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FUNDING CONDITIONS AND FREE SPEECH FOR HIV/AIDS NGOS: HE WHO PAYS THE PIPER CANNOT ALWAYS CALL THE TUNE

*Alexander P. Wentworth-Ping**

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act pledges billions of dollars to fund NGOs combating the HIV/AIDS epidemic but requires recipients to adopt a policy explicitly opposing prostitution and sex trafficking. A possible recipient NGO confronts a tough decision: adopt an affirmative statement against prostitution and sex trafficking to accept the funds, alienating a vital partner in its efforts to eradicate HIV/AIDS; or deny the funds to speak its own message, though without the benefit of government assistance.

Courts are split on whether the Leadership Act's policy requirement places an unconstitutional condition on federal funds that requires grant recipients to surrender their First Amendment right to freedom of speech by compelling speech and impermissibly discriminating on the basis of viewpoint. This Note addresses the circuit split that has resulted from differing conceptions of what constitutes compelled speech, what conditions act as a penalty, and what conditions suppress alternate viewpoints. To resolve this split, this Note adopts the framework of analysis used by dissenting Judge Chester Straub in the Second Circuit and applies his framework to assert that the Leadership Act's policy requirement unconstitutionally denies NGOs the ability to express alternate messages with nonfederal funds.

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* J.D. Candidate, 2013, Fordham University Law School; B.A., 2008, Williams College. I would like to thank my advisor, Professor Tracy Higgins, for her guidance. This Note is dedicated to Mom, Dad, Mimi, Dawson, and Katherine. Your love and support give me the courage to always reach for the stars.

INTRODUCTION

The Human Immunodeficiency Virus (HIV) and the Acquired Immune Deficiency Syndrome (AIDS) have greatly impacted society, both as a disease and as a source of stigma and discrimination. In 2009 alone, approximately 1.8 million adults and children died of HIV/AIDS.[1] As of 2010, about 33.3 million are infected globally,[2] including millions of mothers[3] and children.[4] While epidemic patterns vary, drug use and prostitution both continue to be high risk behaviors that exacerbate the global HIV epidemic.[5]

People infected with HIV continue to be stigmatized, discriminated against, and treated unfairly. The U.N. AIDS program reports that 78

1. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, *Global Report: UNAIDS Report on the Global AIDS Epidemic 2010*, at 19 (2010), *available at* http://www.unaids.org/globalreport/documents/20101123_GlobalReport_full_en.pdf.

2. *Id.* at 21, 23 tbl 2.2.

3. In 2009, approximately 370,000 children were born to mothers infected with HIV. *Id.* at 78.

4. As of 2009, 3.4 million children were living with HIV. *Id.* at 23, 24 fig. 2.5. Sixteen million children have been orphaned by infected parents. *Id.*

5. *Id.* at 224. This Note uses the word "prostitute" unenthusiastically, because that word implies a situation of choice and agency involved for these women, which statistics and evidence suggest is not the case. *See, e.g.*, Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13 (1993) (describing the victimization of women in prostitution); Nicole Franck Masenior & Chris Beyrer, *The US Anti-prostitution Pledge: First Amendment Challenges and Public Health Priorities*, 4 PLOS MED. 1158, 1159 (2007) (briefly describing the controversy over using the term "prostitution"); Julie Bindel, *Eradicate the Oldest Oppression*, GUARDIAN, Jan. 18, 2006, at 28 (detailing the oppressive aspects the prostitution has on women). Instead, words like "the prostituted" or "sex worker" will hopefully become more popular. However, in an effort to be faithful to the wording of the statute at issue, this Note will utilize the word "prostitution."

countries—46 percent of reporting countries—acknowledged the existence of laws, policies, and regulations that obstructed access to effective HIV prevention, treatment, care, and support for population groups at higher risk and other vulnerable population groups.[6] Likewise, only 46 percent of 171 reporting countries budget HIV programs for women;[7] more than 100 countries continue to criminalize some form of sex work.[8] The increasing trend of laws criminalizing the transmission of HIV or the failure to disclose one's HIV status does not support a safe environment for voluntary disclosure either.[9] Even so, 51 countries, territories, and entities impose some form of restriction on the entry, stay, and residence of people living with HIV.[10]

With the HIV/AIDS epidemic continuing to affect millions, the United States, as the world leader in fighting the HIV/AIDS epidemic,[11] took action in 2003 by passing the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act[12] (Leadership Act). The Leadership Act pledged billions of dollars to fight against HIV/AIDS, assisting nonprofits, foreign governments, and nongovernmental organizations (NGOs) around the world.[13] The Leadership Act has one caveat or policy requirement: according to section 7631(f), the government would only disburse funds to organizations that have "a policy explicitly opposing prostitution and sex trafficking."[14]

Despite the government's goodwill, some NGOs conducting HIV/AIDS prevention and treatment programs have challenged the Policy Requirement's constitutionality. Courts disagree on whether the Policy

6. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, *supra* note 1, at 123.

7. *Id.* at 134.

8. *Id.* at 126.

9. *Id.* at 128.

10. *Id.* at 127 fig. 5.2.

11. *See HIV/ AIDS*, USAID, http://www.usaid.gov/what-we-do/global-health/hivaids (last visited Oct. 20, 2012) (finding that USAID has been at the forefront of the global AIDs crisis since 1986, providing lifesaving treatment to more than 3.9 million people, counseling for more than 40 million people, care for 9.8 million pregnant women, including mother-to-child prevention support for 660,000 HIV-infected mothers); *see also* Remarks on Signing the United States Leadership Act Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 1 PUB. PAPERS 541 (May 27, 2003) [hereinafter *Presidential Remarks*], *available at* http://2001-2009.state.gov/p/af/rls/74868.htm.

12. Pub. L. 108-25, 117 Stat. 711 (codified as amended at 22 U.S.C. § 7601 (2006 & Supp. V 2011)). Congress later extended funding until 2013. *See* United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, § 401(a), 122 Stat. 2918, 2966 (codified as amended at 22 U.S.C. § 7601 (Supp V. 2011)).

13. 22 U.S.C. § 7601.

14. This Note refers to this caveat as the "Policy Requirement." *Id.* § 7631(f); *see infra* Part I.B.2. While the Act juxtaposes sex trafficking and prostitution because both perpetuate an oppressive sex industry, sex trafficking and prostitution each involve different levels of agency, coercion, and slavery. *See* Kate Butcher, *Confusion Between Prostitution and Sex Trafficking*, 361 LANCET 1983, 1983 (2003); Masenior & Beyrer, *supra* note 5, at 1159 (finding that "many organizations disagree with the Act's equation of all forms of prostitution with sex trafficking").

Requirement requires recipient NGOs to surrender their First Amendment free speech rights. The D.C. Circuit upheld the Policy Requirement in 2007, finding that the Leadership Act did not coerce or force any recipient to unwillingly espouse the government's message.[15] The Second Circuit disagreed, finding that the Policy Requirement unconstitutionally conditioned the receipt of federal funds by failing to leave open alternative channels of expression and compelling recipient organizations to speak the government's message.[16]

This Note explores the constitutionality of the Leadership Act's Policy Requirement. Like the fabled Pied Piper of Hamelin who charmed a town's rats away in return for a fee,[17] is an NGO that accepts government funds obligated to play the government's tune? Despite Congress's broad powers under the Spending Clause,[18] does a funding condition that imposes an affirmative speech requirement infringe on constitutionally protected free speech? This Note clarifies and explains how the unconstitutional conditions doctrine applies to the Policy Requirement. Part I explains the doctrine of unconstitutional conditions of free speech and outlines the Leadership Act's purpose, text, and effects. Part II analyzes the different standards of review and holdings that form the current split between the Second and D.C. Circuits over whether the Leadership Act's Policy Requirement unconstitutionally infringes on a recipient's free speech. Part III argues that Judge Chester Straub's dissent in the Second Circuit had the best framework for analyzing unconstitutional conditions cases, but applied the framework to reach an incorrect conclusion. Part III concludes that the Policy Requirement should be deemed unconstitutional for failing to provide an adequate alternate channel for NGOs wishing to refrain from speaking an antiprostitution message, and by restricting the recipient's Free Speech outside of the scope of the recipient's participation in the federally-funded program.

I. U.S. FOREIGN AID, UNCONSTITUTIONAL CONDITIONS AND THE LEADERSHIP ACT

Part I of this Note explores the unconstitutional conditions doctrine and its application to the Leadership Act. Part I.A traces the evolution of the unconstitutional conditions through the courts and proposes a general framework for understanding conditional government subsidies on free speech. Part I.B introduces funding conditions for foreign aid and gives a brief account of the Leadership Act's purpose, text, and effects.

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15. *See* DKT Int'l, Inc. v. U.S. Agency for Int'l Dev., 477 F.3d 758, 764 (D.C. Cir. 2007).

16. *See* Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev. (*Alliance IV*), 651 F.3d 218, 223–24 (2d Cir. 2011), *reh'g en banc denied*, 678 F.3d 127 (2d Cir. 2012), *petition for cert. filed*, No. 12-10 (U.S. July 2, 2012).

17. ROBERT BROWNING, THE PIED PIPER OF HAMELIN (1888), *available at* http://www.indiana.edu/~librcsd/etext/piper/text.html.

18. *See infra* notes 19–20 and accompanying text.

A. Understanding Unconstitutional Conditions on the Right to Free Speech: History and Current Analysis

The Spending Clause of the Constitution empowers Congress 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."[19] While this constitutional provision has consistently been found to give Congress the power to provide subsidies in order to advance its policy goals,[20] the spending power does not give Congress absolute discretion to condition federal funds.[21] When the government does not directly regulate an activity, but only implicates those interests through conditions on federal spending, a different framework, the unconstitutional conditions doctrine, applies.[22] The unconstitutional conditions doctrine addresses the constitutionality of conditions placed on the receipt of federal funds that infringe on the recipient's constitutional rights.[23] Though the doctrine has

19. U.S. CONST. art. I, § 8, cl. 1.

20. *See* South Dakota v. Dole, 483 U.S. 203, 206–07 (1987) (citing Fullilove v. Klutznick, 448 U.S. 448, 474 (1980), Lau v. Nichols 414 U.S. 563, 569 (1974), Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958), Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127, 143–44 (1947), and Steward Mach. Co. v. Davis, 301 U.S. 548 (1937)). For the purposes of this Note, government subsidies can be benefits of any type, including cash, grants, tax exemptions, in-kind goods or services, or the permission to use government facilities for a lower cost.

21. *See* Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (*FAIR*), 547 U.S. 47, 59 (2006) (quoting United States v. Am. Library Ass'n., Inc., 539 U.S. 194, 210 (2003)); Perry v. Sindermann, 408 U.S. 593, 597 (1972); Frost v. R.R. Comm'n of Cal., 271 U.S. 583, 593–94 (1926) (finding that "the power of the state . . . is not unlimited").

22. *See, e.g.*, David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government Funded Speech*, 67 N.Y.U. L. REV. 675, 679–80 (1992); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 5–7 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV 1293, 1293–95 (1984); Thomas W. Merrill, Dolan v. City of Tigard*: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 859–60 (1995); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421 (1989).

23. Lynn Baker argues that the government creates subsidies with two types of conditions: (1) conditions that present a choice for the recipient between "complying with the attached condition and receiving the benefit, or not complying and foregoing receipt of the benefit"; and (2) "conditions that automatically disqualify persons who possess some immutable characteristic." Lynn A. Baker, *The Price of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1184, 1189 (1990). This Note will not address the second type of condition, which usually concerns a denial of equal protection under the Fifth or Fourteenth Amendments; instead, the unconstitutional conditions doctrine generally only concerns those conditions on government subsidies that present an individual with an apparent choice. For more conditional allocations based on immutable characteristics that violate the Equal Protection Clause and Substantive Rights, see Gary Feinerman, *Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection*, 43 STAN. L. REV. 1369 (1991).

been criticized,[24] some scholars remain optimistic about the use of conditional government subsidies.[25]

Because the U.S. Supreme Court has acknowledged the importance of checking government conditional power,[26] it has provided four constraints on conditional government subsidies. The first constraint, derived from the language of the Constitution, provides that the spending power must be in pursuit of "the general welfare."[27] Courts, however, have deferred to congressional judgment to make that conclusion.[28] The second constraint requires Congress to unambiguously and clearly denote the condition.[29] This constraint enables the recipient to make an informed free choice, aware of the decision's consequences.[30] Similar to the first, however, courts have found that government subsidies easily comply with this requirement.[31] Third, conditions on federal grants must have a rational relationship to the federal interest at stake.[32] While this rational relationship test could theoretically rein in conditional subsidies by requiring a close nexus between the monies and the enumerated interest, courts have applied this test with similar deference to the legislature, requiring only a minimal showing of a rational relationship.[33] In *South Dakota v. Dole*,[34] the Court admitted that the third "relatedness" constraint had never been defined, but found that receiving federal highway funds was sufficiently related to the condition that the legal drinking age be twenty-one years old.

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24. *See, e.g.*, Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is An Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

25. *See, e.g.*, Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 2 (2000) (arguing that conditional subsidies can be used to change societal norms and values); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996) (analyzing how a democratic state can achieve its goals through subsidizing speech).

26. *See* Frost v. R.R. Comm'n of Cal., 271 U.S. 583, 593–94 (1926).

27. *See* Helvering v. Davis, 301 U.S. 619, 640–41 (1937); United States v. Butler, 297 U.S. 1, 65 (1936); *see also* U.S. CONST. art. I, § 8, cl. 1.

28. *See e.g.*, *Helvering*, 301 U.S. at 640; *Butler*, 297 U.S. at 65. The Court has even questioned whether this restriction is even judicially enforceable given the level of deference given to Congress. *See* South Dakota v. Dole, 483 U.S. 203, 207 n.2 (1987) (citing Buckley v. Valeo, 424 U.S. 1, 90–91 (1976)).

29. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

30. *Id.*

31. *See, e.g.*, *FAIR*, 547 U.S. 47, 59 (2006); *Dole*, 483 U.S. at 207–08.

32. *See* Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion) (finding that federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs"); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.").

33. *See, e.g.*, *Dole*, 483 U.S. at 207 (finding that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs'" (quoting *Massachusetts*, 485 U.S. at 461 (1971))); Lawrence Cnty v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269–70 (1985); Buckley v. Valeo, 424 U.S. 1, 96 (1976). The Supreme Court has likewise required a close nexus between the purpose of a government benefit and the condition for takings. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

34. 483 U.S. 203 (1987).

Consequently, the Court declined to "address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power."[35] Despite Justice O'Connor's finding that the majority had misapplied the relatedness test,[36] lower courts have found this rational-relation test to be toothless.[37]

Because the other requirements have become mostly irrelevant, the Constitution provides the main limitation on conditional subsidies.[38] Any government exchange of some benefit, usually a grant or a tax exemption for the waiver of any part of a constitutional right, triggers the doctrine.[39] This includes a subsidy conditioned on any requirement that infringes on the recipient's First Amendment right to freedom of speech.[40] The unconstitutional conditions framework is irrelevant, however, when the freedom of speech is merely implicated or affected; the condition must cause a violation of the underlying First Amendment right.[41] Thus, the purpose of the unconstitutional conditions doctrine is to determine when a subsidy condition infringes on a recipient's First Amendment rights.[42] When the condition does not violate a right, then no unconstitutional

35. *See Dole*, 483 U.S. at 208–09 n.3.

36. *Id.* at 213–14 (O'Connor, J., dissenting) (finding that "establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose").

37. *See, e.g.*, Kansas v. United States, 24 F. Supp. 2d 1192, 1198 (D. Kan. 1998) (finding that a Child Enforcement Program condition had a "sufficient relationship to the purpose of the federal funding so as to pass constitutional muster" without further analysis); Litman v. George Mason Univ., 5 F. Supp. 2d 366, 376 (E.D. Va. 1998) (providing only limited analysis of the relatedness prong by saying "[t]he Court finds that [the statutory provisions at issue] easily satisfy this requirement, and Defendant does not argue otherwise"); *see also* Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How A Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 463 (2003) (finding that none of the restrictions have much "bite"). *But see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012) (declining to extend the *Dole* framework, though noting its "permissive reading" when considering conditional subsidies).

38. *See Dole*, 483 U.S. at 208; *Buckley*, 424 U.S. at 91; King v. Smith, 392 U.S. 309, 333 n.34 (1968). While other amendments can constrain government subsidies as well, this Note will focus exclusively on conditions that infringe on the freedom of speech in the First Amendment. For more on other types of unconstitutional conditions, see Baker, *supra* note 23, at 1187 (discussing the unconstitutional conditions doctrine with reference to "public assistance" and the general welfare); William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243 (1989); Michael W. McConnel, *Unconstitutional Conditions: Unrecognized Implications of the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989).

