* at 2099-102.

186. *Id.* at 2099.

187. *Id.* at 2099-102.

188. *Id.* at 2086 (Kavanaugh, J., majority) (citing Boumediene v. Bush, 553 U.S. 723, 770-71 (2008).

189. *AOSI II*, 140 S. Ct. at 2100-01 (Breyer, J., dissenting) (citing *Boumediene*, 553 U.S. at 764).

190. *Id.* (Breyer, J., dissenting) (citing *Boumediene*, 553 U.S. at 766).

191. *Id.* at 2100 (Breyer, J., dissenting) ("There is wisdom in our past restraint. Situations where a foreign citizen outside U. S. Territory might fairly assert constitutional rights are not difficult to imagine.").

192. *Id.* at 2099.

193. *Id.* at 2089 (Kavanaugh, J., majority).

194. Breyer included many hypothetical issues to illustrate his point:

> Long-term permanent residents are "foreign citizens." Does the Constitution therefore allow American officials to assault them at will while "outside U. S. territory"? Many international students attend college in the United States. Does the First Amendment permit a public university to revoke their admission based on an unpopular political stance they took on social media while home for the summer? Foreign citizens who have never

IV. THE HARM OF CONFLICTING FIRST AMENDMENT DOCTRINE

AOSI I and *II* are almost identical, with the same parties, the same Act, and the same facts.[195] The Court's new interpretation of the Act affects the plaintiffs through its foreign affiliates as much as the old interpretation. The majority in *AOSI I* even speaks against forcing domestic organizations' affiliates to espouse Congress's beliefs, as an affiliate clearly identified with the domestic organization could express those beliefs "only at the price of evident hypocrisy."[196] Regardless of the nationality of the affiliate, any speech made would be compelled speech that people would attribute to the whole organization. Thus, theoretically, the cases should have the same outcome.

But the biggest difference between the two cases is that the Act in *AOSI I* directly implicates domestic organizations' First Amendment interests, while the reinterpreted Act in *AOSI II* only indirectly implicates domestic organizations' First Amendment interests through their foreign affiliates.[197] The Court seemed to find this difference critical, because it changed course, ruling for the government where it had previously ruled for the domestic organizations.[198] In fact, the Court in *AOSI II* even disregarded the language in *AOSI I,* stating that the government forcing affiliates to espouse Congress's language is unconstitutional.[199] Instead, the majority in *AOSI II* chose to ignore *AOSI I*'s precedent. The majority ignored the plaintiffs' First Amendment rights laid out in *AOSI I* to defer to Congress because the case only involved speech directly made by foreign organizations.[200] Despite the strong protection of the First Amendment rights of domestic organizations abroad

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> set foot in the United States, for that matter, often protest when Presidents travel overseas. Does that mean Secret Service agents can, consistent with our Constitution, seriously injure peaceful protestors abroad without any justification?

Id. at 2100-01.

195. *AOSI II*, 140 S. Ct. at 2085-86.

196. *AOSI I*, 570 U.S. at 219.

197. *See* Romanoff, *supra* note 162, at 387 ("While there are reasons to think that the nonparty NGOs in AOSI II had substantial connections to the United States, the Court considered none of them.").

198. *AOSI II*, 140 S. Ct. at 2085-86.

199. *See AOSI I*, 570 U.S. at 219 ("If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy.").

200. *See AOSI II*, 140 S. Ct. at 2087-88.

articulated in *AOSI I*,[201] *AOSI II* ignored the same rights of non-US citizens and gave Congress almost carte blanche when it comes to non-US citizens abroad.[202]

While the plaintiffs are the same in both cases, the cases are framed differently by each majority.[203] Su highlights the fact that *AOSI I* had many references to international implications in the parties' briefs, oral arguments, and amicus briefs.[204] Yet, this same emphasis on internationalism and its consequences abroad is not present in the Court's ruling.[205] Instead, the Court treats the case as an issue of Congressional spending versus a domestic organization's First Amendment rights.[206] The case focuses on the important domestic implications of compelled speech through Congressional spending.[207] *AOSI I* applies to all cases involving a government's attempt to control speech through spending with strong domestic implications—whether that government body be a local town council or Congress.[208] *AOSI II* does not have this same domestic applicability.

