

BUSINESS INSIDER

Should Federal Funding Come With Political Stipulations?

By: Ilya Shapiro – April 23, 2013

On Monday, the Supreme Court heard arguments in *Agency for International Development v. Alliance for Open Society International*, a case that will determine just how much the federal government can demand of organizations that receive federal funding.

Can it require them to advocate a political position unrelated to the funds they receive?

Here's the issue: Under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act, the government requires groups receiving federal funds for overseas HIV/AIDS programs adopt policies explicitly opposing prostitution. It even goes so far as to require grantees to espouse an anti-prostitution policy when they spend *private* funds.

Several nonprofit groups that receive such funds claim that this "policy requirement" violates their First Amendment rights, and the Cato Institute agrees. We filed an amicus brief supporting the nonprofit groups and arguing that the policy requirement significantly burdens political speech, the constitutional protection of which lies at the very heart of the First Amendment.

These groups don't seek to advocate prostitution, its legalization, or anything else: they'd rather not speak of it at all. The fact is that efforts to fight AIDS often involve working with marginalized groups, so adopting a statement that explicitly renounces prostitution could frustrate efforts to disseminate public health information.

The lower courts agreed with the nonprofit groups and ruled that the government may not condition the receipt of public funds on giving up First Amendment rights. Indeed, were the government's position accepted, it would eviscerate the "unconstitutional conditions" doctrine, which courts have used to prevent the conditioning of generally available federal benefits on the waiver of fundamental rights.

Now before the Supreme Court, the government has invoked the Spending Clause, which gives Congress broad powers to "provide for the common Defence and general Welfare," to expand the scope of permissible conditions it can impose. But the key case it relies on, *South Dakota v. Dole* (1987) – which okayed a conditioning of five percent of federal highway funds on states' raising their drinking age – didn't involve the First Amendment or any other individual right.

Dole wasn't a case about the government's power to force citizens to choose between constitutional rights. It instead considered the extent to which the strings attached to

federal funds coerce the states to do the federal government's bidding—and set a limit on those strings. The Supreme Court in last year's Obamacare ruling further restricted the conditions that the government could attach to money it offers the states.

Of course, there's no dispute that Congress can impose restrictions to ensure that federal funds are used only for the programs it creates. There's likewise no dispute that when Congress funds private parties to deliver a public message, it can control that message. But the Supreme Court has repeatedly held that Congress can't impose conditions on funding that prevent a person from exercising First Amendment rights outside of, or only tangentially related to, the funded program.

That's why the unprecedented "policy requirement" now before the Court lost in the lower courts: It compels organizations to speak in a way that goes far beyond the purpose of the HIV/AIDS program, even though the groups are already barred from using federal funds to promote prostitution. The requirement easily exceeds the acceptable scope of speech-burdening conditions that Congress may place on funding recipients.

The Supreme Court has never given Congress *carte blanche* to give federal contractors Sophie's Choices, whether relating to the freedom of speech or otherwise. If the government is allowed to do so here, the door will be open for it to tie eligibility for federal benefits to citizens' giving up their right to protest, pray, bear arms, travel, or any number of constitutional rights.

When it rules on this case later this spring, the Court should continue to adhere to the principle that Congress's power to condition funding is limited to ensuring that its funds are used to properly implement the program it wants to fund, not to compel private organizations to adopt express "policies" that don't relate to the use of those funds.