39. *See* Sullivan, *supra* note 22, at 1421–22.

40. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (finding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."); *see also FAIR*, 547 U.S. 47, 59 (2006) (recognizing Congress's limited ability to condition funds that limit freedom of speech).

41. *See Alliance IV*, 651 F.3d 218, 244 (2d Cir. 2011), *reh'g en banc denied*, 678 F.3d 127 (2d Cir. 2012); *FAIR*, 547 U.S. at 59–60 (not addressing the unconstitutional conditions issue because no underlying constitutional violation would occur even under a direct restriction).

42. *See Alliance IV*, 651 F.3d at 244 (quoting *FAIR*, 547 U.S. at 59).

conditions problem arises and the conditional subsidy is presumed constitutional.[43] When the condition does violate the right, then the condition is presumed unconstitutional.[44]

The unconstitutional doctrine case law for subsidies related to speech has many different justifications and lines of reasoning. The rest of Part I.A will help to clarify those cases. First, it describes some of the First Amendment doctrine relevant when considering whether a conditional subsidy infringes on the underlying First Amendment right and explains how the viewpoint-based distinction has become a relevant factor to the analysis. Next it considers those conditional subsidy cases that have examined whether the condition acts as a coercive penalty. Finally it discusses those subsidy cases that have based their holding on whether the speech can be considered government speech.

1. The Viewpoint Discrimination-Based Analysis of Conditional Subsidies

The First Amendment states that "Congress shall make no law abridging the freedom of speech."[45] First Amendment rights have been found to include both the right to speak freely and the right to refrain from speaking.[46] The Supreme Court has even found that compelled speech should be treated no differently than compelled silence.[47] Regardless of its distinction, the right to communicate one's views has never been absolute; restraints on free expression may be "permitted for appropriate reasons."[48]

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43. *See Dole*, 483 U.S. at 209 (finding that the constitutional limits of the spending power are less demanding when the regulation is indirect); Regan v. Taxation With Representation of Wash., 461 U.S. 540, 548 (1983) (finding that heightened scrutiny was not warranted for all conditions that "'*affect*[] First Amendment rights'" (quoting Taxation With Representation v. Regan, 676 F.2d 715, 728 (D.C. Cir. 1982))); Speiser v. Randall, 357 U.S. 513, 518 (1958) (noting that the denial of a tax exemption could infringe on free speech).

44. While the Supreme Court has never applied a heightened standard, the standard applied depends on the substantive right being infringed upon. *See supra* note 31 and accompanying text. Speech limitations are scrutinized differently depending on a number of different factors under the First Amendment. *See infra* Part I.A.1.

45. U.S. CONST. amend. I.

46. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (holding that the First Amendment protects the right to speak and the "right to refrain from speaking at all"). The Supreme Court has intimated that the government may even be held to a higher standard when restricting the right to refrain from speaking. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) ("It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."). Both *Wooley* and *Barnette* dealt with state laws that punished those from refraining to speak. *See Wooley*, 430 U.S. at 709; *Barnette*, 319 U.S. at 633, 642 (declaring unconstitutional a state law requiring children to salute the flag).

47. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988) (finding the distinction between compelled speech and compelled silence "without constitutional significance").

48. Elrod v. Burns, 427 U.S. 347, 360 (1976). Hugo Black famously disagreed, though the Supreme Court never accepted his view. *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 880 (1960) (finding that the plain language of the Constitution shows that the First Amendment did not contain "any qualifications").

a. The Government's Content-Neutrality Mandate

Two distinctions have been critical to the Supreme Court's analysis of government restrictions on freedom of speech. First, the Supreme Court has differentiated between content-based and content-neutral restrictions. Content-based restrictions inhibit expression based on its message, whereas content-neutral restrictions apply to all speech regardless of viewpoint.[49] Government content-based restrictions are consequently presumed invalid,[50] and must pass strict scrutiny, whereas content-neutral restrictions need only pass intermediate scrutiny.[51]

When the government seeks to prohibit speech directly, the First Amendment demands neutrality toward content[52] and viewpoint[53] because government regulation "may not favor one speaker over another."[54] Viewpoint restrictions are presumed unconstitutional because they "raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace"[55] or "indoctrinate the citizenry."[56] Any attempt by the government "aimed at the suppression of dangerous ideas" is presumptively beyond the power of the government to curtail.[57]

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49. Viewpoint discrimination is defined as speech regulation based on "the specific motivating ideology or the opinion or perspective of the speaker," and as "an egregious form of content discrimination." Rosenberger v. Rector, 515 U.S. 819, 829 (1995).

50. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *see also* Turner Broad. Sys. v. FCC, 512 U.S. 622, 640–41 (1994). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 932–41 (3d ed. 2006).

51. The strict scrutiny test finds constitutional only those laws that are narrowly tailored to a substantial government interest. The less rigorous intermediate scrutiny standard upholds only laws that are substantially related to an important government interest. The rational basis standard finds constitutional those laws that are rationally related to a legitimate government interest. For more on standards of review for First Amendment claims, see CHEMERINSKY, *supra* note 50, at 933–41 (describing content-neutrality, strict scrutiny, and intermediate scrutiny).

52. *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message . . . or its content."); *see also* Cole, *supra* note 22, at 680–81; Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 105–10 (1996).

53. *See, e.g.*, City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *see also* Cole, *supra* note 22, at 680–81.

54. *Rosenberger*, 515 U.S. at 828.

55. Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

56. Cole, *supra* note 22, at 681.

57. Speiser v. Randall, 357 U.S. 513, 519 (1958) (quoting Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 402 (1950)); *see also* Nicole B. Cásarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 503 (2000).

b. Public Forum Doctrine

The Court has also drawn distinctions based on the places available for the speech.[58] Because speech requires a place to be heard, the Court has generally distinguished between two types of government property where speech can take place: public and nonpublic forums.[59] While public forums were traditionally held to be only streets and sidewalks used for public communication and assembly,[60] the Court now treats all publicly owned property basically the same.[61] Nonpublic forums are those government properties that can be closed to all speech activities.[62]

While the Court has never articulated clear criteria for determining whether a forum is public or nonpublic, three factors have been particularly salient: whether the particular place is traditionally available for speech,[63] the extent to which speech is incompatible with the usual functioning of the place,[64] and whether the place's primary purpose is for speech.[65] Thus, the basic rule is that a forum is public if the speech occurs at the customary time and manner of expression at that location.[66]

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58. Jess Alderman, *Words to Live By: Public Health, the First Amendment, and Government Speech*, 57 BUFF. L. REV. 161, 166–68 (2009).

59. For more on publicly owned property for speech purposes and under what circumstances it can be restricted, see Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79; Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

60. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (finding that public forums are places "held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions").

61. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44–46 (1983) (discussing the different categories of places accessible for speech purposes). While an additional distinction exists between public forums and designated or limited public forums, if the government chooses to allow speech in such a place, all the rules for public forums apply equally and the distinction becomes mostly irrelevant. *See e.g.*, Good News Club v. Milford Centr. Sch., 533 U.S. 98, 112 (2001) (finding a content-based restriction impermissible when both parties had created a "limited public forum" in a school); *see also* Kaplan v. Cnty. of L.A., 894 F.2d 1076, 1080 (9th Cir. 1990) (finding that limited public forums are treated as a public forum for First Amendment purposes); CHEMERINSKY, *supra* note 50, at 1137–39.

62. CHEMERINSKY, *supra* note 50, at 1139–43; *cf.* Adderly v. Florida, 385 U.S. 39 (1966) (holding that the government could prohibit speech in the areas outside prisons and jails because it was not a public forum).

63. *See* CHEMERINSKY, *supra* note 50, at 1143–44; *cf.* United States v. Kokinda, 497 U.S. 720, 727 (1990) (plurality opinion) (focusing not on whether sidewalks were generally available for free speech, but whether sidewalks were available on U.S. Post Office property).

64. CHEMERINSKY, *supra* note 50, at 1143 ("The greater the incompatibility, the more likely that the Court will find the place to be a nonpublic forum."); *cf.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543 (2001) (describing how the government cannot control private speech in a medium of expression to "distort its usual functioning").

65. CHEMERINSKY, *supra* note 50, at 1144; *cf. Kokinda*, 497 U.S. at 727 (finding post office property was not a public forum because it had not been dedicated to speech activities); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992) (finding that expression is not the primary purpose of airports).

66. *See* Greer v. Spock, 424 U.S. 828, 860 (1976) (finding a "flexible approach" to be more appropriate); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (finding that

Consequently, any speech in a public forum is subject to the content-neutral "time, place, and manner" restrictions provided to all regulated speech.[67] In any public forum, the government can only regulate speech that reasonably limits disruption to the public space.[68] Reasonable restrictions must be (1) content-neutral; (2) narrowly tailored to serve a significant government interest (i.e., pass strict scrutiny); and (3) leave open alternative channels for communication.[69] The constitutionality of these so-called "time, place, and manner" restrictions is mostly contextual.[70] While these restrictions must be narrowly tailored, they do not necessarily have to use the least restrictive alternative.[71]

2. The Analysis of Government Subsidies That Hinge on Whether the Condition Coerces or Penalizes

The unconstitutional conditions doctrine provides that the "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[72] This conception of the doctrine has caused courts and commentators to consider whether the government uses its conditional subsidy power to coerce recipients to engage in unconstitutional activities.[73]

"[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"); *see also* Stone, *supra* note 59, at 251–52.

67. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); *Adderley*, 385 U.S. at 47–48.

68. *See Grayned*, 408 U.S. at 116.

69. *See Heffron*, 452 U.S. at 647.

70. *See Grayned*, 408 U.S. at 116 ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.'" (quoting Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1042 (1969)); Alderman, *supra* note 58, at 166; Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1042 (1969).

71. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 726 (2000) ("[I]t may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal."); Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (finding that the regulation "need not be the least restrictive or least intrusive means of doing so").

72. Sullivan, *supra* note 22, at 1415. Sullivan explains: "Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference." *Id.* at 1421–22.

73. *See* South Dakota v. Dole, 483 U.S. 203, 210 (1987) (finding a subsidy to be a "relatively mild encouragement" rather than "federal coercion"); Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937) (considering whether the conditional subsidy passed the point where "pressure turns into compulsion"); Sullivan, *supra* note 22, at 1428–41 ("Directly and through metaphors of duress or penalty, the Court has repeatedly suggested that the problem with unconstitutional conditions is their coercive effect.").

a. Speiser v. Randall

Speiser v. Randall[74] was one of the first articulations that a conditional government subsidy cannot act as a coercive penalty.[75] In *Speiser*, the State of California required veterans to sign a loyalty oath stating that they did not advocate the violent overthrow of the government in exchange for a property exemption.[76] The Court found that the condition penalized the recipients by coercing them to refrain from constitutionally protected speech.[77] Though the tax exemption was a "privilege," the government could not deny the tax exemption without unconstitutionally infringing on speech.[78] Because the conditional subsidy acted as a coercive penalty, the statute violated the First Amendment and the Due Process Clause of the Fourteenth Amendment.[79]

b. Regan v. Taxation With Representation of Washington

In *Regan v. Taxation With Representation of Washington*,[80] the Court upheld a federal statute providing that contributions to an organization are tax deductible only if that organization either (1) does not use a substantial portion of their contributions for lobbying or (2) is a veterans' organization.[81] Even though the First Amendment protects lobbying activities,[82] the Court found that Congress was not required to subsidize lobbying efforts.[83]

Two important factors were critical to the Court's holding: Congress denied Taxation With Representation In Washington (TWR) neither the right to receive deductible contributions to support its nonlobbying activity nor any independent benefit.[84] Even under a least-restrictive means analysis, these organizations remained free to receive tax-deductible contributions to support non-lobbying activities through their organizational affiliates.[85] The veterans' organizations, which could use their contributions for lobbying, were tax exempt regardless of their speech's

74. 357 U.S. 513 (1958).

75. *Id.* at 518 ("To deny an exemption to claimants who engage in certain forms of speech is in effect to *penalize* them for such speech. Its deterrent effect is the same as if the State were to *fine* them for this speech.") (emphasis added).

76. *Id.* at 515.

77. *Id.* at 519 ("[T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of *coercing* the claimants to refrain from the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas.'") (citation omitted).

78. *See id.* at 518 (finding that the fact that "a tax exemption is a 'privilege' or 'bounty'" does not mean that "its denial may not infringe speech").

79. *Id.* at 520–29.

80. 461 U.S. 540 (1983).

81. *Id.* at 543.

82. *See* E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137–38 (1961).

83. *Regan*, 461 U.S. at 545.

84. *Id.* at 545–46.

85. *Id.* at 545; *see id.* at 553 (Blackmun, J., concurring).

content.[86] Congress was free to make policy choices unless those choices infringe on free speech by suppressing a certain viewpoint.[87] The *Regan* Court emphasized that Congress had not violated the First Amendment by making a policy choice to fund one activity over another.[88] Subsidies, the Court found, are simply "a matter of grace" that Congress has the power to grant or deny as a matter of democratic vote.[89] In a concurring opinion, Justice Blackmun similarly found that the affiliate structure alleviated any problems to the conditional subsidy by allowing nonprofits to speak without losing the tax benefits.[90] This contrast between permissible nonsubsidies and impermissible penalties is not limited to speech, but is a common feature of the Supreme Court's protection of individual liberties from government overreaching.[91]

c. FCC v. League of Women Voters of California

The Supreme Court in *FCC v. League of Women Voters of California*[92] struck down a conditional subsidy that penalized protected speech by invalidating a law withholding federal funds from public radio and television stations that engaged in "editorial broadcasts."[93] In contrast with the tax provisions upheld in *Regan*, the Court emphasized that the government had failed to provide an alternative route for expression: broadcast stations could not limit the speech conducted with federal funds while also pursuing their protected speech funded by nonfederal donations.[94] Congress need not support all forms of speech, but it cannot withdraw funding merely because the recipient uses other nonfederal funds to engage in disliked speech, even if federal funding is only a small minority of the total contributions.[95]

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86. *Id.* at 545 (majority opinion).

87. *Id.* at 549 (noting that Congress's freedom to "select[] . . . particular entities or persons for entitlement to this sort of largesse 'is obviously a matter of policy and discretion not open to judicial review'" (quoting United States v. Reality Co., 163 U.S. 427, 444 (1896)).

88. *Id.* at 546 (finding that Congress "ha[d] not infringed any First Amendment rights . . . [but] ha[d] simply chosen not to pay for TWR's lobbying").

89. *Id.* at 549 (quoting Comm'r v. Sullivan, 356 U.S. 27, 28 (1958)).

90. *Id.* at 553 (Blackmun, J., concurring).

91. *See* Harris v. McRae, 448 U.S. 297, 317 n.19 (1980); Maher v. Roe, 432 U.S. 464, 474 n.8 (1977) (finding that a penalty analysis would lead to strict scrutiny of the conditional subsidy for welfare benefits to women). At least one court placed emphasis on whether the funding program has placed any obstacle in the way of the recipient exercising its constitutional right. *See* DKT Mem'l Fund Ltd. v. U.S. Agency for Int'l Dev., 887 F.2d 275, 289 (D.C. Cir. 1989) (finding that an agency program was constitutional because it placed no obstacles in the way of the plaintiff's funding of abortions).

92. 468 U.S. 364 (1984).

93. *Id.* at 400–01.

94. *Id.* at 400.

95. *Id.* (finding that Congress had not merely refused to subsidize editorializing by public broadcasting stations, but rather it had caused a "station that receives only 1% of its overall income from [federal] grants [to be] barred absolutely from all editorializing").

Because the condition restricted the station's speech outside of the scope of the recipient's participation in the government program, the Court found the conditional subsidy unconstitutional.[96] The Court did, however, explicitly note that Congress could have maintained the restriction if it had also allowed broadcast stations to establish affiliate organizations to editorialize with nonfederal money.[97]

d. Rust v. Sullivan

Rust v. Sullivan[98] similarly distinguished between restricting the recipient's speech funded by the government and restricting all of the recipient's speech.[99] In *Rust*, a Title X[100] program provided grants to healthcare organizations on the condition that no money would be used on abortion-related advocacy.[101] The regulations also required grant recipients to keep federally-funded activities financially and physically separate from prohibited abortion activities.[102] The funds were tied exclusively to how the recipient used Title X money, not how the recipient used its own non-Title X funds.[103]

Echoing *Regan* and *League of Women Voters*, the *Rust* Court upheld the regulations, finding that the subsidy condition did not restrict the recipient's First Amendment speech outside of the scope of the government program.[104] The *Rust* Court similarly found that Congress had not denied any recipient its constitutional right to engage in pro-abortion related speech or activism by refusing to fund abortion-related activities and by requiring some institutional separation and integrity.[105]

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96. *Id.* ("The station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity.").