V. THE POST-AOSI II *LEGAL LANDSCAPE*

AOSI II provides a bleak future for non-US citizens outside of the United States seeking constitutional relief. The seemingly strict language is quite clear, yet has several gaps. Questions remain about when it should apply and why the Court took such a strict ruling.

201. *See generally AOSI I*, 570 U.S. at 208-21.

202. *See AOSI II*, 140 S. Ct. at 2086-87.

203. *Compare AOSI I*, 570 U.S. at 217-19 (focusing on the First Amendment rights of individuals rather than their location or citizenship status), *with AOSI II,* 140 S. Ct. at 2086-87 (focusing on the foreign organizations implicated in the domestic plaintiffs' argument).

204. Su, *supra* note 26, at 1426 (arguing that *AOSI I* hinted that the court might build on the extraterritorial First Amendment in the future).

205. *See generally AOSI I*, 570 U.S. at 217-21.

206. *Id.* at 218 ("By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient.").

207. *See* McBride, *supra* note 115.

208. *See generally id.* at 1073-75.

A. The Court's Obliteration of the First Amendment Abroad

The Court has demonstrated a strong interest in protecting domestic organizations' First Amendment rights,[209] which *AOSI I* further articulated. But *AOSI II* did not find this interest significant enough to protect the plaintiffs' First Amendment rights. The majority disregarded the language in *AOSI I* asserting that Congress compelling the speech of foreign organizations would be hypocritical to the whole organization's actual stance, and the stance of its domestic affiliates. The language is directly attributable to the circumstances in *AOSI II*, as forcing an affiliate to adopt language contrary to the domestic organizations' stance would appear hypocritical, discounting the organizations' attempt at a unified organization with a unified message. But instead of applying its reasoning from *AOSI I*, the majority in *AOSI II* ignored this analysis and deferred to Congress.

AOSI II does not have the same domestic applicability as *AOSI I*.[210] Therefore, it cannot have the same domestic emphasis as *AOSI I*. The plaintiffs in *AOSI II* focus on their First Amendment rights only through the foreign affiliates' compelled speech.[211] Thus, this case cannot be framed as a domestic issue with intraterritorial applications. There may have been some domestic implications in terms of misattributed speech through the compelled speech of affiliates.[212] But this argument was already addressed in *AOSI I* when the majority hinted that forcing a domestic affiliate to espouse Congress's beliefs would infringe upon a domestic affiliate's rights.[213] In terms of applicability, *AOSI II* was therefore a whole new case with only extraterritorial applications. The lack of domestic applicability of *AOSI II* is especially relevant to a Supreme Court that has been historically hesitant to extend First Amendment rights extraterritorially and has made every indication that it intends to continue on this trajectory of limiting

209. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

210. *See infra supra* Part III.

211. *AOSI II*, 140 S. Ct. at 2086-87.

212. *See* Brief for Respondents at 36-37, *AOSI II*, 140 S. Ct. 2082 (No. 19-177) (focusing on piercing the corporate veil rather than the domestic-foreign distinction).

213. *See AOSI I*, 570 U.S. at 219 ("If the affiliate is distinct from the recipient, the arrangement does not afford a means for the recipient to express its beliefs.").

First Amendment rights abroad.[214] Because *AOSI II* did not have a domestic applicability like *AOSI I* had, the Court was not as motivated to protect the American plaintiffs, as the Americans' territorial First Amendment rights were not at stake. Thus, the Court could defer to the government without fear of infringing on Americans' territorial rights.

The plaintiffs' First Amendment rights in *AOSI II* are not as direct as those in *AOSI I*. In the second case, the speech of foreign affiliates indirectly implicates the plaintiffs' rights.[215] By arguing for an American plaintiff's First Amendment rights through the speech of a non-US citizen, *AOSI II* is similar to *Mandel*[216] and *Amnesty International USA*.[217] In those cases, too, American plaintiffs argued that their First Amendment rights were being infringed upon through the speech of non-US citizens, even though the non-US citizens did not have First Amendment rights.[218] The Court did not wholeheartedly reject these arguments.[219] However, the American plaintiffs did not receive the desired result, as the Court ultimately deferred to the government in both cases.[220] In *AOSI II*, the Court may have acknowledged the domestic organizations' First Amendment rights in *AOSI I*,[221] but the Court ultimately discounted these rights by deferring to the government at the expense of the plaintiffs' First Amendment rights.[222] The Court seems to take extraterritorial First Amendment claims far less seriously when the government only infringes upon Americans' rights indirectly, through the speech of non-US citizens.

This is not the first time this has occurred: as we have seen, the Supreme Court has given much more leniency to the government at the expense of Americans' First Amendment rights

214. *See supra* Part II. *But see* Romanoff, *supra* note 162, at 352-53 (suggesting that *AOSI II* was so against extending constitutional rights abroad because of Kavanaugh's appointment to the Supreme Court, who had been against the extraterritorial First Amendment as a D.C. Circuit judge).

215. *AOSI II*, 140 S. Ct. at 2086.

216. Kleindienst v. Mandel, 408 U.S. 753 (1972).

217. Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013).

218. *Id.* at 401, 406-07; *Mandel*, 408 U.S. at 759-60.

219. *Amnesty Int'l USA*, 568 U.S. at 401-02, 411 (dismissing the case for lack of harm to American plaintiffs); *Mandel*, 408 U.S. at 762-63, 765.

220. *Amnesty Int'l USA*, 568 U.S. at 401-02; *Mandel*, 408 U.S. at 769-70.

221. *AOSI I*, 570 U.S. at 220.

222. *AOSI II*, 140 S. Ct. at 2089.

when dealing with government actions abroad.[223] For example, while *Mandel* recognized Americans' First Amendment rights to "receive information and ideas," the Court ultimately disregarded this because Congress had a right to make policies to exclude non-US citizens.[224] So, the Court found that the executive branch's decision to prevent a non-US citizen from entering the United States was legal, despite its infringement on Americans' First Amendment rights.[225] In *Amnesty International USA*, the Court again ignored the very probable infringement on Amnesty International's First Amendment rights because the government was spying on foreign actors and only indirectly spying on Americans.[226] The Court's leniency to the government was most apparent in *Holder*,[227] with legal experts classifying the Court's standard of review as "a weak, tepid version of strict scrutiny to a content-based criminal restriction of the freedom of speech and association."[228] *AOSI II* appears to follow the long but clear trajectory of the last fifty years of the Supreme Court eroding any existence of an extraterritorial First Amendment. But *AOSI II* goes even further than simply diminishing the extraterritorial First Amendment. The case draws a clear line between American and non-American, regardless of that affect on Americans.[229]

The Court particularly shies away from intervening in the other branches of the federal government's decisions abroad, wanting to allow the government to perform necessary functions abroad.[230] Many cases, including *Agee, Holder,* and *Amnesty International USA*, provide examples of the Court's fear that the government will be unable to operate abroad, particularly within

223. *See supra* Part II.
224. *Mandel*, 408 U.S. at 762-63.
225. *Id.* at 769-70.
226. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 407 (2013).
227. Holder v. Humanitarian L. Project, 561 U.S. 1 (2010).
228. Krotoszynski, *supra* note 32, at 505.
229. *See* Romanoff, *supra* note 162, at 387.
230. *See* Krotoszynski, *supra* note 32, at 482 ("The federal government has successfully invoked imperatives associated with diplomatic, military, and national security concerns to justify content- and viewpoint-based speech regulations that burden or completely prohibit First Amendment activity based on the locus of the speech activity being outside the United States."); *see also* Romanoff, *supra* note 162, at 399 (arguing that *AOSI II* should be interpreted as an emphasis on the separation of powers).

areas of national security.[231] As we have seen, the Court will go out of its way to defer to the government in cases regarding non-US citizens abroad on the off chance that the Court's decision *might* affect national security.[232] Even in *AOSI II*, Justice Kavanaugh underscored the importance of allowing the government to carry out its goals abroad and promote its interests at the expense of domestic organizations' First Amendment rights.[233]