97. *Id.*

98. 500 U.S. 173 (1991).

99. *See id.* at 197.

100. The Title X Family Planning Program, enacted under President Richard Nixon in 1970 as part of the Public Health Service Act, is the only federal grant program solely dedicated to family planning and reproductive health services for low-income and uninsured patients. *See* 42 U.S.C. §§ 300–300a-8.

101. *Rust*, 500 U.S. at 178. Specifically, the condition barred grant-receiving programs from providing abortion counseling, referring pregnant women to abortion providers, lobbying for legislation, or otherwise advocating for measures that would increase the availability of abortion. *See id.* at 196.

102. *Id.* at 180–81.

103. *Id.* at 198–99.

104. *Id.* at 196 ("The Secretary's regulations do not force the Title X *grantee* to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X *activities*.") (emphasis added).

105. *Id.* at 198.

e. United States v. American Library Association

The latest chapter in this line of conditional cases was *United States v. American Library Association Inc.*,[106] where the Supreme Court upheld a law that conditioned public library funding on the installation of filter software to block access to inappropriate material on library computers.[107] The *American Library* Court echoed *Rust*, *Regan*, and *League of Women Voters*, and found that a mere refusal to fund a protected activity is not a penalty.[108] The Supreme Court continued its trend of upholding government subsidies because the recipient could freely accept the conditional subsidy or find alternate means of funding.[109] If adequate alternative channels for protected expression are available, Congress can conditionally restrict the First Amendment rights of the recipients without the restriction being considered a coercive penalty.[110]

While the Court has stressed the availability of alternate independent means of funding, seldom has the Court inquired into whether the independent alternate means of funding actually exists. In *American Library*, for example, the Court found that the program did not deny the libraries their right to provide unfiltered internet access,[111] but failed to consider that no alternate means of funding actually existed. The *League of Women Voters* Court, however, found that because the station received only one percent of its funds from nonfederal sources, the refusal to subsidize editorializing amounted to a penalty because effectively no other source of funding existed.[112] A recipient program's reliance on federal funding may be yet another variable in the calculus to be explored further in the future.

106. 539 U.S. 194 (2003).

107. *Id.* at 200–01, 214.

108. *See id.* at 200–01.

109. *See id*. at 212 ("To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance."); *Rust*, 500 U.S. at 199 n.5 ("[S]ubsidies are just that, subsidies. The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy." (citing Grove City Coll. v. Bell, 465 U.S. 555, 575 (1984))); *cf.* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971, 2986 (2010) (finding that plaintiffs were not coerced to modify its membership policies in order to receive state funding); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 596 (1983) (finding that the receipt of conditional federal funding "is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt").

110. *See Am. Library Ass'n*, 539 U.S. at 212 (finding that Congress's decision not to subsidize the activity could not be considered a penalty); Velazquez v. Legal Servs. Corp., 164 F.3d 757, 766 (1999) ("Congress may burden the First Amendment rights of recipients of government benefits"); *see also* Brooklyn Legal Servs. v. Legal Servs. Corp., 462 F.3d 219, 231 (2006).

111. *See Am. Library Ass'n*, 539 U.S. at 212.

112. *See* FCC v. League of Women Voters, 468 U.S. 364, 400 (1984).

3. The Analysis of Conditional Subsidies Based on Government Speech and Public Forums

The government speech doctrine, however, considers what messages the government can support either by communicating its own message or subsidizing speech for another. The First Amendment and public forum doctrine recognize that the government must permit some speech on public property without content discrimination, but can restrict other property from public speech use altogether.[113] Because any attempt by the government to suppress an unpopular idea is considered unconstitutional,[114] the Supreme Court has repeatedly emphasized maintaining viewpoint neutrality.[115] While the *Speiser* and *Regan* Courts followed this logic by finding conditional subsidies to be unconstitutional if based on viewpoint discrimination,[116] they never used the language of the government being able to control the message it seeks to convey or support.

a. Rust v. Sullivan

Rust v. Sullivan was the seminal case establishing the government speech doctrine. In addition to considering whether the conditional subsidy was coercive,[117] the Court considered whether the Title X regulations on family planning grants were unconstitutionally viewpoint-based.[118] Like *Regan*, the Court found no viewpoint discrimination because the government can choose to encourage certain activities by funding one program without also funding an alternate program dealing with the problem in another way.[119]

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113. *See supra* Part I.A.1.b.

114. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998) (quoting Regan v. Taxation With Representation of Wash., 461 U.S. 540, 550 (1983)); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) ("[I]deologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts."); *Regan*, 461 U.S. 540, 550 (1983).

115. *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505 (1984) (stating that "viewpoint neutrality. . . . underlies the First Amendment"); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[The] government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (invalidating a school's compulsory flag salute as a government attempt to impose a favored viewpoint). For more on viewpoint discrimination, see Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 105–10 (1996), and Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

116. *See* Speiser v. Randall, 357 U.S. 513, 519 (1958) (finding conditional subsidies unconstitutional if aimed at the "suppression of dangerous ideas"); *Regan*, 461 U.S. at 548 (same).

117. *See infra* Part I.A.2.d.

118. Rust v. Sullivan, 500 U.S. 173, 192 (1991).

119. *Id.* at 193 (finding that the government had "merely chosen to fund one activity to the exclusion of the other").

Conditional encouragement of an activity prompts an entirely different analysis from direct state regulation.[120]

Because the government must choose what messages, programs, and projects to fund, certain programs will always be chosen and funded to the exclusion of others based on the viewpoints expressed. Though the government did make a policy choice in *Rust* that discriminated by viewpoint,[121] making that viewpoint-based policy choice was permissible because its purpose was not to suppress an unpopular idea.[122] The government must make policy choices about what activities and services to subsidize, though those choices may be based on aesthetic, political, or moral viewpoints.[123] Instead, the government was ensuring that the grantee engaged in activities within the funded project's scope.[124] Thus, when the government appropriates public funds to establish a *program*, it is entitled to define the limits of that program's speech.[125]

120. *Id.* ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.").

121. *See, e.g.*, *id*. at 209 (Blackmun, J., dissenting) ("The regulations are also clearly viewpoint based."); Robert C. Post, *supra* note 25, at 170 ("The [Rust] regulations plainly discriminate on the basis of viewpoint.").

122. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (finding that viewpoint-based funding decisions can be sustained in situations like in *Rust* where private speakers are used as agents to convey a government-funded program or message); *Alliance IV*, 651 F.3d 218, 250 n.2 (2d Cir. 2011) (Straub, J., dissenting), *reh'g en banc denied*, 678 F.3d 127 (2d Cir. 2012) ("[The *Rust* Court's explanation] may have been another way of stating the conclusion that the government had not *impermissibly* discriminated on the basis of viewpoint."). *But see* Post, *supra* note 25, at 170 (finding that *Rust* discriminated on the basis of viewpoint); Ann Brewster Weeks, *The Pregnant Silence:* Rust v. Sullivan, *Abortion Rights, and Publicly Funded Speech*, 70 N.C. L. REV. 1623, 1661 (1992) (condemning *Rust* for viewpoint discrimination). The fine line between permissible and impermissible viewpoint discrimination for conditional subsidies hinges on whether the viewpoint being suppressed is based on a desire to suppress an unpopular idea or a desire to make an effective policy choice. *See* Maher v. Roe, 432 U.S. 464, 477 (1977) (finding that the state was "not required to show a compelling interest for its policy choice to favor normal childbirth"); DKT Mem'l Fund Ltd. v. U.S. Agency for Int'l Dev., 887 F.2d 275, 289 (D.C. Cir. 1989) (finding that deciding not to fund abortion-related activities in NGOs "simply represents a policy choice, not an invidious discrimination"); *see also* Cole, *supra* note 22, at 730 n.217 (finding that conditional funding underscores that "neutrality can be imposed in varying degrees").

123. *See* Sunstein, *supra* note 24, at 613 (discussing the government dilemma of making policy choices while still maintaining viewpoint neutrality). The desire to present a unified government message can become even stronger when the issue involves foreign rather than domestic affairs. *See DKT Mem'l Fund*, 887 F.2d at 290 (finding that the government policy choices in foreign affairs is consistent with settled precedent and to hold otherwise would "work much mischief"); *see also* Baker v. Carr, 369 U.S. 186, 211 (1962) (citing Doe v. Braden, 57 U.S. 635, 657 (1853)).

124. *Rust*, 500 U.S. at 194. The *Rust* Court even used a provocative hypothetical to illustrate this point. *Id.* (finding that if Congress established "the National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism").

125. *Id.*

The *Rust* Court did, however, find that government subsidy conditions could not always justify content- or viewpoint-based restrictions.[126] The difference between permissible and impermissible restrictions depended on whether the government had created a public forum.[127] The government's ability to refuse to grant a speaker access to a forum does not allow the government to violate its neutrality mandate.[128] If the government creates a public forum, certain privileged relationships may be inherently protected regardless of government subsidies, but abortion-related speech is not one of them.[129]

b. Rosenberger v. Rector & Visitors of University of Virginia

The Court applied *Rust*'s viewpoint discrimination analysis to a government subsidy given to public university student groups in *Rosenberger v. Rector & Visitors of University of Virginia*,[130] where a student organization was denied funding when it wanted to publish a newspaper that advocated Christian viewpoints.[131] Because the government had created a "metaphysical" public forum for student speech by funding student groups, the State could not exclude speech based on viewpoint.[132] If the government does use private speakers to convey its own message, the government can make viewpoint-based decisions and "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[133] Because the University of Virginia offered funds to student groups to encourage speech from private speakers and intended to facilitate the speech of those private speakers

126. *Id.*

127. *Id.* at 200 ("[T]he university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted." (citing Keyishian v. Board of Regents, State Univ. of N.Y., 385 U.S. 589, 603, 605–06 (1967))).

128. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (plurality opinion) (finding that the government cannot discriminate once it has created a forum for speech); *see also* United States v. Kokinda, 497 U.S. 720, 726–27 (1990) (plurality opinion) (holding that once the government "has expressly dedicated [a particular forum] to speech activity," it cannot exclude speakers based upon the content of their speech); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1985) (same holding); Cole, *supra* note 22, at 692.

129. *Rust*, 500 U.S. at 194–95; *see* Cole, *supra* note 22, at 692 (finding that the *Rust* Court "acknowledged that the doctor-patient relationship might deserve similar first amendment protection 'even when subsidized by the government,'" but found that the Title X program was not significantly affected) (citation omitted).

130. 515 U.S. 819 (1995).

131. *Id.* at 823–28.

132. *Id.* at 829–30. Interestingly, the Court distinguished *Rosenberger* from *Rust* because in *Rust* the government had used private speakers to transmit its own message for its funded program rather than create a forum for private speech. *See id.* at 833.

133. *Id.* at 833 (citing *Rust*, 500 U.S. at 196–200).

through funding, the Court found that the University had created a public forum and could not "silence the expression of selected viewpoints."[134]

c. National Endowment for the Arts v. Finley

The Court further elaborated on the limitations of the public forum doctrine in the context of government subsidies in *National Endowment for the Arts v. Finley*.[135] In *Finley*, Congress had conditioned federal grants to artists upon consideration of "general standards of decency and respect for the diverse beliefs and values of the American public."[136] The Court found that the conditional funding did not amount to impermissible viewpoint discrimination because the government did not "indiscriminately 'encourage a diversity of views from private speakers'" but instead mandated a program with viewpoint-based "esthetic judgments."[137]

d. Legal Services Corp. v. Velazquez

In *Legal Services Corp. v. Velazquez*,[138] the Court struck down a conditional subsidy, where the government conditioned the receipt of legal assistance funds on a waiver prohibiting any funded assistance to challenge existing welfare laws.[139] The Court distinguished the case from *Rust* because the private speech was expressly not intended to speak a government message.[140] The Title X programs in *Rust* neither created a public forum nor distorted the privileged doctor-patient relationship,[141] whereas in *Velazquez* the regulation had tainted the attorney's role by limiting the ability to challenge potentially illegal welfare statutes and interfering with the expression of speech integral to the proper functioning of the judiciary.[142] The funded program was designed to facilitate private speech in a public forum rather than convey a government message.[143]

134. *Id.* at 835.
135. 524 U.S. 569 (1998).
136. *Id.* at 586.
137. *Id.* (quoting *Rosenberger*, 515 U.S. at 834); s*ee also Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672–73 (1998) (holding that public forum principles do not generally apply to a public television station's editorial judgments regarding the private speech presented to viewers).
138. 531 U.S. 533 (2001).
139. *See id.* at 537–38, 549.
140. *Id.* at 541–43 (noting that *Rust* involved the government disbursing funds to support a government message whereas the law at issue sought to restrict the private speech of lawyers speaking on behalf of indigent clients).
141. *See supra* note 129 and accompanying text.
142. *Velazquez*, 531 U.S. at 543 (noting that the government sought "to use an existing medium of expression," the lawyer-client relationship, "and to control it, in a class of cases, in ways which distort its usual functioning").
143. *Id.* at 542 ("[T]he [Legal Services Corporation] program was designed to facilitate private speech, not to promote a governmental message.").

Additionally, the restriction could be redefined post-enactment to include a programmatic government message.[144] If private speech is involved, then the defined main purpose cannot be aimed at the suppression of dangerous ideas.[145] The Court did not address whether statutes could have more than one main purpose.

e. United States v. American Library Ass'n

United States v. American Library Ass'n[146] further clarified the distinction between government speech and the public forum doctrine.[147] Chief Justice Rehnquist's plurality opinion found that internet access in public libraries did not constitute a designated public forum deserving of strict scrutiny protection because viewpoint-based restrictions are improper only "'when the [government] does not itself speak or subsidize transmittal of a message it favors *but instead expends funds to encourage a diversity of views from private speakers*.'"[148] A public forum can only be created by an affirmative government decision to create such a forum; however, acquiring internet terminals does not create a forum in libraries.[149] The law denied a benefit to no one by merely insisting that funds be spent for their authorized purpose of helping public libraries provide quality educational and informational materials.[150]

B. Conditional Foreign Aid & The Leadership Act

This section describes the contours of government funding in the context of foreign aid, specifically the Leadership Act. It first discusses the limits of conditional spending for foreign aid. It then explains the purpose, text, and effects of the Leadership Act of 2003, which conditions funding for NGO's fighting the HIV/AIDS epidemic on the adoption of a policy explicitly opposing prostitution and sex trafficking.

1. Conditional Funding & Foreign Affairs

While foreign aid has long been considered an instrument or tool of U.S. foreign policy, many commentators have concluded that foreign policy is inevitably infused with American moral values.[151] The promotion of

144. *Id.* at 547 (finding that the purpose could not be redefined as "help[ing] the current welfare system function in a more efficient and fair manner").

145. *Id.* at 548–49 (citing Regan v. Taxation With Representation of Wash., 461 U.S. 540, 548 (1983), and Speiser v. Randall, 357 U.S. 513, 519 (1958)).

146. 539 U.S. 194 (2003).

147. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 207–08 (2003).

148. *Id.* at 213 n.7 (quoting *Velazquez*, 531 U.S. at 542).

149. *See id.*

150. *See id.* at 228–29 (Stevens, J., dissenting).

151. *See generally* Nina J. Crimm, *The Global Gag Rule: Undermining National Interests by Doing unto Foreign Women and NGOs What Cannot Be Done at Home*, 40 CORNELL INT'L L.J. 587, 588–92 (2007); Ernest W. Lefever, *Morality Versus Moralism in Foreign Policy*, *in* ETHICS AND WORLD POLITICS: FOUR PERSPECTIVES 1, 11 (Ernest W.