Constitutional law scholar Aziz Huq tries to square the Court's First Amendment ruling in *Holder* with other, more protective decisions by suggesting that the Court adopt different standards between internal and external threats.[234] National security law scholar David Cole theorized that *Holder* is only logical if it applies to cases involving (1) the government's regulation of speech (2) coordinated with foreign organizations (3) to protect national security interests.[235] *AOSI II* meets the first two prongs of Cole's hypothesis, but not the third: a statute aimed at combating the HIV/AIDS epidemic is not a clear national security risk the way second-guessing the State Department's decision to deny a visa in *Mandel* or invalidating the Patriot Act in *Holder* might have been.

In *Agee*, *Holder,* and *Amnesty International USA*, the Court had clear national security concerns in mind when making its rulings.[236] With *AOSI II*, those national security issues are not present. While the majority hinted at national security concerns by stating that Congress may condition funding based on a foreign

231. *Amnesty Int'l USA*, 568 U.S. at 407, 422 (declining to consider any violation of the plaintiffs' First Amendment rights because the plaintiffs could not demonstrate the clear nonspeculative harm of the government surveilling people not living in the United States); *Holder*, 561 U.S. at 30-31, 33 (creating a new form of strict scrutiny that appears to only be applicable abroad); Haig v. Agee, 453 U.S. 280, 280-81, 309 (1981) (deferring to the Secretary of State by highlighting that the plaintiff was targeted by his conduct rather than speech and underlining the importance of national security in such cases). National security also appears to be a rationale for deferring to the government, even when First Amendment issues are at stake. *See AOSI I*, 570 U.S. at 221-22, 224 (Scalia, J., dissenting) (inexplicably creating hypothetical examples involving funding Hamas to argue that the Act's funding provisions did not violate the First Amendment).

232. Romanoff, *supra* note 162, at 391.

233. *AOSI II*, 140 S. Ct. at 2087-88.

234. Huq, *supra* note 84, at 17.

235. Cole, *supra* note 88, at 149-50, 164-77.

236. *Amnesty Int'l USA*, 568 U.S. at 402; *Holder*, 561 U.S. at 36; *Agee*, 453 U.S. at 305 (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964)) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation.").

organization's "ideological commitments" such as "anti-terrorism,"[237] *AOSI I* and *II* implicates an Act aimed at combating the global HIV/AIDS epidemic, which does not directly affect national security concerns.

Some have argued that *AOSI I* and *II* may have security concerns because American foreign aid has many objectives, including promoting national security.[238] But even so, any national security implications of the Act would be minor. And if Congress truly needed to prevent terrorism, precedent in *Holder* indicates that Congress's statute would only have to prevail against a weaker, tepid form of strict scrutiny.[239] Moreover, there are other means of promoting the First Amendment abroad: the government may use its spending powers or diplomatic influence to encourage other nations to adopt First Amendment standards. [240] The Supreme Court's deference to the government on extraterritorial issues at the expense of the First Amendment is not reasonable, nor is its continued diminishing of First Amendment rights abroad. Even so, the majority wanted to draw a hard line in the sand, demolishing what little extraterritorial First Amendment rights may still exist in case *AOSI II* might somehow affect national security interests in the future.

The Court prioritizes making clear rules about the applicability of the Constitution in an era of globalization.[241] This priority is quite important, as borders begin to blur with the rise of global commerce and the ease of transborder communication.[242] The majority in *AOSI II* underscored the importance of clearly laying out when the First Amendment applies abroad. [243]

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237. *AOSI II*, 140 S. Ct. at 2087-88.

238. *See, e.g.*, Romanoff, *supra* note 162, at 395-96.

239. *See* Charles W. Rhodes, *Speech, Subsidies, and Traditions:* AID v. AOSI *and the First Amendment*, 2012-13 CATO SUP. CT. REV. 363, 390-91 (2013) (suggesting a court could apply *Holder*'s lower standard of strict scrutiny in cases of terrorism); *see also* Krotoszynski, *supra* note 32, at 505; Cole, *supra* note 88, at 148 (finding that *Holder* indicates that extraterritorial First Amendment cases must require a weaker standard of review than intraterritorial cases).

240. Zick, *supra* note 19, at 1589.

241. *See id.* at 1580.

242. *Id.* ("The once-clear line between domestic and foreign speech has begun to blur.").

243. *AOSI II*, 140 S. Ct. at 2089 ("Plaintiffs' carve-out not only would deviate from that fundamental principle, but also would enmesh the courts in difficult line-drawing exercises—how closely identified is close enough?—and leave courts without any

Regardless of how clear the majority's purported clearly drawn line really is, why does this line need to be where the majority drew it? As the dissent stated, the "bedrock principles"[244] are not nearly as well-founded as the majority claims. Nor is the answer as clear as the majority claims, with many questions still uncertain.

By taking such a hardline ruling against affiliates' speech, the Court has drastically limited American citizens' First Amendment rights abroad. Suddenly, domestic organizations have no First Amendment rights unless they do not work with any foreign affiliates. But domestic organizations often must create foreign affiliates to defer to local law in other countries.[245] The US Agency for International Development even has many programs where organizations can only receive federal funding through foreign affiliates.[246] In effect, domestic organizations must choose between adopting Congress's views and accepting federal funding or staying true to their word and missing out on funding that could help many vulnerable people. The plaintiffs faced this same dilemma before *AOSI I*, before the Court held that these domestic organizations had First Amendment rights and should not have to make this choice. The plaintiffs should not be back where they started.

The Supreme Court is so concerned that its rulings may infringe the government's ability to operate abroad, that they are unwilling to acknowledge the existence of almost any First Amendment rights outside of the United States. *AOSI II*'s ruling will harm domestic plaintiffs as much as if *AOSI I* had not ended up in their favor. Clearly, something has gone wrong. Instead of consistently diminishing the extraterritorial First Amendment case by case, the Supreme Court should build up the First Amendment abroad, affording Americans the same standards of intraterritorial First Amendment rights. If the Court continues its current trajectory, the extraterritorial First Amendment will be almost nonexistent, adopting the most deferential standard to the government, even for American citizens.

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principled basis for making those judgments."); *but see id.* at 2100-01 (Breyer, J., dissenting) ("We have never purported to give a single 'bedrock' answer to . . . myriad other extraterritoriality questions that might arise in the future. To purport to do so today, in a case where the question is not presented and where the matter is not briefed, is in my view a serious mistake.").

244. *See id.* at 2086-87 (Kavanaugh, J., majority).

245. Brief for Respondents at 6, *AOSI II*, 140 S. Ct. 2082 (No. 19-177).

246. *Id.* at 7.

B. Possible Solution: Reframing the Question to Fit Within AOSI I *Doctrine*

While the content of *AOSI II* seemed to have much more of a foreign emphasis than *AOSI I*, the case did not need to be interpreted this way. Justice Breyer's dissent in *AOSI II* asserts that the messages belonged to American speakers who need to use foreign affiliates abroad.[247] Forcing foreign affiliates to adopt the Act's speech also distorts the American organizations' speech.[248] Thus, this case is not about foreign organizations' rights, but about domestic organizations' rights, and how far those rights should extend beyond US borders.[249]

Misattributed speech is not a new legal concept.[250] The dissent laid out a strong explanation for why forcing foreign affiliates to adopt Congress's views would be misattributed to the domestic organizations, therefore violating the First Amendment,[251] and the majority does not deny this. The majority could easily have followed a long line of domestic precedent regarding misattributed speech mentioned by the dissent, finding for the plaintiffs that compelling foreign affiliates' speech violates the First Amendment rights of their domestic affiliates. Instead, the majority took a hardline stance against the rights of foreign entities abroad, ignoring domestic entities' First Amendment rights in the process.

Moreover, as Justice Breyer asserts, there is a long line of precedent around misattributed speech in the United States.[252] The Court likely believed it was creating a precedent that lower courts could follow when deciding *Hurley*. If the Court had been concerned that lower courts would be unable to apply a ruling on misattributed speech made by foreign affiliates, it could have laid out a legal standard for future cases, including criteria to look for, degrees of separation, whether it was necessary to use foreign affiliates, or any other factors the Court deemed necessary. By

247. *AOSI II*, 140 S. Ct. at 2099 (Breyer, J., dissenting).