American values and foreign policy abroad is nevertheless entwined with the pursuit of "national interest."[152] Although the Constitution provides Congress and the president shared powers over foreign affairs,[153] beginning with Franklin Delano Roosevelt, the president has been the dominant force setting U.S. objectives in foreign policy.[154] Congress distributed funds for governmental initiatives furthering U.S. foreign policy abroad to many agencies, including the U.S. Agency for International Development (USAID), Department of Health and Human Services (HHS), and the Centers for Disease Control (CDC).[155] USAID, the main agency involved in foreign aid, has two interconnected explicit purposes: (1) to promote democracy abroad and (2) to provide foreign aid to the developing world.[156]

U.S. foreign aid is really a misnomer because it "has never been an unconditional transfer of financial resources."[157] The United States really provides assistance subject to conditions and policies intended to serve national interests.[158] Identical to domestic spending, U.S. foreign aid "may attach conditions that ensure use of the resources exclusively for advancing the spread and stability of political democracies and free markets, or for

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Lefever ed., 1988); Arthur Schlesinger, *National Interests and Moral Absolutes*, *in* ETHICS AND WORLD POLITICS, *supra* note 151, at 21, 24 (describing the problematic relationship between morality and international politics).

152. *See* Lefever, *supra* note 151, at 12.

153. *See* Richard Grimmett, *Foreign Policy Roles of the President and Congress*, DEP'T ST. BULL., June 1, 1999, http://fpc.state.gov/6172.htm (detailing the division of powers between Congress and the President in foreign affairs); Nina J. Crimm, *Toward Facilitating a Voice for Politically Marginalized Minorities and Enhancing Presidential Public Accountability and Transparency in Foreign Health Policy Making*, 39 VAND. J. TRANSNAT'L L. 1053, 1080–81 (2006) (discussing the separation of powers in foreign policy).

154. *See* LEE H. HAMILTON, A CREATIVE TENSION: THE FOREIGN POLICY ROLES OF THE PRESIDENT AND CONGRESS 6, 9, 15, 42, 44 (2002) (discussing the increased power of the president in the modern era); Crimm, *supra* note 153, at 1081–85 (discussing the rise of the President as the "dominant foreign policymaker"); *see also* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." (quoting 10 ANNALS OF CONG. 613 (1822))).

155. *See generally* CURT TARNOFF & MARIAN LEONARDO LAWSON, CONG. RESEARCH SERV., R40213, FOREIGN AID: AN INTRODUCTION TO U.S. PROGRAMS AND POLICY 21–23 (2011). International developmental aid also is made available through the U.S. Department of State. *Id.* at 21–22.

156. *Who We Are*, USAID, http://www.usaid.gov/who-we-are/ (last visited Oct. 20, 2012) ("U.S. foreign assistance has always had the twofold purpose of furthering America's [foreign policy] interests while improving lives in the developing world. . . . Spending less than 1 percent of the total federal budget, USAID works in over 100 countries" to achieve these goals by "protect[ing] human rights" and "improv[ing] global health."). For more on USAID's mission to spread democracy and advance U.S. foreign policy interests, see generally USAID, FOREIGN AID IN THE NATIONAL INTEREST: PROMOTING FREEDOM, SECURITY, AND OPPORTUNITY (2002).

157. TERESA HAYTER, AID AS IMPERIALISM 15 (1971) (concluding that the "conditions attached to aid are clearly and directly intended to serve the interests of the governments providing it").

158. *Id.*

enhancing the health, education, and economic well-being of populations in developing countries."[159]

2. The Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act: Enactment, Execution and Effects

This section outlines one particular example of conditional foreign aid: the Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act. This section discusses the congressional history and purpose of the Leadership Act; the text of the statute itself; and the effects of the Act on foreign aid, the fight against HIV/AIDS, and the response to its implementation.

a. The Purpose of the Act

The United States has been fighting the HIV/AIDS epidemic since 1986.[160] The most recent initiatives in the fight against this epidemic began in 2001 in response to a declaration in the United Nations that encouraged all members to create policies and dedicate aid towards the prevention, treatment, and collaboration needed to not only halt but also reverse the worldwide HIV/AIDS pandemic.[161] President Bush followed suit in his 2003 State of the Union Address by announcing a comprehensive, five-year global strategy to fight HIV/AIDS, which included an Emergency Plan for AIDS Relief (PEPFAR).[162] Under PEPFAR, both USAID and HHS, along with five other agencies, implement prevention, care, and treatment programs for HIV/AIDS.[163] USAID supports implementation through direct in-country presence and regional programs, while HHS operates in developing countries and conducts research.[164] As a part of the HHS, CDC assists with surveillance, training, evaluation and implementation of HIV/AIDS prevention, treatment and care by partnering with governments, NGOs, international organizations, U.S.-based universities, and the private sector.[165]

The United States finally joined the United Nations' global strategy to fight HIV/AIDS when Congress passed the Leadership Act on May 21, 2003.[166] The law established the largest financial commitment to combating the international HIV/AIDS epidemic ever.[167] The Act's

159. *See* Crimm, *supra* note 151, at 589.

160. *See supra* note 11; *see also Presidential Remarks*, *supra* note 11.

161. *See* G.A. Res. S-26/2, U.N. Doc. A/RES/S-26/2 (June 27, 2001).

162. *See* George W. Bush, State of the Union Address (Jan. 28, 2003), *available at* http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/bushtext_012803.html.

163. *See* OFFICE OF THE U.S. GLOBAL AIDS COORDINATOR, ACTION TODAY, A FOUNDATION FOR TOMORROW: THE PRESIDENT'S EMERGENCY PLAN FOR AIDS RELIEF 145–54 (2006), *available at* www.state.gov/documents/organization/60813.pdf.

164. *Id.*

165. *Id.*

166. 22 U.S.C. § 7671(a) (2006 & Supp. V 2011).

167. *See* 22 U.S.C. § 7601(28)–(29) (2006). The Leadership Act first dedicated 15 billion dollars for the 2004–2008 fiscal years. *Id.* The current version of the Act provides 48 billion dollars over a five-year period beginning on October 1, 2008. *Id.* § 7671 (Supp. V 2011).

purpose was to strengthen U.S. leadership and the effectiveness of the country's response to HIV/AIDS, tuberculosis, and malaria.[168]

The five-year strategy included several avenues for implementation including service delivery,[169] improved treatment and prevention programs (especially for those at the highest risk for contracting the disease),[170] and improved technical assistance, training, and research.[171] An HIV/AIDS Response Coordinator was established to authorize the use of funds,[172] to combat HIV/AIDS,[173] assist children and families,[174] and provide expanded debt relief.[175]

The Act was based on extensive findings.[176] It began with both general[177] and specific[178] findings about the extent of the epidemic and then focused on addressing its behavioral causes.[179] The Act even expresses support for the role of private partners and NGOs in fighting HIV/AIDS.[180]

The Act also identifies prostitution and sex trafficking[181] as one of the major behavioral causes and contributing factors to the spread of HIV/AIDS and states that a U.S. policy goal is to eradicate prostitution as a principal means of combating the spread of the disease.[182] While a number

168. *Id.* § 7603.

169. *See* H.R. REP. NO. 108-60, § 5(101)(2) at 6 (2003), *reprinted in* 2003 U.S.C.C.A.N. 712, 712 (emphasizing an approach based on local delivery).

170. *See* 22 U.S.C. § 7611(a)(5) (Supp. V 2011).

171. *See id.* § 7611(a)(8)–(10).

172. *See id.* § 7612.

173. *See id.* § 7631. Funds were also appropriated to use for malaria and tuberculosis. *See id.* §§ 7632–7633.

174. *See id.* §§ 7651–7655.

175. *See id.* § 7681.

176. Congress had forty-one "findings" in total. § 7601 (2006 & Supp. V 2011).

177. *Id.* § 7601(1) (detailing the "pandemic proportions" of the spread of the disease worldwide).

178. *Id.* § 7601(2) (suggesting that over 65 million people have been infected, more than 25,000,000 have died, and more than 14,000,000 children have been orphaned since the pandemic began).

179. *See generally id.* § 7611(a)(4) (finding abstinence from sexual activity, substance abuse, monogamy, faithfulness, the effective use of condoms as well as "prostitution, the sex trade, rape, sexual assault and sexual exploitation of women and children" to be main behavioral risks that should be addressed in fighting the HIV/AIDS epidemic).

180. *See id.* § 7601(18) (acknowledging that "nongovernmental organizations . . . have proven effective in combating the HIV/AIDS pandemic"); *id.* § 7621(b)(1) (finding that "the sustainment and promotion of public-private partnerships should be a priority element of the strategy pursued by the United States to combat the HIV/AIDS pandemic and other global health crises").

181. Sex trafficking is defined as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act." *Id.* § 7102(9).

182. The Act stated:

> Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic. One in nine South Africans is living with AIDS, and sexual assault is rampant, at a victimization rate of one in three women. Meanwhile in Cambodia, as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of

of strategies continue to be employed to combat HIV/AIDS,[183] Congress made the policy choice that sex trafficking and prostitution should be considered inimical to reversing the HIV/AIDS epidemic worldwide.[184] Other advocates for these populations maintain that the imposition of harsh criminal penalties for prostitution runs contrary to accepted best practices of public health.[185]

b. The Text of the Act

Based on the findings that prostitution and sex trafficking are degrading to women and children,[186] Congress imposed two prostitution-related conditions on the receipt of Leadership Act funds: a funding provision (Funding Restriction) prohibiting the use of funds to promote or advocate the legalization or practice of prostitution or sex trafficking;[187] and the Policy Requirement, requiring recipients to adopt a policy explicitly opposing both practices.[188] The Funding Restriction does not preclude

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> increase of HIV infection in all of Southeast Asia. Victims of coercive sexual encounters do not get to make choices about their sexual activities.

Id. § 7601(23).

183. *See Proven HIV Prevention Methods, Ctr. for Disease Control & Prevention* (June 2012), http://www.cdc.gov/nchhstp/newsroom/docs/HIVFactSheets/Methods-508.pdf (discussing a range of prevention techniques needed to combat HIV/AIDS, including testing, medication, access to condoms, at-risk prevention programs and substance abuse treatment). Several countries have implemented effective programs that have addressed the idiosyncrasies of their culture. *See* GLOBAL HIV PREVENTION WORKING GRP, PROVEN HIV PREVENTION STRATEGIES 4 (Aug. 2006) *available at* http://www.kff.org/hivaids/upload/050106_HIVPreventionStrategies.pdf (discussing the effectiveness of public awareness, promotion of abstinence and monogamy efforts, free HIV testing, universal access to treatment and other strategies in several countries); UNAIDS, HIV PREVENTION NEEDS AND SUCCESSES: A TALE OF THREE COUNTRIES (2001) *available at* http://data.unaids.org/publications/IRC-pub02/jc535-hi_en.pdf (discussing contrasting strategies for combating HIV/AIDS in Senegal, Thailand, and Uganda).

184. *See* Joanna Busza, *Having the Rug Pulled from Under Your Feet: One Project's Experience of the U.S. Policy Reversal on Sex Work*, 21 HEALTH POL'Y & PLAN. 329, 330–31 (2006) (describing the House Committee on International Relations' criticism of providing health care to sex workers).

185. *See* Edi C. M. Kinney, *Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Anti-prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS*, 21 BERKELEY J. GENDER L. & JUST. 158, 160 (2006); Press Release, ACLU, Global AIDS Gag Holds Critical Funding Captive to Politics (Nov. 9, 2005), *available at* http://www.aclu.org/womens-rights/global-aids-gag-holds-critical-funding-captive-politics [hereinafter *Funding Captive to Politics*].

186. *See* 22 U.S.C. § 7601(23).

187. *Id.* § 7631(e) ("No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.").

188. *See* 22 U.S.C § 7631(f). In December 2003, Congress passed the Trafficking Victims Protection Act (TVPA), which has two provisions mimicking the Leadership Act's Funding Restriction and Policy Requirement. First, the TVPA provides funding for anti-trafficking activities on the condition that no funds be used to "promote, support or advocate the legalization or practice of prostitution." *See id.* § 7110(g)(1). The TVPA also provided funding on the condition that the recipient organizations state "in either a grant application, a grant agreement, or both, that it does not promote, support or advocate the legalization or

organizations from providing palliative care, post-exposure treatments, and "necessary pharmaceutical and commodities" such as test kits, condoms, or potentially microbicides.[189] While the Policy Requirement prohibits distributing funds to any organization that does not have a policy explicitly opposing prostitution and sex trafficking, the restriction exempted three notable HIV/AIDS organizations dedicated to developing preventative HIV vaccines as well as "any United Nations agency."[190]

USAID, CDC and HHS have wavered when implementing the Policy Requirement. Initially in 2004, USAID provided minimal guidance, but refrained from applying the Policy Requirement to U.S.-based NGOs because the Department of Justice's Office of Legal Counsel (OLC) found that applying the Policy Requirement to U.S.-based organizations would unconstitutionally restrict First Amendment free speech rights.[191] The OLC later retracted its previous "tentative advice" and, in June 2005, USAID issued a directive requiring both U.S. and foreign NGOs to comply with the Policy Requirement.[192] In the midst of litigation with both Alliance for Open Society International and DKT International, both HHS and USAID amended their guidelines in 2007 to give recipients the ability to partner with affiliate organizations that do comply with the requirement.[193] The 2007 guidelines attempted to clarify the separation required between

practice of prostitution." *See id.* § 7110(g)(2). Unlike the Leadership Act, the TVPA exempted organizations that provide "assistance designed to promote the purposes of this Act by ameliorating the suffering of, or health risks to, victims while they are being trafficked or after they are out of the situation that resulted from such victims being trafficked."). *Id.* § 7710(g)(1). Despite the TVPA's similarity, these provisions have not been challenged in any litigation to date. For more on the definitions, causes, and concerns about sex trafficking and the Trafficking Victims Protection Act, see Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403 (2011).

189. *Id.* § 7631(f).

190. *Id.* (exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any U.N. agency).

191. *See* USAID, ACQUISITION & ASSISTANCE POLICY DIRECTIVE (AAPD), IMPLEMENTATION OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS AND MALARIA ACT OF 2003—ELIGIBILITY FOR ASSISTANCE, LIMITATION ON THE USE OF FUNDS AND OPPOSITION TO PROSTITUTION AND SEX TRAFFICKING (Jan. 15, 2004). *See generally Alliance IV*, 651 F.3d 218, 225–27 (2d Cir. 2011), *reh'g en banc denied*, 678 F.3d 127 (2d Cir. 2012) (discussing the history of the policy directives).

192. USAID, ACQUISITION & ASSISTANCE POLICY DIRECTIVE (AAPD), IMPLEMENTATION OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS, AND MALARIA ACT OF 2003—ELIGIBILITY LIMITATION ON THE USE OF FUNDS AND OPPOSITION TO PROSTITUTION AND SEX TRAFFICKING 2–4 (June 9, 2005) [hereinafter 2005 POLICY DIRECTIVE]; *see Alliance IV*, 651 F.3d at 225.

193. *See* USAID, ACQUISITION & ASSISTANCE POLICY DIRECTIVE (AAPD), AMENDMENT 1, IMPLEMENTATION OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS AND MALARIA ACT OF 2003—ELIGIBILITY LIMITATION ON THE USE OF FUNDS AND OPPOSITION TO PROSTITUTION AND SEX TRAFFICKING (July 23, 2007) [hereinafter 2007 POLICY DIRECTIVE].

recipients and any partner or affiliate organizations by modifying the affiliate requirement of "objective integrity and independence."[194]

In April 2010, in the midst of continued litigation, HHS and USAID changed the required affirmation statement and modified the guidance on partnering affiliate separation.[195] The 2010 guidelines provide that a Leadership Act recipient must affirmatively declare its opposition to prostitution and sex trafficking in the funding contract "because of the psychological and physical risks they pose for women, men, and children"[196] and reaffirm that it "cannot engage in activities that are inconsistent with [its] opposition to prostitution."[197] Despite these clarifications and continued amendments, recipient organizations have continued to complain that the guidelines fail to define what activities may be deemed "inconsistent" with an "opposition to prostitution" under the Policy Requirement.[198]

The Guidelines now provide that adequate separation would be determined with "more flexibility for funding recipients" on a case-by-case basis, assessed according to five, nonexclusive factors: (1) the separation of personnel, management, and governance; (2) the separation of accounts and records; (3) the separation between the recipient and the affiliate's facilities; (4) the separation of identifying signs and forms; and (5) the degree of public association between the affiliate's restricted activities and the government.[199]

c. The Effects of the Act

Many organizations that receive funding from the Leadership Act protest the implementation of the Policy Requirement, not because they support

194. The previous guidelines required legal, financial, and physical separation of affiliates. *See* Dep't Health & Hum. Servs., Guidance Regarding Section 301(f) of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, 72 Fed. Reg. 41, 076, 41,076–77 (July 26, 2007); 2007 POLICY DIRECTIVE, *supra* note 193, at 2; 2005 POLICY DIRECTIVE, *supra* note 192, at 2–4.