248. *Id.*

249. *Id*.

250. *See, e.g.,* Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, Inc., 515 U.S. 557 (1995).

251. *AOSI II*, 140 S. Ct. at 2094-99 (Breyer, J., dissenting).

252. *Id.* at 2097-98; *see also generally* Abner Greene, *(Mis)Attribution,* 87 DENV. U. L. REV. 833 (2010).

refusing to even look at when misattributed speech might apply in an international context, the Supreme Court was actively choosing to curtail the extraterritorial First Amendment. It did not need to take what seemed to be the easiest approach of drawing a line separating domestic organizations and their foreign affiliates.[253]

Even if the majority was concerned that ruling for the plaintiffs in *AOSI II* would give non-US citizens too much power, or take away too much power from the government, the majority did not need to acknowledge anything about non-US citizens' rights abroad. Past cases have made it clear that non-citizens do not have constitutional rights abroad.[254] Thus, the question in *AOSI II* was not supposed to be whether the foreign organizations have First Amendment rights abroad. That argument would not prevail: no Justice wanted to overrule such strong precedent.[255] But the scope of the extraterritorial First Amendment's application to Americans remains unclear.[256] Therefore, the issue in *AOSI II* did not turn on the rights of foreign organizations, but on the First Amendment rights of domestic organizations indirectly implicated through foreign organizations' speech.

As the dissent mentions, the majority did not need to find that all foreign organizations had First Amendment rights abroad. It only had to work within the existing framework of misattributed speech to find that forcing foreign affiliates of domestic organizations to adopt certain beliefs violated the domestic organizations' First Amendment rights. The Court took a very different approach, discounting all Americans' indirect speech made through non-American affiliates. Justice Breyer's dissent was the correct argument, consistent with First Amendment caselaw. Justice Breyer's dissent should have been the majority ruling in *AOSI II*, protecting American organizations' First Amendment

253. *Cf.* Adam Liptak, *Justices Are Long on Words but Short on Guidance* N.Y. TIMES (Nov. 17, 2010) https://www.nytimes.com/2010/11/18/us/18rulings.html?_r=0&pagewanted=print [https://perma.cc/JB7Y-RQA5] (writing the Supreme Court has increasingly offered only limited and ambiguous guidance to lower courts in its rulings).

254. *Su, supra* note 26, at 1413; s*ee, e.g.,* Boumediene v. Bush, 553 U.S. 723, 770-71 (2008); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

255. *See, e.g., AOSI II*, 140 S. Ct. at 2100 (Breyer, J., dissenting) ("[E]ven our most sweeping statements about foreign citizens' (lack of) constitutional rights while outside U.S. Territory have come with limits.").

256. Su, *supra* note 26, at 1413.

rights abroad and maintaining the Court's commitment to First Amendment rights generally.

C. Looking Beyond AOSI II

AOSI II created a clear and dangerous precedent for lower courts to follow: the government is owed deference to act overseas, even to the point of constitutional violations abroad. *AOSI II* adequately conveys the Court's future intentions to eat away at the extraterritorial First Amendment in favor of allowing the government to act as it likes abroad.

Some scholars recommend that lower courts disregard *AOSI II*'s ruling, arguing that the case can be disregarded because it could have been resolved without the majority's ruling.[257] Others argue that *AOSI II*'s ruling does not actually settle whether non-US citizens have US constitutional rights while abroad, and thus the matter is still open to interpretation.[258] But neither of those ideas get to the root of the problem: the Supreme Court's fear of encroaching on the other two branches' plenary powers, even when First Amendment rights are at stake. Moreover, lower courts cannot simply disregard Supreme Court cases they disagree with, however incorrect or problematic the cases may be. Instead, the Court needs to build up these rights abroad, laying out clear rules and when they should apply.

The Supreme Court needs to begin rebuilding the extraterritorial First Amendment. The Court can start by overturning its erroneous ruling in *AOSI II*, implementing the position laid out in Justice Breyer's dissent to protect American organizations' First Amendment rights. By focusing on the rights of the American organizations instead of their foreign affiliates, the

257. *See First Amendment—Freedom of Speech—Extraterritoriality*—Agency for International Development v. Alliance for Open Society International, Inc., 134 HARV. L. REV. 490, 498-99 (2020) ("Finally, the unique facts of AOSI II, coupled with the Court's traditional hesitancy to rule broadly on the extraterritorial reach of the Constitution, counsel against adoption of AOSI II's articulation of extraterritoriality in future cases.").

258. Romanoff, *supra* note 162, at 407 (referring to lower court cases which disregarded *AOSI II* to consider that future cases will allow the Constitution to reach non-US citizens abroad); Joshua J. Schroeder, *Conservative Progressivism in Immigrant Habeas Court: Why* Boumediene v. Bush *Is the Baseline Constitutional Minimum*, 45 HARBINGER 46 (2021) (claiming that the majority's statement in *AOSI II* that "foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution" was dicta, and not law).

Court can make sure that American organizations will effectively retain their First Amendment rights abroad.

1. Justice Breyer's Hypotheticals in *AOSI II*

In his dissent, Justice Breyer posed several hypothetical ambiguities which the majority's hardline ruling did not address.[259] First, Justice Breyer asked if American officials may assault long-term permanent residents while outside of US territories.[260] The hypothetical raises valid questions about what contacts within the United States are necessary for constitutional rights to apply to a person. A long-term permanent resident is not a US citizen, but one would hope that he or she would have some constitutional rights. Justice Breyer's hypothetical suggests a comparison between foreign affiliates of domestic organizations and long-term permanent residents, asking in what contexts constitutional rights apply to non-US citizens.

Next Justice Breyer asks whether a public university may revoke admission to an international student based on a political stance the student posted on social media while outside of the United States.[261] In this hypothetical, although the student posted on social media outside of the United States, the university is located within the United States, and the student has substantial connections within the United States. In addition to highlighting the motivation of protecting students' free speech, this scenario demonstrates the question about what kind of contacts might afford an individual free speech protections under the Constitution.

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259. Justice Breyer's hypotheticals include:

> Long-term permanent residents are "foreign citizens." Does the Constitution therefore allow American officials to assault them at will while "outside U. S. territory"? Many international students attend college in the United States. Does the First Amendment permit a public university to revoke their admission based on an unpopular political stance they took on social media while home for the summer? Foreign citizens who have never set foot in the United States, for that matter, often protest when Presidents travel overseas. Does that mean Secret Service agents can, consistent with our Constitution, seriously injure peaceful protestors abroad without any justification?

AOSI II, 140 S. Ct. at 2100 (Breyer, J., dissenting).

260. *Id.*

261. *Id.*

Justice Breyer's last hypothetical asks whether Secret Service agents may constitutionally injure, without justification, non-US citizens peacefully protesting abroad.[262] The scenario asks to what extent the First Amendment may protect individuals with no ties to the United States, or if the US government can create repercussions for non-citizens based on their speech. Comparing *Boumediene*[263] and *AOSI II*,[264] it is unclear in what instances non-US citizens have constitutional rights. While *Boumediene* involved an area outside of US territory that was nonetheless under US control, it is unclear how much control the US government must have for the Constitution to apply to everyone, including non-citizens.

These hypothetical scenarios demonstrate the many remaining questions regarding the extraterritorial First Amendment applications to non-US citizens,[265] as well as the great nuance required in these situations. While one would like the US Constitution to protect all victims in Justice Breyer's hypotheticals, it is unclear if the Roberts Court would extend constitutional protections to all those implicated. Instead of making hardline rules, the Court must look to who is involved and affected before determining who has First Amendment rights. In looking at these important questions, the Court can begin creating clear caselaw that builds up the First Amendment abroad, and allows lower courts to do the same.