195. *See* Dep't Health & Hum. Servs., Organizational Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 75 Fed. Reg. 18,760, 18,760 (Apr. 13, 2010) (codified in part at 45 C.F.R. § 89.3 (2011)) [hereinafter *2010 HHS Guidelines*]; USAID, ACQUISITION & ASSISTANCE POLICY DIRECTIVE (AAPD), AMENDMENT 3, IMPLEMENTATION OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS AND MALARIA ACT OF 2003, AS AMENDED—ELIGIBILITY LIMITATION ON THE USE OF FUNDS AND OPPOSITION TO PROSTITUTION AND SEX TRAFFICKING (Apr. 13, 2010) [hereinafter *2010 Policy Directive*].

196. 45 C.F.R. § 89.1 (2011); *2010 Policy Directive*, *supra* note 195, at 2.

197. *2010 HHS Guidelines*, 75 Fed.Reg. at 18,760.

198. The Plaintiffs in *Alliance for Open Society* brought claims based on the Act's definition of "promoting prostitution." Alliance for Open Soc'y Int'l, Inc., v. U.S. Agency for Int'l Dev. (*Alliance II*), 570 F. Supp. 2d 533, 549 (S.D.N.Y. 2008). For more on the Act's failure to define "promoting prostitution," see generally Sung Chang, Note & Comment, *Prostitutes + Condoms = AIDS?: The Leadership Act, USAID, and the HHS Guidelines' Failure to Define "Promoting Prostitution,"* 19 AM. U. J. GENDER SOC. POL'Y & L. 373 (2011).

199. *See* 45 C.F.R. § 89.3(b) (2011).

prostitution or sex-trafficking per se, but because the Policy Requirement chills HIV/AIDS outreach and treatment programs.[200] The Policy Requirement not only violates best practices policy, but alienates and stigmatizes the same population the NGO had sought funding to support.[201]

In February 2005, a group of nonprofit organizations, including CARE, Save the Children, and the International Center for Research on Women, wrote a letter to Randall Tobias, U.S. Director of Foreign Assistance, protesting the Policy Requirement.[202] In August 2005, a group of over 100 nonprofits countered by signing a letter to President George H.W. Bush supporting the policy.[203]

The Policy Requirement had immediate consequences for HIV/AIDS NGOs worldwide. Brazil rejected approximately $40 million in USAID money because the Policy Requirement would interfere with its successful anti-HIV/AIDS program.[204] Brazil's AIDS commissioner Pedro Chequer even explained the importance of working with at-risk populations, stating, "'They are our partners. How could we ask prostitutes to take a position

200. *See* Brief for AIDS Action and Twenty-Five Other Public Health Organizations and Public Health Experts as Amici Curiae Supporting Plaintiffs-Appellees at 8, Alliance of Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 254 F. App'x 843 (2d Cir. 2007) (No. 06-4035-cv), 2006 WL 5582287 at *8 [hereinafter Brief for AIDS Action] (discussing how the Policy Requirement "threatens to alienate the communities with which they work"); CTR. FOR HEALTH & GENDER EQUITY, POLICY BRIEF: IMPLICATIONS OF U.S. POLICY RESTRICTIONS FOR HIV PROGRAMS AIMED AT COMMERCIAL SEX WORKERS (2008) [hereinafter H&G POLICY BRIEF], *available at* http://www.genderhealth.org/files/uploads/change/publications/aplobrief.pdf.

201. *See* Alliance for Open Soc'y Int'l, Inc., v. U.S. Agency for Int'l Dev. (*Alliance I*), 430 F. Supp. 2d 222, 232 (S.D.N.Y. 2006), *aff'd*, 657 F.3d 218 (2d Cir. 2009), *petition for cert. filed*, No. 12-10 (U.S. July 2, 2012) (finding that the stigmatizing effect of the Policy Requirement could push these at-risk groups underground); Erica Tracy Kagan, *Morality v. Reality: The Struggle to Effectively Fight HIV/AIDS and Respect Human Rights*, 32 BROOK. J. INT'L L. 1201, 1224 (2007) (describing the stigmatizing effect of the Policy Requirement); *cf.* USAID, LEADING THE WAY: USAID RESPONDS TO HIV/AIDS 1997–2000 (2001) [hereinafter LEADING THE WAY] (finding that working with community sex workers gives credibility, reduces fear, and makes the HIV/AIDS work more successful); Aziza Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women's Health*, 34 HARV. J.L. & GENDER 225, 240 (2011) (describing the need for encouraging work with at-risk groups like prostitutes).

202. David Brown, *U.S. Backs Off Stipulation on AIDS Funds*, WASH. POST., May 18, 2005, at A9.

203. Paul Lachynsky, *Over 100 Groups Urge Bush to Enforce Anti-prostitution Policy to Aid Sexually Exploited Women and Children*, MED. NEWS TODAY (Aug. 8, 2005), http://www.medicalnewstoday.com/releases/28834.php.

204. *See, e.g.*, Esther Kaplan, *Just Say Não*, NATION, May 30, 2005, at 4; Matt Mofett & Michael M. Phillips, *Brazil Refuses U.S. AIDS Funds, Rejects Conditions*, WALL ST. J., May 2, 2005, at A3 (stating that the Brazilian government turned down $40 million in anti-HIV/AIDS funding instead of complying with the Policy Requirement).

against themselves?'"[205] The Policy Requirement has also impacted programs in Thailand, India, Mali, Bangladesh, and Cambodia.[206]

Additionally, the Center for Health and Gender Equality published a policy brief (H&G Policy Brief) in 2008 that explained how the Policy Requirement negatively impacted women's health abroad.[207] The H&G Policy Brief, using a 2006 field study, asserted that the Policy Requirement undermined public health best practices by undercutting the trust and credibility that HIV/AIDS NGOs need to foster in order to work with sex workers and trafficked persons, who are one of the groups at the highest risk for becoming infected with HIV.[208] The study also found that "reaching sex workers [w]as the biggest challenge to their work" because sex workers do not disclose their vocation to those they do not know.[209] Thus, the adoption of the Policy Requirement has alienated trafficked persons and prostitutes and prevented them from receiving the needed aid that the Leadership Act meant to provide.[210]

The H&G Policy Brief asserted that the HIV/AIDS work of many HIV/AIDS NGOs has suffered after the implementation of the Policy Requirement.[211] The adoption of the Policy Requirement has created tension between programmatic success and funding, caused a chilling effect on organizations which results in self-censorship, curtailed effective HIV prevention programs, and exacerbated the stigma and isolation for already marginalized persons and groups.[212]

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205. Kaplan, *supra* note 204, at 4; *see also* Moffett & Phillips, *supra* note 204 (quoting Chequer, who said the Policy Requirement was an "'interference that harms the Brazilian policy regarding diversity, ethical principles and human rights'").

206. *See* Sexworkerspresent, *Taking the Pledge*, BLIP (Nov. 1, 2008), http://blip.tv/sexworkerspresent/taking-the-pledge-185356 (detailing the negative effects the Policy Requirement has had on prostitutes in Thailand, India, Mali, Bangladesh, Brazil, and Cambodia, including less access to condoms, increased poverty, and less prevention centers) [hereinafter *Taking the Pledge*]; *see also* Brief for AIDS Action, *supra* note 200, at 18–20; Alliance of Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 254 F. App'x 843 (2d Cir. 2007) (No. 06-4035-cv), 2006 WL 5582287 at *18–20 (discussing how the Policy Requirement is already impeding NGOs' efforts to combat HIV/AIDS).

207. *See* H&G POLICY BRIEF, *supra* note 200, at 2 (discussing the development of programs designed to educate sex workers about condom use); *see also* Sheetal Doshi, *Sex Workers on the Front Line of Prevention*, CENTER FOR PUB. INTEGRITY (Nov. 30, 2006, 1:15am), http://www.icij.org/projects/divine-intervention/sex-workers-front-line-prevention (discussing an effective strategy implemented by one anti-AIDS organization in India). The H&G Policy Brief also challenged the constitutionality of the Policy Requirement in passing. H&G POLICY BRIEF, *supra* note 200, at 2.

208. H&G POLICY BRIEF, *supra* note 200, at 2; Brief for AIDS Action, *supra* note 200, at 9, 14 (detailing how the Policy Requirement contradicts "best practice[s]" for HIV/AIDS prevention and care).

209. H&G POLICY BRIEF, *supra* note 200, at 3.

210. *Id.* The H&G Policy Brief even detailed one organization whose program had been recognized as a U.N. AIDS "best practice," but had suffered a serious decline after conforming to the Policy Requirement mandated by the Leadership Act. *Id.* at 3.

211. *Id.* at 4 (describing the sharp declines in HIV/AIDS education and the monthly condom distribution rate).

212. *Id.* at 2–6; *Taking the Pledge*, *supra* note 206 (interviewing several sex workers about the negative impacts of the Policy Requirement on their lives).

The H&G Policy Brief's suspicions have since been confirmed by other sources.[213] It has even been suggested that the negative fallout of the United States' expanded so-called global gag order against HIV/AIDS work with high-risk populations is tantamount to "public health malpractice."[214] The Policy Requirement's effects on anti–human trafficking initiatives are less well documented, but one commentator suggests they are equally as detrimental.[215]

Activism against the Policy Requirement has not abated. In July 2012, HIV/AIDS activists protested the Policy Requirement both domestically and abroad.[216] The United Nation's Development Program even published a report in September 2012 denouncing the Policy Requirement and recommending its repeal.[217]

II. MUST THE PAID PIPER PLAY THE TUNE?: CONFLICT AMONG COURTS OVER WHETHER THE LEADERSHIP ACT'S POLICY REQUIREMENT UNCONSTITUTIONALLY INFRINGES ON RECIPIENT NGOS' FREE SPEECH

Part II of this Note details the conflict between the U.S. Courts of Appeals over the Leadership Act's Policy Requirement. Courts differ on whether the Policy Requirement places an unconstitutional condition on federal funding to be distributed to domestic NGOs combating the HIV/AIDS epidemic, thereby impermissibly discriminating on the basis of viewpoint. Additionally, courts are split on whether the Policy Requirement compels unwilling NGOs to convey a government message. In the following sections, this Note examines the three approaches to these issues. Part II.A discusses the 2007 decision of the D.C. Circuit, *DKT International v. U.S. Agency for International Development*,[218] which

213. *See* Funding Captive to Politics, *supra* note 185 (discussing the alliance of many signatory organizations who filed an amicus brief in the Alliance for Open Society litigation); Susan A. Cohen, *Ominous Convergence: Sex Trafficking, Prostitution and International Family Planning*, 8 GUTTMACHER REP. ON PUB. POL'Y 12–13 (2005) (discussing the counterproductive interventions of antiabortion and anti-prostitution campaigns on public health).

214. *See* Kinney, *supra* note 185, at 164 (discussing the implications of the Policy Requirement on public health); *Funding Captive to Politics*, *supra* note 185; *see also* Mehilka Hoodbhoy et al., *Exporting Despair: The Human Rights Implications of U.S. Restrictions on Foreign Health Care Funding in Kenya*, 29 FORDHAM INT'L L.J. 1 (2005) (suggesting that current U.S. funding policies may violate international human rights obligations such as the right to health).

215. Kinney, *supra* note 185, at 181–90.

216. Claire Provost, *Anti-prostitution Pledge in US Aids Funding "Damaging" HIV Response*, GUARDIAN (July 24, 2012, 10:32 AM), http://www.guardian.co.uk/global-development/2012/jul/24/prostitution-us-aids-funding-sex?CMP=email (describing protests in Washington, D.C., and Kolkata, India).

217. U.N. DEVELOPMENT POLICY, HIV/AIDS GROUP, GLOBAL COMMISSION ON HIV AND THE LAW: RISKS, RIGHTS AND HEALTH ¶ 3.2.8, 43 (2012) ("Repeal punitive conditions in official development assistance—such as the United States government's PEPFAR anti-prostitution pledge and its current anti-trafficking regulations—that inhibit sex workers' access to HIV services or their ability to form organisations in their own interests.").

218. 477 F.3d 758 (D.C. Cir. 2007).

upheld the policy requirement. Part II.B discusses the majority decision in *Alliance for Open Society International, Inc. v. U.S. Agency for International Development*[219] in the Second Circuit, which struck down the Policy Requirement as compelled speech and viewpoint discriminatory. Part II.C discusses Judge Straub's dissent in the Second Circuit, which found that the Policy Requirement did not impermissibly burden the recipients' free speech rights.

A. DKT International *and the D.C. Circuit*

DKT International is an organization that provides family planning and AIDS prevention programming in eighteen different countries around the world.[220] In June 2005, Family Health International (FHI), a family planning NGO in Vietnam, attempted to contract DKT to operate as a subgrantee to run a USAID-funded program and provided DKT with an agreement, which included the certification that DKT had a policy "explicitly opposing prostitution and sex trafficking" in conformity with the Leadership Act Policy Requirement.[221] DKT refused to comply with the Policy Requirement.[222] FHI cancelled the grant and informed DKT that funding had been discontinued.[223] Unlike other HIV/AIDS NGOs, DKT did not depend on government funding to operate, with only 16 percent of its total budget coming from USAID grants.[224] DKT then filed a complaint for an injunction on the use of the Policy Requirement.[225]

This section discusses the D.C. Circuit's ruling in *DKT*, which held that the Policy Requirement is a permissible funding condition because it neither imposes a penalty on protected First Amendment rights nor discriminates in a way aimed at the suppression of ideas.[226] First, this section outlines the court's argument that the Policy Requirement does not suppress an unpopular idea. Then, it details the court's determination that this Policy Requirement does not impermissibly discriminate on the basis of viewpoint and allows for alternate routes of expression. Finally, this section explains the court's determination that the government had not created a forum for public speech nor encouraged private speech. As such, the Policy Requirement was a permissible condition to prevent the government's message from being distorted.

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219. 651 F.3d 218, 223–24 (2d Cir. 2011), *reh'g en banc denied*, 678 F.3d 127 (2d Cir. 2012), *petition for cert. filed*, 2012 WL 2586932 (U.S. July 2, 2012) (No. 12-10).

220. DKT INTERNATIONAL, http://dktinternational.org/ (last visited Oct. 20, 2012); *see DKT*, 477 F.3d at 760.

221. *DKT*, 477 F.3d at 760.

222. *Id.* at 761.

223. *Id.*

224. *Id.* at 760.

225. *Id.*

226. *Id.* at 764.

1. The Policy Requirement Does Not Attempt to Suppress an Unpopular Idea

The D.C. Circuit upheld the Policy Requirement as a constitutional condition on federal funds, finding that "[t]he Act does not compel DKT to advocate the government's position on prostitution and sex trafficking; it requires only that if DKT wishes to receive funds it must communicate the message the government chooses to fund."[227] Under the government speech doctrine, the court found that the government can discriminate on the basis of viewpoint when communicating a government message to make sure that the message is properly communicated.[228] While the choice to fund certain activities at the exclusion of others will necessarily discriminate on the basis of viewpoint, that choice is problematic only when made to suppress a dangerous idea.[229]

The D.C. Circuit recognized that the Policy Requirement was not intended to suppress the expression of NGOs desiring to remain silent or oppose the government's message against prostitution and sex trafficking.[230] Instead, the court found that the Policy Requirement nobly aimed to eradicate prostitution and reduce the behavioral risks that cause the spread of the HIV epidemic.[231]

2. Alternative Routes of Expression Remain Available

The court also found that the Policy Requirement did nothing to prevent an NGO from speaking its own message either by rejecting the funding or alternatively creating a subsidiary or affiliate organization that agrees to the policy opposing prostitution.[232] Like in *Rust*, where the clinic could advocate abortion if it conducted that activity "through programs that are separate and independent from the project that receives Title X funds,"[233] a subsidiary could adopt the Policy Requirement while the parent organization remains independent according to the USAID and HHS guidelines.[234]

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227. *Id.*

228. *See supra* notes 127–29, 143 and accompanying text.

229. *See DKT*, 477 F.3d at 761 ("When it communicates its message . . . the government can—and often must—discriminate on the basis of viewpoint." (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995))). The Court makes several comparisons to illustrate this point. *Id.* (finding that if the government funds Nancy Reagan's "Just Say No" anti-drug campaign, it is not constitutionally required to simultaneously sponsor a "Just Say Yes" pro-drug campaign). Other courts have found similar illustrations useful. *See, e.g.*, DKT Mem'l Fund Ltd. v. U.S. Agency for Int'l Dev., 887 F.2d 275, 289 (D.C. Cir. 1989) (suggesting that a Surgeon General's activities against smoking does not require a simultaneous program supporting smoking activities).

230. *DKT*, 477 F.3d at 764 (finding that the Policy Requirement was only aimed at trying to encourage a government message, not suppressing speech).

231. *Id.* at 761 (detailing the objective of the Leadership Act to "eradicate HIV/AIDS").

232. *Id.* at 763.

233. Rust v. Sullivan, 500 U.S. 173, 196 (1990).

234. *DKT*, 477 F.3d at 763.

The D.C. Circuit also found that the Policy Requirement did not restrict any recipient's First Amendment speech outside the scope of the recipient's participation in the government program.[235] While the *DKT* court acknowledged that, unlike *Rust*, the Leadership Act placed restrictions on *grantees*, as opposed to just *projects*, it held that DKT could remain neutral by setting up a subsidiary or affiliate organization.[236] The Policy Requirement's effect on the entire organization rather than the funded project does not prevent the recipient NGO from remaining neutral.[237] Several other courts have echoed the *DKT* court's finding that conditional subsidies with independent affiliate requirements cure any constitutional difficulty by allowing the recipients to confine the speech condition to the federally funded program.[238]

3. The Government Had Not Created a Forum for Speech or Encouraged Private Speech

As elucidated above, a government condition becomes unconstitutional not only when it impermissibly discriminates by viewpoint but also when it operates as a coercive penalty.[239] A government condition becomes coercive if it forces the recipient to convey a message with which it would not otherwise agree.[240] The D.C. Circuit adopted a narrow reading of *Rust* and *Rosenberger*, finding that the Policy Requirement had not created a quasi-public forum for private speakers to voice their viewpoint.[241] The interpretation rested on the distinction between government subsidy programs that provide funds to encourage private speech in a public forum and those that "use private speakers to transmit specific information pertaining to its own program."[242] Citing *Rosenberger*, *Rust*, and *DKT Memorial International v. U.S. Agency for International Development*,[243] the court found that the government may constitutionally communicate a particular viewpoint through agents and require that those agents not

235. *Id.* at 764.
236. *Id.* at 763.
237. *Id.*
238. *See Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 463–64 (8th Cir. 1999) (upholding a Missouri statute "requir[ing] abortion services to be provided through independent affiliates"); *Legal Aid Soc'y of Haw. v. Legal Servs. Corp.*, 145 F.3d 1017, 1026 (9th Cir. 1998) (upholding regulations "requir[ing] that if a recipient wishes to engage in prohibited activities, it must establish an organization separate from the recipient in order to ensure that federal funds are not spent on prohibited activities").
239. *See supra* Part I.A.2.
240. *See supra* Part I.A.1.
241. *DKT*, 477 F.3d at 762 ("Here too the government has not created 'a program to encourage private speech' . . . [i]n this case, as in *Rust*, 'the government's own message is being delivered.'" (quoting FCC v. League of Women Voters, 468 U.S. 364, 367–68 (1984), and Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001))).
242. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001).
243. DKT Mem'l Fund Ltd. v. U.S. Agency for Int'l Dev., 887 F.2d 275 (D.C. Cir. 1989).

convey contrary messages.[244] While the law at issue in *Rust* only demanded that programs and not the entire organization convey a message, the D.C. Circuit suggested that DKT could avoid adopting an organization-wide policy and still receive funding by setting up a separate subsidiary organization with an antiprostitution policy that could receive and spend the Agency's funds.[245]

The D.C. Circuit also found that the Policy Requirement was not meant to encourage private speech.[246] The government can make sure that its agents do not "convey contrary messages," and that its "message is conveyed in an efficient and effective fashion."[247] Because the government's program would be undermined if recipients hired to implement the program could advance alternative viewpoints at the same time, the court upheld the Policy Requirement.[248]

The D.C. Circuit also added that when the government speaks on matters with foreign policy implications, the government has a heightened incentive to protect its viewpoint.[249] While admitting that the government's main objective in the Leadership Act was to "eradicate HIV/AIDS," the D.C. Circuit also found that government speech was a primary means of achieving that objective.[250] Plaintiffs never contested the legitimate government interest in eradicating HIV/AIDS or ending prostitution and sex trafficking.[251] The court found that both objectives are equally integral to Congressional intent.[252] The legitimacy of the government interest was not weakened by the exemptions to the Policy Requirement provided to select organizations.[253] Fundamentally, "[s]pending money to convince people at

244. *DKT*, 477 F.3d at 761 ("The government may speak through . . . government officers and employees . . . . Or it may hire private agents to speak for it. . . . When it communicates its message, either through public officials or private entities, the government can—and often must—discriminate on the basis of viewpoint." (citing Rust v. Sullivan, 500 U.S. 173, 196 (1990), Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995), & *DKT Mem'l*, 887 F.2d at 289)).

245. *Id.* at 763.

246. *Id.* at 762.

247. *Id.* (finding that the government can "use criteria to ensure" that its agents do "not convey contrary messages" and that its "message is conveyed in an efficient and effective fashion"); *cf. DKT Mem'l*, 887 F.2d at 290–91 (holding that the government has long held the ability to maintain its own message).

248. *See DKT*, 477 F.3d at 762–63.

249. *Id.* at 762 (finding that "where the government is speaking on matters with foreign policy implications, as it is here," the government has a more legitimate interest in ensuring that its speech is "'neither garbled nor distorted'" (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995))); *DKT Mem'l*, 887 F.2d at 289–91 ("To hold that the United States government cannot make viewpoint-based choices in foreign affairs would not only depart from settled precedent, but would work much mischief.").

250. *See DKT*, 477 F.3d at 761 (finding that the Leadership Act necessitated the "United States to speak out against legalizing prostitution in other countries" and "not merely to ship condoms and medicine to regions where the disease is rampant").

251. *See id.* at 761 (describing both objectives of the Leadership Act).

252. *Id.*

253. *See id.* at 763 n.5 ("[T]he Act's underinclusiveness does not violate the First Amendment. . . . Because viewpoint discrimination raises no First Amendment concerns when the government is speaking, the underinclusiveness of the certification requirement is

risk of HIV/AIDS to change their behavior is necessarily a message."[254] Because the condition did not compel the recipient "to advocate the government's position on prostitution and sex trafficking," the *DKT* court concluded that the Policy Requirement need not be subjected to any heightened scrutiny[255] and did not violate the First Amendment.[256]

B. Alliance for Open Society *and the Second Circuit*

Alliance for Open Society Institute (AOSI) and Pathfinder are both independent U.S.-based NGOs actively engaged in the worldwide effort to combat HIV and AIDS.[257] Both organizations work closely with populations that have a high-risk of contracting HIV/AIDS, including drug users, victims of sex trafficking, and prostitutes.[258] Both NGOs, like DKT International, engage with these at-risk groups to improve accessibility and create other gateways to prevention within the general population.[259] Both NGOs receive financial assistance from the U.S. government through the USAID,[260] as well as from private sources.[261]

In 2005, USAID told AOSI that their guidelines did not comply with the Policy Requirement.[262] AOSI and the Open Society Institute quickly filed suit, challenging the provision, and Pathfinder quickly joined.[263] In 2006, the district judge issued a preliminary injunction preventing the agencies from enforcing the Policy Requirement against the NGOs because the condition impermissibly banned protected speech.[264] After the case was remanded when HHS and USAID published new guidelines,[265] the district

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immaterial." (citing Ruggiero v. FCC, 317 F.3d 239, 250–51 (D.C. Cir. 2003) (Randolph, J., concurring))).

254. *Id.*

255. *See id.* at 761–63 (applying a more deferential lower standard of scrutiny, though not explicitly stated, based on the overinclusivity and underinclusivity of the Policy Requirement).

256. *Id.* at 764.

257. *See Alliance I*, 430 F. Supp. 2d 222, 230 (S.D.N.Y. 2006), *aff'd*, 657 F.3d 218 (2d Cir. 2009), *petition for cert. filed*, No. 12-10 (U.S. July 2, 2012).

258. *Id.*

259. *Id.* at 232.

260. Pathfinder receives additional funds from other agencies such as the U.S. Department of Health and Human Services (HHS) and the U.S. Center for Disease Control (CDC). *See id.* at 230–31.

261. Alliance for Open Society is closely affiliated with, though independent of, the Open Society Institute established and financed by George Soros, which supports a network of more than thirty foundations that operate worldwide. *Id.* at 230. Alliance for Open Society has received financial support from USAID but has also received a private grant from the Open Society Institute of nearly $2.2 million. *Id.* Pathfinder has similar utilized grants from private sources to fund many of its programs related to family planning and reproductive health services. *Id.*

262. *Id.* at 237.

263. *Id.* at 237–38.

264. *Id.* at 276.

265. Guidance Regarding Section 301(f) of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, 45 C.F.R. pt. 89 (2011); 2007 POLICY DIRECTIVE, *supra* note 193, at 3.

court stood by its first decision, striking down the Policy Requirement a second time,[266] and the Second Circuit ultimately affirmed.[267]

This section discusses the Second Circuit's majority decision in *Alliance for Open Society*,[268] along with the Southern District of New York and D.C. District Courts,[269] which struck down the Leadership Act's Policy Requirement as an unconstitutional condition on federal funds.[270] This section outlines the standard that Second Circuit adopts for evaluating whether a conditional subsidy unconstitutional infringes on First Amendment free speech rights. It then discusses the court's application of that standard, finding that the Policy Requirement impermissibly discriminates on the basis of viewpoint and compels speech.

1. The Policy Requirement Impermissibly Compels Recipients to Espouse the Government's Position

As seen in Part I.A.1, compelled speech "cannot be squared with the First Amendment."[271] Because the Policy Requirement forces any recipient to declare its opposition to prostitution and sex-trafficking, the Second Circuit compared the Policy Requirement to other compelled speech cases and found that "silence, or neutrality, is not an option" for any recipient of Leadership Act funds.[272] Conceding that *Wooley*, *Speiser*, and *Barnette* did not control, the court found those holdings instructive when analyzing the unconstitutional conditions doctrine, which had never dealt with an affirmative speech requirement before.[273] Because the First Amendment frowns on affirmative-speech requirements, and because the Policy Requirement pushed beyond the *Regan* and *Rust* progeny, the court found the Policy Requirement warranted heightened scrutiny.[274]

The court even found that the Policy Requirement ignored dicta from *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)*, where the Supreme Court upheld the Solomon Amendment's requirement that

266. *Alliance II*, 570 F. Supp. 2d 533, 550 (S.D.N.Y. 2008), *aff'd*, 651 F.3d 218 (2d Cir. 2011), *reh'g en banc denied*, 678 F.3d 127 (2d Cir. 2012).

267. *Alliance IV*, 651 F.3d 218, 223–24 (2d Cir. 2011), *reh'g en banc denied*, 678 F.3d 127 (2d Cir. 2012), *petition for cert. filed*, No. 12-10 (U.S. July 2, 2012).

268. *Id.*

269. *Alliance I*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006), *aff'd*, 651 F.3d 218 (2d Cir. 2011), *reh'g en banc denied*, 678 F.3d 127 (2d Cir. 2012), *petition for cert. filed*, No. 12-10 (U.S. July 2, 2012); DKT Int'l, Inc. v. U.S. Agency for Int'l Dev. (*DKT I*), 435 F. Supp. 2d 5 (D.D.C. 2006), *rev'd*, 477 F.3d 758 (D.C. Cir. 2007).

270. *See Alliance IV*, 651 F.3d at 223–24; *DKT I*, 435 F. Supp. 2d at 12–14; *Alliance I*, 430 F. Supp. 2d at 274–76.

271. *Alliance IV*, 651 F. 3d at 234.

272. *Id.*

273. *Id.* at 234–35 n.3 ("[A]lthough *Regan* and its progeny unquestionably provide the framework for our analysis, they do not capture the Policy Requirement as neatly . . . ."). The Court took away the principle that "the First Amendment does not look fondly on attempts by the government to affirmatively require speech." *Id.; see also supra* note 46 and accompanying text.

274. *Id.* at 234–35.

universities permit military recruiters on campus as a condition of receiving federal funding.[275] The *FAIR* Court signaled that affirmative government-preferred speech raises "serious First Amendment concerns" by noting that "[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse."[276] Concluding that the result of *FAIR* would have been different if a forced pledge or motto had been required, the Second Circuit found the Policy Requirement to be exactly the type of government-mandated pledge that *FAIR* warned about.[277] Thus, the court found that the Policy Requirement unconstitutionally compelled the recipients to speak the government's message and exceeded the limits of permissible funding conditions.[278]

2. The Policy Requirement Impermissibly Discriminates on the Basis of Viewpoint

The Second Circuit also found that the Policy Requirement constituted impermissible viewpoint discrimination by requiring the recipients to endorse the government's point of view.[279] While viewpoint-based restrictions are presumed unconstitutional under the First Amendment,[280] conditional viewpoint-based funding restrictions were found "not necessarily unconstitutional" under *Rust*.[281] The court added that such restrictions do merit heightened scrutiny because they are "constitutionally troublesome."[282] Because it combined both affirmative and viewpoint-based speech requirements, the Policy Requirement ultimately failed heightened scrutiny.[283]

3. The Policy Requirement Fails Heightened Scrutiny

Having concluded that the Policy Requirement is an affirmative-speech viewpoint-based funding requirement, the Second Circuit applied an

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275. *Id.* (citing *FAIR*, 547 U.S. 47, 61–62 (2006)).

276. *Id.* at 234, 235 (citing *FAIR*, 547 U.S. at 61–62).

277. *Id.* at 234–35.

278. *Id.* at 234 (finding that the Policy Requirement "falls well beyond what the Supreme Court and this Court have upheld as permissible funding conditions").

279. *Id.* at 235.

280. *See, e.g.*, *supra* notes 46–48; Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

281. *Alliance IV*, 651 F.3d at 235.

282. *See id.* (finding the dicta by all four dissenting Justices in *FCC v. League of Women Voters* to be persuasive that viewpoint-based restrictions are constitutionally problematic); *see also* FCC v. League of Women Voters, 468 U.S. 364, 407–08 (1984) (Rehnquist, J., dissenting) (suggesting that the prohibition's viewpoint neutral stance was the most significant and determinative aspect of the restriction). The Second Circuit found added confirmation for this conclusion in the *Legal Services Corporations* line of cases. *Alliance IV*, 651 F.3d at 235–36; *see also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 540–42 (2001).

283. *Alliance IV*, 651 F.3d at 236 (finding that the "bold combination . . . of a speech-targeted restriction that is both affirmative and quintessentially viewpoint-based" warranted heightened scrutiny).

unspecified heightened scrutiny test.[284] The court first questioned whether the Leadership Act's purpose is to convey the particular antiprostitution message[285] and distinguished between programs in which conveying a government message *is* the stated purpose of the program and those programs where the message is only secondary.[286] Because the Leadership Act's primary purpose was to fight HIV/AIDS, tuberculosis, and malaria, not to campaign against prostitution,[287] the court found that the government could not retroactively recast the Leadership Act's purpose as one of conveying a message against prostitution simply because that would conveniently give it the ability to compel recipients to affirmatively espouse its point of view.[288] Indeed, the court found that the Leadership Act's exemption for some organizations severely undermines the conclusion that conveying a government message is really so central to the Leadership Act's purpose.[289]

Additionally, because the Policy Requirement is a matter of international debate and public concern, greater First Amendment protection is warranted.[290] Because it not only bans certain pro-prostitution speech,[291] but also precludes silence or neutrality on a "contested public issue," the Policy Requirement unfairly skews international debate.[292] In fact, the Policy Requirement runs counter to the best practices for HIV/AIDS

284. *See id.* at 234, 239 (applying a heightened scrutiny standard and discussing alternative routes of expression).

285. *See id.* at 237 (describing the centrality of the antiprostitution message to the Leadership Act program).

286. *Id.* (differentiating between government programs whose purpose is to convey a particular message and those in which the message is secondary); *cf. Velazquez*, 531 U.S. at 547 ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.").

287. *Alliance IV*, 651 F.3d at 237–38 (finding that the Leadership Act's purpose is to fight HIV/AIDS, not to facilitate an "anti-prostitution messaging campaign").