2. The Supreme Court's Opportunity with *Thunder Studios*

In 2021, the Ninth Circuit limited *AOSI II*'s reach by extending First Amendment protections to defendants located in Australia.[266] Although the majority in *AOSI II* implied that First Amendment protections were contingent on the non-US citizen being physically

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262. *Id.*

263. Boumediene v. Bush, 553 U.S. 723, 771 (2008) (finding that the Suspension Clause of the Constitution applied to non-US citizens located outside of US territory because the area was under the complete control of the United States government).

264. *AOSI II*, 140 S. Ct. at 2086 ("[I]t is long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution.").

265. *See* Su, *supra* note 26, at 1415 (arguing that a non-US citizen protesting at a US embassy should be able to invoke First Amendment rights if American security officers arrest him).

266. Thunder Studios, Inc. v. Kazal, 13 F.4th 736, 743-44 (9th Cir. 2021).

present in the United States,[267] in *Thunder Studios, Inc. v. Kazal*, the court did not take *AOSI II*'s ruling that far. In *Thunder Studios*, an Australian citizen, but California resident, sued three Australian citizens for stalking, even though the three defendants remained in Australia throughout the series of events that unfolded.[268] The defendants argued that their actions were speech-related, and therefore protected under the First Amendment.[269] The Ninth Circuit found that although the defendants were outside of the United States, "the recipients of their speech and speech-related conduct were in California."[270] Therefore, *AOSI II* did not apply, and the Court protected the defendants' speech under the First Amendment.[271] However, one judge dissented, arguing that the First Amendment did not extend to defendants without "substantial connections" to the United States.[272]

Thunder Studios is an excellent example of a court building up the extraterritorial First Amendment rather than diminishing it. The plaintiff in *Thunder Studios* has recently petitioned the Supreme Court to grant certiorari.[273] His petition largely relies on *AOSI II* and its hardline refusal to extend the extraterritorial First Amendment.[274] Taking this case and upholding the Ninth Circuit's ruling would be an excellent opportunity for the Supreme Court to undo much of the damage it inflicted in *AOSI II*. By upholding the Ninth Circuit's ruling and overturning *AOSI II*, the Court would set

267. *AOSI II*, 140 S. Ct. at 2086; Romanoff, *supra* note 162, at 383.

268. *Thunder Studios*, 13 F.4th at 740-43. According to the record, these events included sending rude emails to Thunder Studios employees, engaging a private investigator in Los Angeles to surveil the plaintiff's house, and hiring protestors to picket the plaintiff's house and Thunder Studios. *Id.* at 740-41. The record also documents some of plaintiff's actions to include a Thunder Studios employee creating several websites accusing the defendants of money laundering and claiming they were affiliated with the terrorist group Hezbollah and the Libyan leader Muammar Qaddafi. *Id.* at 741.

269. *Id.* at 742.

270. *Id.* at 743.

271. *Id.* at 744.

272. *Id.* at 748-52 (Lee, J., dissenting) (drawing on law supposedly going back to the founding fathers to argue that First Amendment protections did not extend to the defendants in Australia).

273. Petition for a Writ of Certiorari, David v. Kazal, (No. 21-1156) (February 22, 2022).

274. *Id.* at i, 6-9.

the stage for future opportunities to demonstrate its interest in extending First Amendment protections extraterritorially.[275]

VI. CONCLUSION

The Supreme Court has been gradually diminishing the extraterritorial First Amendment for decades, and its most recent case is no exception. *AOSI II* contradicts *AOSI I's* emphasis on the First Amendment. The Court in *AOSI II* effectively took away domestic organizations' First Amendment rights by allowing the government to control the organizations through their affiliates. The Supreme Court acted wrongly in *AOSI II* by ruling that foreign organizations acting abroad do not have First Amendment rights, even when carrying out their American affiliates' will. The Court must immediately grant certiorari on a similar case to overrule *AOSI II* in favor of the position outlined in Justice Breyer's dissent so the courts can once again protect the First Amendment rights of Americans overseas.

275. *See* Romanoff, *supra* note 162, at 385 ("Thunder Studios speaks to a potential category of situations in which courts might viably extend a partial noncitizens' extraterritorial Constitution on more nuanced, subtler grounds . . . Future scholarship and litigation may further illuminate the scope of this category.").