288. *Id.* at 238 ("If the government-speech principle allowed Congress to compel funding recipients to affirmatively espouse its viewpoint on every subsidiary issue subsumed within a federal spending program, the exception would swallow the rule.").

289. *See* 22 U.S.C. § 7631(f) (2006); *Alliance IV*, 651 F.3d at 238 ("In short, the Agencies' suggestion that requiring Plaintiffs to adopt an anti-prostitution policy statement is integral to the Leadership Act program is undermined by the fact that the government has chosen to fund high-profile, global organizations that remain free to express—and indeed openly express—a contrary policy, or no policy at all.").

290. *Alliance IV*, 651 F.3d at 236; *see* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting Carey v. Brown, 447 U.S. 455, 467 (1980))).

291. The court never actually discusses what sorts of speech are prohibited as "inconsistent with [an] opposition to the practice[] of prostitution." 45 C.F.R. § 89.3 (2011). The majority did not reach the argument that the Policy Requirement was unconstitutionally vague because they found the Policy Requirement to be an unconstitutional condition, though it acknowledged that both parties did not seem to have a good "grasp on what it means to engage in expression that is 'inconsistent' with an opposition to prostitution." *Alliance IV*, 651 F.3d at 239–40 n.8.

292. *Alliance IV*, 651 F.3d at 236.

prevention.[293] Thus, the Policy Requirement might even cause more harm than good.[294] The court overlooked the need for a unified government message in foreign affairs because the Policy Requirement principally impacted domestic U.S.-based NGOs' speech.[295]

At the trial court level, both district courts also found that the Policy Requirement was not narrowly tailored to the government objective of preventing the expression of a contrary message.[296] Instead of limiting only the speech used with federal funds, the Policy Requirement limits the speech used with both private and public funds by requiring a policy to be adopted by the entire organization.[297]

The court found that giving recipient NGOs the ability to engage in privately funded silence or neutrality provided an inadequate alternative.[298] While an affiliate provides the recipient an outlet to express a pro-prostitution message, the affirmative obligation to speak the government's message prevents the recipient from abstaining from the debate altogether.[299] Less restrictive measures exist: a recipient could abide by the Policy Requirement in the funded-program while being free to speak in other nonfederally funded programs.[300]

The *Alliance for Open Society* district court even suggested that disclaimers could be used to clarify that particular projects and activities are privately funded and not support by the government funds, a method far less restrictive than preventing recipient NGOs from engaging in "any speech conveying a different viewpoint than the one advanced by the Act."[301] Consequently, the Policy Requirement was overbroad by restricting the NGO's ability to use its own private funding, as opposed to just its own government funds.[302] Because the Policy Requirement compels grantees to espouse the government's position on a controversial issue, the Second Circuit concluded that the Policy Requirement was an unconstitutional condition placed on the receipt of federal funds.[303] One

293. *See id.* (describing the World Health Organization and the Joint United Nations Programme on HIV/AIDS's recognition that advocating for the reduction of penalties for prostitution in order to stimulate outreach efforts is considered a best practice).

294. *Id.* (detailing the Policy Requirement's negative foreign policy implications).

295. *Id.* at 239 (holding that the domestic impact of the Policy Requirement makes it "more of a domestic than a foreign concern").

296. *See DKT I*, 435 F. Supp. 2d 5, 14 (D.D.C. 2006), *rev'd*, 477 F.3d 758 (D.C. Cir. 2007) (addressing the overinclusivity of the Policy Requirement); *Alliance I*, 430 F. Supp. 2d 222, 268–71 (S.D.N.Y. 2006), *aff'd*, 651 F.3d 218 (2d Cir. 2011), *reh'g en banc denied*, 678 F.3d 127 (2d Cir. 2012), *petition for cert. filed*, No. 12-10 (U.S. July 2, 2012) (addressing the Policy Requirement's lack of narrow tailoring).

297. *See Alliance I*, 430 F. Supp. 2d at 265 (finding that affirmative or compelled speech requirements do not address "adequate alternative channels").

298. *DKT I*, 435 F. Supp. 2d at 13.

299. *Id.*

300. *Id.* at 14.

301. *Alliance I*, 430 F. Supp. 2d at 270.

302. *DKT I*, 435 F. Supp. 2d at 15–16.

303. *Alliance IV*, 651 F.3d 218, 239 (2d Cir. 2011), *reh'g en banc denied*, 678 F.3d 127, *petition for cert. filed*, No. 12-10 (U.S. July 2, 2012).

other court has noted the unconstitutionality of the Policy Requirement.[304] One commentator also agrees with the Second Circuit's holding, though suggesting that ultimately Congress should amend the statute to survive constitutional scrutiny.[305]

C. Judge Straub's Dissent in Alliance for Open Society

Judge Straub wrote a spirited and elaborate dissent where he detailed his version of the unconstitutional conditions doctrinal analysis. When he applied his test, he found that the Policy Requirement neither discriminated on the basis of viewpoint nor compelled speech nor acted as a coercive penalty. He concluded that the Policy Requirement did not merit heightened scrutiny and, consequently, would have upheld its constitutionality. This section discusses Judge Straub's dissent, focusing on the standard he elaborated and how he applied that standard to reach its result.

1. A New Framework of Analysis for Unconstitutional Conditions

Judge Straub chided the majority for thinking that affirmative funding conditions raise more "serious First Amendment concerns" than negative funding conditions.[306] Consequently he found the majority's reliance on *West Virginia State Board of Education v. Barnette*,[307] *Speiser v. Randall*,[308] and *Wooley v. Maynard*[309] to be unfounded.[310] The majority characterized those cases, traditionally described to be compelled speech cases,[311] as unconstitutional conditions cases where the government threatened the denial of an already-existing benefit ("going to school" or "using the roads"), over which the government had monopolistic control as a means of coercing the recipients to give up First Amendment rights.[312] Judge Straub saw the majority as attempting to "creatively recast" those

304. *See* Hill v. Kemp, 645 F. Supp. 2d. 992, 1005 (N.D. Okla. 2009) (finding that because the Leadership compelled an NGO to adopt a policy that would affect its non-federal funds and because no adequate alternative method allowed the organization to express a contradictory viewpoint, "the requirement to enact a policy opposing the legalization of prostitution constituted impermissible viewpoint discrimination").

305. *See* Garima Malhotra, Comment, *Good Intentions, Bad Consequences: How Congress's Efforts to Eradicate HIV/AIDS Stifle the Speech of Humanitarian Organizations*, 61 CATH. U. L. REV. 839, 860–65 (2012) (finding the Policy Requirement unworkable and unconstitutional and suggesting Congress should amend the statute to permit organizations to regulate the process for allocating their own funds while retaining the prohibition on funding activities related to legalizing prostitution).

306. *Alliance IV*, 651 F.3d at 255 (Straub, J., dissenting) (citing *id.* at 234 (majority opinion)).

307. 319 U.S. 624 (1943).

308. 357 U.S. 513 (1958).

309. 430 U.S. 705 (1977).

310. *See Alliance IV*, 651 F.3d at 256.

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

312. *See Alliance IV*, 651 F.3d at 256.

cases as conditional subsidies and distinguished them as cases that conditioned benefits on something that the recipient could not realistically deny: public education or public road use.[313] Additionally, the compelled speech requirements were completely unrelated to the government benefit at issue.[314] Instead, Alliance for Open Society neither relies on Leadership Act funds for "continued survival"[315] nor relies on the government as its only source of funding.[316] Because any recipient could realistically reject these funds, Judge Straub found that the government did not "compel anyone to speak the government's favored viewpoint."[317] A number of Second Circuit judges dissented from the denial of a rehearing en banc with the same criticism.[318] These dissents suggest that an affirmative-negative speech restriction is irrelevant to the unconstitutional conditions analysis.[319]

Similarly, Straub categorically objected to the majority's reliance on dicta from *FAIR*.[320] Straub found that the dicta in *FAIR* only stated the conclusion that there was no underlying First Amendment violation.[321] Consequently, the Policy Requirement was not found to be coercive because "[t]here is a basic difference between the denial of government funding and a direct compulsion to speak."[322]

After discarding that line of cases, Judge Straub presented two ways in which a conditional subsidy could be unconstitutional: (1) the condition operates as a "coercive penalty on the exercise of First Amendment rights"; or (2) the condition operates to suppress a certain viewpoint.[323] Based on *Regan*, Straub observed that the court found that a conditional government subsidy could be considered a coercive penalty on the exercise of First Amendment rights if (1) the condition restricted the recipient's speech outside of the scope of the recipient's participation in the government

313. *See id.* at 255–56; DKT Int'l, Inc., v. U.S. Agency for Int'l Dev., 477 F.3d 758, 762 n.2 (2007) ("Offering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from [*Wooley* and *Barnett*e] in which the government coerced its citizens into promoting its message on pain of losing their public education . . . or access to public roads.").

314. *See Alliance IV*, 651 F.3d at 257.

315. *See id.*

316. While the exact percentage of Alliance for Open Society's and Pathfinder's total funds derived from Agency grants is unclear, both certainly "receive funding from sources other than the Agencies." *Id.* at 224 (majority opinion).

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

318. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 678 F.3d 127 (2d Cir. 2012) (Cabranes, J., dissenting) (noting that "the policy requirement does not actually "mandate," "compel," or "require" the plaintiffs to say anything at all" (citing *Alliance IV*, 651 F.3d at 223, 228, 230 (majority opinion))).

319. *See Alliance IV*, 651 F.3d at 256–57 (Straub, J., dissenting).

320. *Id.* at 257–58; *see FAIR*, 547 U.S. 47, 62 (2006)("There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.").

321. *See Alliance IV*, 651 F.3d at 258 (finding that the Supreme Court in *FAIR* has found that "a necessary but not sufficient element of an unconstitutional funding condition was absent—there would be no underlying First Amendment violation if the condition was applied directly").

322. *Id.*

323. *Id.* at 246.

program; or (2) the condition denied government benefits to which the recipient would otherwise be entitled and that the government program at issue did not provide.[324] Either way, the denial of the government benefit would infringe on the recipient's freedom of speech.[325]

Additionally, Straub found that a funding condition only suppresses certain viewpoints when the condition (1) aims to suppress dangerous ideas; or (2) when the government creates a public forum designed to facilitate private speech.[326] He saw the unconstitutional conditions doctrine as a two-step inquiry. First, the program must be deemed to create a public forum that encourages a diversity of viewpoints.[327] If the program does not create a public forum, but instead uses private speakers to convey a government message, then the government is allowed to ensure that its message is neither "garbled or distorted"[328] by restricting the viewpoints that can be expressed by that private speaker, so long as it does not interfere with any traditional relationships.[329] If the program does establish a public forum, then the government cannot violate its neutrality mandate without being assessed under strict scrutiny and being presumed unconstitutional.[330]

2. Applying the Test: The Policy Requirement Does Not Impermissibly Infringe on an NGO's Free Speech

When Judge Straub applied his test, he found that the Leadership Act's Policy Requirement neither serves as a coercive penalty nor suppresses a dangerous idea. This section details his finding that the Policy Requirement does not act as a penalty and explains his conclusion that the Policy Requirement does not discriminate on the basis of viewpoint.

a. The Policy Requirement Does Not Act As a Coercive Penalty

First, Judge Straub concurred with the *DKT International* court that the Policy Requirement did not restrict any recipient's speech outside of the scope of the program.[331] He found that the organizational integrity guidelines allowing for affiliate structures alleviate any concerns of restricting speech outside of the program.[332] An affiliate organization

324. *See id.* at 246–48 ("[T]here is no coercive force behind a funding condition that is truly cabined to the federal subsidy program to which it is attached.").

325. *See FAIR*, 547 U.S. 47, 59 (2006).

326. *Alliance IV*, 651 F.3d at 261.

327. *See supra* notes 59–71 and accompanying text.

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

329. Rust v. Sullivan, 500 U.S. 173, 196 (1990); *supra* Part I.A.1.a.

330. *See supra* notes 67–71, 128, 143, 148–149 and accompanying notes.

331. *See Alliance IV*, 651 F.3d at 259 (suggesting that any recipient is free to continue "to remain silent or to espouse a pro-prostitution message with non-Leadership Act funds" by creating an "affiliate organization to receive Leadership Act funds and comply with the Leadership Act's Policy Requirement").

332. *Id.* at 262 (suggesting that the "organizational integrity guidelines" leave NGOs in the same condition as previous to the regulation, with the ability to remain silent or speak a pro-prostitution message).

provides an adequate alternate route for expression and the ability to create an affiliate organization provides the ability to engage in silence.[333] Consequently, the Policy Requirement is not an impermissible restriction preventing any adequate alternative "outlets" for expression; it is simply a condition to accept or deny.[334]

Second, Judge Straub finds that the condition does not deny government benefits to which the recipient would otherwise be entitled and that the government program at issue did not provide.[335] Thus, failing to comply with the Policy Requirement does not threaten any independent existing benefits.[336]

b. The Policy Requirement Does Not Suppress Any Viewpoint

Applying his test, Judge Straub finds that the Policy Requirement is neither aimed at the dangerous suppression of ideas or in a government-created public forum designed to facilitate private speech. Similar to the D.C. Circuit, Judge Straub recognized that the Policy Requirement was not intended to suppress the expression of NGOs desiring to remain silent or to oppose the government's message against prostitution and sex trafficking.[337] In fact, in neither case did the plaintiff argue that Congress intended to do so.[338] Judge Straub even points out that the effect of the law would not be to suppress pro-prostitution views because public discourse would hardly be altered by obligating a specific range of NGOs to espouse the antiprostitution position.[339] The Policy Requirement even supported the reasonable goal of reducing a cause of the spread of HIV.[340]

Distinguishing *Rosenberger*, Judge Straub found that the Policy Requirement had not meant to encourage private speech by NGOs.[341] Consequently, the government was allowed to take certain measures to ensure that its message was not weakened or diluted.[342] Public forum

333. *Id.*

334. *See id.* at 259.

335. *Id.* at 258 ("The only consequence if Plaintiffs do not subscribe to the Leadership Act's Policy Requirement is that they will not receive Leadership Act funds.").

336. *Id.*

337. *Id.* at 261 (finding that the purpose of the Policy Requirement was not to suppress pro-prostitution views or even neutrality).

338. *Id.*

339. *Id.* (finding that Congress could not have intended to suppress public support for prostitution with a conditional funding requirement to a narrow range of groups that wished to combat HIV/AIDS).

340. *Id.* at 261–62 ("[T]he purpose and effects of the Policy Requirement are a far cry from those cases where the government condition was clearly aimed at the suppression or compulsion of speech qua speech.").

341. *Id.* at 262 (finding that the purpose of the Leadership Act was not to fund a variety of NGOs interested in espousing their viewpoint on prostitution and sex-trafficking but sought "to advance an anti-prostitution, anti–sex trafficking approach to combating HIV/AIDS" (citing 22 U.S.C. §§ 7601(23), 7611(a)(12) (2006))).

342. *Id.* at 263 (distinguishing the *Velazquez* cases because the government's message and strategy of combating the HIV/AIDS epidemic would be weakened and diluted if its partners were allowed to speak in ways contrary to that message).

principles were consequently inapplicable to the Policy Requirement because "Congress did not authorize Leadership Act funds 'in order to create a public forum for [Plaintiffs] to express themselves.'"[343]

Foreign policy issues also weighed in favor of allowing the government to make sure its message is not garbled. Judge Straub suggested that because these polices are controversial and far-reaching, courts should defer to Congress.[344]

Finally, Judge Straub categorically rejected the majority's interpretation that the purpose of the Leadership Act must be examined at the broadest level of generality to see whether the viewpoint discrimination is a primary or secondary component to the substantive goals of the program.[345] The viewpoint discrimination need not be a "central" component in order for it to be permissible. Neither *Rust* nor *Rosenberger* nor *Velazquez* considered the priority or weight of the potential purposes of the programs and Judge Straub argued that the majority should not have considered them either.[346]

Like the *DKT* court, Straub found that the government interest in eradicating HIV/AIDS was as important as its interest in ending prostitution and sex trafficking.[347] Judge Straub reasoned that the Policy Requirement was substantially related to eradicating AIDS/HIV, prostitution, and sex-trafficking because the policy is "precisely aimed at Congress's goal."[348] Congress only authorized federal funds for organizations that shared its desire to affirmatively reduce HIV/AIDS behavioral risks, including its policy of eradicating prostitution.[349] As a result, the Agencies require recipients to affirm that they are in fact opposed to prostitution.[350]

The Policy Requirement addresses the interest by trying to regulate the policies and practices of those using government funds; the Policy Requirement is not "so attenuated . . . as to invalidate the condition."[351] As agents for the government, the recipients are therefore required to adhere to its policy.[352] "[T]he Policy Requirement is obviously related to the

343. *Id.* (alteration in original) (citing United States v. Am. Library Ass'n, 539 U.S. 194, 206 (2003)).

344. *Id.* at 265 ("[T]he decision whether to withhold Leadership Act funds from these organizations or instead to provide an exemption from the Policy Requirement is precisely the kind of policy judgment that Congress, not the courts, is entitled to make.").

345. *Id.* at 265; *see also id.* at 238 (majority opinion) (finding that the main purpose was based on eradicating HIV/AIDS, not prostitution and sex trafficking).

346. *Id.* at 266 (Straub, J., dissenting) (finding centrality of the viewpoint-discrimination to the purpose not determinative).

347. *Id.* at 257.

348. *Id* at 265 ("[T]he Policy Requirement is obviously related to substantive policy goals of the Leadership Act—goals beyond, and different from, simply subsidizing private speech for its own sake.").

349. *Id.*

350. *Id.*

351. *Id.* at 264.

352. *Id.*

substantive policy goals of the Leadership Act—goals beyond, and different from, simply subsidizing private speech for its own sake."[353]

These government interests were still legitimate despite the exemptions provided to certain organizations.[354] Because organizations can be exempted for a variety of legitimate reasons,[355] the decision to exempt these organizations is even stronger because it involved foreign affairs.[356]

III. HE WHO PAYS THE PIPER CANNOT ALWAYS CALL THE TUNE: THE LEADERSHIP ACT'S POLICY REQUIREMENT SHOULD BE FOUND TO PLACE AN UNCONSTITUTIONAL CONDITION ON RECIPIENT NGOS' FREE SPEECH

Part III examines the conflict described in Part II and suggests that the analysis should depend on whether the condition impermissibly coerces the recipient or attempts to suppress a recipient's unpopular idea. In doing so, it asserts that Judge Straub of the Second Circuit pinpointed the appropriate framework for analyzing conditional government subsidies but failed to apply the test correctly. He provided two ways that a conditional subsidy is unconstitutional: (1) the condition operates as a "coercive penalty on the exercise of First Amendment rights" or (2) the condition operates to suppress a certain viewpoint.[357] This framework provides a clear, easy line of analysis that would aid future courts in determining unconstitutional conditions and should be adopted.

While this Note agrees with Judge Straub that the Policy Requirement neither compels speech nor aims to suppress any recipients unpopular idea, this Note contends that the Policy Requirement does not sufficiently limit its scope to restrict only the recipient's government-funded speech; instead the Policy Requirement restricts both government-funded and privately-funded speech. As a result, the Policy Requirement acts as a coercive penalty and ultimately fails heightened scrutiny.

A. Compelled Speech Is Not Relevant to the Unconstitutional Conditions Analysis

While the Supreme Court has found that compelled speech is impermissible under the First Amendment,[358] speech is not compelled when it is a condition for receiving a government subsidy.[359] While perhaps *Wooley*, *Speiser*, and *Barnette* aid the analysis by providing guidance in an

353. *Id.* at 265 (citing 22 U.S.C. §§ 7601(23), 7611(a)(12), (a)(12)(J) (2006 & Supp. V 2011)).

354. *Id.* at 265–66.

355. *Id.* at 266 (describing "diplomatic considerations" as the main legitimate reason for exempting an organization). Congress's desire to eradicate prostitution may also have been an incentive to exempt the International AIDS Vaccine Initiative. *Id.* at 265.

356. *Id.* at 266.

357. *See supra* note 324 and accompanying text.

358. *See supra* notes 46, 271 and accompanying text.

359. *See supra* notes 43–48 and accompanying text.

area never dealt with before,[360] it certainly seems strange to consider any conditional relationship as truly compelled. Because the recipients are never obligated to accept the conditions attached to federal funding, they are free to choose alternate methods of funding besides Leadership Act funds. Silence or neutrality can be, in fact, a viable option when speech is conditional.[361]

B. The Policy Requirement Acts As a Coercive Penalty

At its core, the unconstitutional conditions doctrine defines the limits of what society, and the law, deems coercive. Determining what is an act compelled by force, however, is difficult to determine because many pressures exist that influence one's decision. Determining what analytical baseline should be used to determine the limits of coercion can be complicated as well.[362] This is especially true when considering not extreme cases, but moderate ones, such as conditional subsidies where the government encourages speech in indirect ways.

The Court has found that an offer is not a threat if the recipient retains the option to deny the funds altogether.[363] While conditions may contain underlying unconstitutional purposes or effects, conditional funds can never be compelled in the same way that direct regulation can.[364] Stopping the analysis there, however, likely would only continue to frustrate the courts' ability to provide a coherent framework of analysis.

Speiser and its progeny elaborate two ways in which the denial of a government benefit can have the same effect as the direct regulation of speech.[365] As Judge Straub found, funding conditions are unconstitutional if they operate as a coercive penalty on the exercise of First Amendment rights when they either (1) restrict a recipient's First Amendment speech outside the scope of the recipient's participation in a government program or (2) deny benefits to which the recipient would otherwise be entitled and that are independent from those provided by the government program at issue.[366]

First, the Policy Requirement has prevented any recipient NGO from expressing its silence or neutrality outside the scope of the government program. While the Policy Requirement admittedly does not involve a monopolistic use of power by the state in the same way that *Wooley* and *Barnette* did,[367] any recipient NGO is severely limited with what it can do with any nonfederal private funds outside the scope of the program, to

360. *See supra* note 273 and accompanying text.
361. *But see supra* note 272 and accompanying text.
362. *See supra* note 22 and accompanying text.
363. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 196 (1991) (holding that the condition still allowed the recipients to accept or deny them and were therefore not deemed a penalty); *see also* Part I.A.2.
364. *See supra* notes 22, 41, 109, 271–72 and accompanying text.
365. *See supra* notes 278–80 and accompanying text.
366. *See supra* notes 298–303 and accompanying text.
367. *See supra* note 311 and accompanying text.

either remain neutral or speak a pro-prostitution message.[368] The Leadership Act funds are not tied to any particular project as was the case in *Rust* or *Regan*, where each speaker could speak through alternate subsidiary programs that are separate and independent from the project that receives funding.[369] Instead the Policy Requirement ties the funding to the *grantee*, making a separation based on speech impossible because any grantee would be unable to express a privately neutral or pro-prostitution message once it has already spoken by adopting the Policy Requirement. Ultimately, the Policy Requirement does leave each recipient in the same position as those in *Wooley* and *Barnette*: without any reasonable alternative. Instead the government could simply limit the Policy Requirement to the projects that the government specifically funds, not to the grantee itself.

The Policy Requirement would also fail the second prong because the condition denies recipient NGOs the ability to fund other pro-prostitution or prostitution-neutral projects with nonfederal funds.[370] The affiliate organization structure does not solve that problem.[371] As the majority opinion in *Alliance for Open Society* indicates, affiliate structures are inadequate to provide a sufficient outlet for any recipient to engage in privately funded *silence*.[372] The Policy Requirement's affirmative speech mandate becomes a penalty because it applies to the grantee rather than any specific project that the grantee executes and provides an inadequate means for separating that message independently through an affiliate dual-structure.[373]

The government's failure to leave adequate alternative channels for expression is especially notable when one considers the germaneness of the Policy Requirement to the funding received. The Leadership Act authorizes funding not for the purpose of eradicating prostitution or even espousing an antiprostitution message; it authorizes funds for HIV/AIDS-, tuberculosis-, and malaria-targeted work. While admittedly the targeted work can involve prostitutes, the government has forced NGOs to respond to an issue that these NGOs may never have intended to broach. The Policy Requirement forces NGOs with no desire to work with prostitutes or sex-trafficking to express a message where they would have otherwise remained neutral. The government can ensure that its monies are tied to the message it wants to espouse, but must require a sufficient nexus between the message and the monies used.

Judge Straub argues that the previous cases turned only on whether the government limited the scope of its funding to the purpose for which those funds were authorized; none of those cases hinged on the affirmative versus

368. *See supra* notes 272–74 and accompanying text.
369. *See* Rust v. Sullivan, 500 U.S. 173, 196 (1991); *see supra* notes 104, 251–56 and accompanying text.
370. *See supra* notes 298–300 and accompanying text.
371. *See supra* notes 299–300 and accompanying text.
372. *See supra* notes 299–302 and accompanying text.
373. *See supra* notes 299–302 and accompanying text.

negative speech distinction.[374] However, this criticism does not adequately address the major difference between the Policy Requirement and previous conditions. In *Rust* and *Regan*, negative speech requirements were central aspects of the condition, and an affiliate organization would allow them to speak differently on different projects. Here no such outlet is possible because silence remains impossible once the speaker has spoken. Like the Pied Piper who cannot unsing his tune, neither can the NGO disavow the Policy Requirement once it has been declared. The condition obliging the recipients to speak taints any speech made by any other affiliate organization.

C. The Policy Requirement Does Not Suppress Any Viewpoint

Funding conditions that discriminate on the basis of viewpoint are only subject to heightened scrutiny when they are (1) "aimed at the suppression of dangerous ideas"[375] or (2) when they are imposed in the context of a program designed to encourage a diversity of views or facilitate private speech.[376] The Policy Requirement does not aim to suppress pro-prostitution or prostitution-neutral views from the marketplace of ideas.[377] As Judge Straub acknowledges, Congress could hardly have thought to suppress pro-prostitution views by limiting speech for NGOs seeking funding for HIV/AIDS work.[378] If that were the case, the restriction would hardly prevent the disfavored speech from being sung.

Nevertheless, the Court has not concluded that the condition need apply to the general population at large. In *Speiser v. Randall*, for example, the loyalty oath was not taken by anyone other than veterans eligible for a property exemption.[379] This condition did not necessarily suppress all speech for those that wanted to advocate for the violent overthrow of the government, but the condition was nevertheless found invalid because it was found to significantly suppress an idea that was considered dangerous—the violent overthrow of the government.[380]

While the Policy Requirement has not significantly suppressed the speech of the general public because the public continues to be able to discuss the issue freely and openly, the groups that are subject to the condition are limited in what they can say. As illustrated by the government's findings which explicitly oppose pro-prostitution viewpoints,[381] the Policy Requirement arguably attempts to suppress the "dangerous" idea of legalizing prostitution or even remaining neutral on the

374. *See Alliance IV*, 651 F.3d 218, 257 (2d Cir. 2011) (Straub, J., dissenting), *reh'g en banc denied*, 678 F.3d 127 (2d Cir. 2012); *Rust*, 500 U.S. at 196, *petition for cert. filed*, No. 12-10 (U.S. July 2, 2012).

375. *See supra* notes 56, 114, 145 and accompanying text.

376. *See supra* notes 134–37, 148, 327 and accompanying text.

377. *See supra* notes 339–40 and accompanying text.

378. *See supra* note 339 and accompanying text.

379. *See supra* note 76 and accompanying text.

380. *See supra* notes 74–76 and accompanying text.

381. *See supra* notes 181–82 and accompanying text.

issue. A narrow conception of the targeted group proves determinative when considering whether a condition aims to suppress an idea. When considered as the group of NGOs, the argument that the Policy Requirement aims to suppress certain viewpoints becomes stronger; but when considered from the standpoint of the public at large, and understanding the limited nature of the speech, the Policy Requirement does not aim to suppress a dangerous idea. The Policy Requirement aims only to reduce a known cause of the HIV/AIDS epidemic: prostitution and sex trafficking. [382]

If the government could create a forum to encourage the diversity of ideas,[383] then the Policy Requirement similarly is not unconstitutional because the government need not maintain its neutrality mandate.[384] In those situations where the government designed a program to use private speakers to transmit its own government message, viewpoint discrimination is not improper.[385]

The Policy Requirement does not encourage a diversity of views from private speakers. The purpose of the Leadership Act, as defined by Congress, was very narrow: to fund NGOs interested in fighting HIV/AIDS through an antiprostitution, anti–sex trafficking approach.[386] The government did not seek to establish a fund to encourage a diversity of viewpoints about prostitution or sex trafficking.

As with all policy decisions, Congress made a viewpoint-based decision that allocated public resources for fighting HIV/AIDS. The Leadership Act's funded programs are distinguishable from *Rosenberger* and *Finley*,[387] where the programs were designed to encourage a diversity of ideas, as well as *Velazquez*, where the program was designed to facilitate private speech.[388] Here the purpose of the Leadership Act is to combat HIV/AIDS in a particular manner. It makes no difference that the eradication of sex trafficking and prostitution is supplementary to the main goal of the Leadership Act. However counterproductive or ineffectual the policy decision may be towards achieving the end result of reducing the HIV/AIDS epidemic,[389] Congress made a policy choice to espouse an antiprostitution, anti–sex trafficking message and is entitled to make sure that its message is neither "garbled nor distorted."[390]

This is not, however, an example of the government retroactively recasting the Leadership Act's purpose as one of conveying a message against prostitution simply because that would conveniently allow the government to compel recipients to affirmatively espouse its point of

382. *See supra* notes 181–84 and accompanying text.
383. *See supra* notes 134–37, 148, 327 and accompanying text.
384. *See supra* notes 128, 330 and accompanying text.
385. *See supra* note 133 and accompanying text.
386. *See supra* notes 178–88 and accompanying text.
387. *See supra* notes 130–37 and accompanying text.
388. *See supra* notes 138–45 and accompanying text.
389. *See supra* notes 132–37 and accompanying text.
390. *See supra* notes 254–345 and accompanying text.

view.[391] Instead the Policy Requirement closely relates to the policy goals of the Leadership Act, beyond subsidizing the private speech for its own sake.[392] The prostitution and sex trafficking concerns are not simply redefined after the fact, but were originally included in the findings and purpose of the statute itself.[393]

The exceptions given to certain organizations do not seem particularly troubling either.[394] Congress is allowed to exempt organizations that would neither garble nor distort the strong antiprostitution message that the U.S. government sought to advance, even though that may be the practical effect of those exemptions. A host of political factors could lead to these conclusions, including the diplomatic relations between countries and institutions upon which the U.S government relies.[395] The U.S. diplomatic relationship with the United Nations could easily explain why the Act exempts all U.N. agencies, for example.

The judiciary should show deference when it comes to issues of foreign affairs.[396] The executive and Congress have historically been afforded a great deal of deference and duly so.[397] Because foreign affairs "uniquely demand [a] single-voiced statement of the Government's views,"[398] the Leadership Act should only be considered a policy choice, which advocates a certain strategy at the expense of another but does not intend to suppress a dangerous idea on the marketplace or suppress the viewpoints of certain speakers once in a government-created public forum.[399]

CONCLUSION

Courts should adopt the framework of analysis espoused by Judge Straub to assess the constitutionality of government subsidies affecting free speech. This Note supports the framework he proposed, which asks whether a conditional subsidy suppresses a certain viewpoint or acts as a coercive penalty on speech. A condition acts as a penalty by either restricting speech outside of the scope of the government program or denying a benefit to which the recipient would otherwise be entitled. Alternatively, when the condition aims not to define the limits of federal spending, but to suppress certain viewpoints, the condition is unconstitutional.

The application of this analysis to the Leadership Act supports concluding that the Policy Requirement unconstitutionally infringes on a recipient's freedom of speech, preventing recipient NGOs from playing

391. *See supra* notes 286–88 and accompanying text.
392. *See supra* notes 181–84 and accompanying text.
393. *See supra* notes 181–84 and accompanying text.
394. *See supra* notes 253–355 and accompanying text.
395. *See supra* notes 253–355 and accompanying text.
396. *See supra* notes 249, 356 and accompanying text.
397. *See supra* notes 153–54 and accompanying text.
398. Baker v. Carr, 369 U.S. 186, 211 (1962); *see supra* note 123 and accompanying text.
399. *See supra* notes 230–340 and accompanying text.

their own pro-prostitution or prostitution-neutral tunes. Because the government has an important interest in maintaining a unified message on foreign affairs and has determined that prostitution causes the spread of HIV/AIDS, the Policy Requirement cannot be considered compelled speech or viewpoint suppression. However, the Policy Requirement prevents a recipient from engaging in privately funded silence or neutrality, chills best practices for combating the HIV/AIDS epidemic, and could be achieved through a less restrictive alternative. Consequently, because an HIV/AIDS NGO should be free to play its own tune with nonfederal funds, the Policy Requirement should be deemed an unconstitutional condition.