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My Way and/or the Highway: Exploring the "Adequacy" of the Alternative Channels Test in Conditional Speech Cases

Justice D. Warren*

Drivers of the modern era can choose from a vast array of vehicles, enjoying the ability to find the right color, body, and features that best suit their personality. If that "perfect car" is not out there, there is enough variety in the makes and models on the road today that one can readily find a reasonable alternative to "perfect." While we may take this for granted today, long ago there were no such choices—there was... the Ford Model T. And as Henry Ford once famously stated: "Any customer can have a car painted any colour he wants so long as it is black." This situation is often described as a Hobson's choice, where one chooses between one thing in its offered condition or nothing at all—the proverbial "take it or leave it." The Hobson's choice Ford presented customers helped make the Ford Motor Company a powerhouse in the automotive industry. However, when the government presents citizens or groups with a Hobson's choice, the "take it or leave it" demand may be more problematic.

The government's ability to present individuals with a Hobson's choice is constrained by the unconstitutional conditions

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2. HENRY FORD & SAMUEL CROWTHER, MY LIFE AND WORK 72 (1922).
This doctrine prevents the government from offering a benefit to an individual on the condition that she relinquish a constitutional right in order to receive it. The Supreme Court has found such conditions to be unconstitutional. The Supreme Court, however, has not always viewed conditions on government benefits as a Hobson's choice; in the context of restrictions on speech, the condition may be constitutional if it leaves open adequate alternative channels for expression. With this perspective, having the black Model T or no Model T may not be the Hobson's choice it first seemed—one could alternatively buy the black Model T and subsequently take it to a body shop to get a candy red paint job. While the adequacy of the alternative to paint a car need not be grappled with here, the Court's determination of what alternative channels for expression are "adequate" in any particular instance has proven challenging to say the least, and has left lower courts with little guidance as to how the adequate alternative channels test is to be applied to conditional speech restrictions.

The unconstitutional conditions doctrine often comes into play when the government provides funding for nonprofit organizations. The government will occasionally condition funding to an organization by requiring that organization to remain silent or to espouse a certain viewpoint. The government often does this because it has an interest in seeing its funds spent in a way that furthers its objectives. Such is the case regarding a funding provision of The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act ("Leadership Act"), the constitutionality of which is currently before the Court as a result.

4. See infra notes 110-18 and accompanying text.
5. See id.
6. See infra Part II.B.
7. See infra notes 120-25, 133-35 and accompanying text.
8. See infra Part II.
9. See infra notes 52-54 and accompanying text.
10. See infra note 40 and accompanying text.
12. See DKT Int'l, Inc. v. U.S. Agency for Int'l Dev. (DKT II), 477 F.3d 758, 764 (D.C. Cir. 2007) (rejecting an unconstitutional conditions claim on the basis that the government chose to fund a particular message and that the plaintiffs were not compelled to adopt that message), with Alliance for Open
Enacted to combat a global epidemic of communicable diseases, the Leadership Act contains a provision ("the Policy Requirement") stipulating that no funds are to be provided to any organization without a "policy explicitly opposing prostitution and sex trafficking." In *DKT International, Inc. v. U.S. Agency for International Development* (DKT II), the D.C. Circuit Court of Appeals upheld the Policy Requirement as constitutional, ruling that it did not violate the nonprofit organization's First Amendment rights. The same Policy Requirement was struck down by the Court of Appeals for the Second Circuit in *Alliance for Open Society International v. U.S. Agency of International Development* (AOSI IV) as an unconstitutional infringement on the organization's First Amendment right to free speech. The Supreme Court has granted the government's petition for writ of certiorari in the AOSI case, and how the Court decides the case will undoubtedly have major implications for government financiers and nonprofit organizations.

In light of the Supreme Court's pending decision in the AOSI case, this Note argues that the Court should use the opportunity to add clarity to the unconstitutional conditions doctrine, and, in particular, the adequate alternative channels test. Part I provides a background on nonprofit associations in the United States and their relationship with government. This Part also examines the history and purpose of the Leadership Act. It concludes by making a policy argument for strengthening the speech protection for nonprofit organizations. Part II explores the Supreme Court's legal framework for determining if a funding condition is unconstitutional. It examines how the Court has

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Soc'y Int'l v. U.S. Agency of Int'l Dev. (AOSI IV), 651 F.3d 218, 223 (2d Cir. 2011) (holding that the unconstitutional conditions doctrine applied where the government affirmatively compelled plaintiffs' speech).

14. 477 F.3d 758 (D.C. Cir. 2007).
15. Id. at 764.
16. 651 F.3d 218 (2d Cir. 2011).
17. Id. at 223-24.
applied the adequate alternative channels test to conditional speech restrictions, while noting that the Court has never explicitly defined the test for such cases. Part III explores the various ways in which federal courts have applied the Supreme Court's unconstitutional conditions precedent to the Policy Requirement of the Leadership Act. Part IV argues the need for the Supreme Court to explicitly lay out the framework of the adequate alternative channels test for conditional speech restrictions by placing the burden on the government to prove that alternative channels of communication are adequate for the plaintiff organizations in each particular case. This Part contends that the Supreme Court should adopt the AOSI IV court's way of employing the adequate alternative channels test to find the Policy Requirement unconstitutional.

I. THE SOCIAL LANDSCAPE OF NONPROFIT ORGANIZATIONS AND THE LEADERSHIP ACT

A. Nonprofits — Past, Present, and Government Partnerships

At the time of our nation's founding, philanthropic organizations already served a crucial role in strengthening American society and fostering a unique American identity. The late professor Robert H. Bremner attributes the Native Americans who greeted Christopher Columbus at his first landfall in the New World as America's earliest philanthropists. Columbus reported that these people freely gave away anything asked of them and gave each gift "with as much love as if their hearts went with it." The Native Americans also served an indispensable role in assisting the settlers in adjusting to the rigors of a new life in a foreign land. Many of the early settlers also came to the Americas with


21. Id.

22. Id.
philanthropic visions. The various churches established in the colonies supported a variety of charitable institutions in recognition of "the individual's responsibility for . . . the welfare of the community."

Since those philanthropic visions took root in America, the role of charitable organizations has only increased in prevalence and importance. Today, the United States nonprofit sector (sometimes referred to as the "voluntary sector" or the "third sector") is made up of over 1.6 million organizations. Nonprofits offer an avenue of desired change for minority groups whose interests are not represented by the majoritarian government or in the market. In this way, nonprofits act as laboratories for developing social strategies sometimes not yet identified by the mainstream public. Nonprofits therefore serve indispensable roles in the functioning of healthy communities and promoting the interests and welfare of many citizens.

These general qualities of nonprofit organizations are no less true for Acquired Immune Deficiency Syndrome (AIDS) relief

23. See id. at 6–7 ("It is not too much to say that many Europeans regarded the American continent mainly as a vastly expanded field for the exercise of benevolence.").
24. MILLER, supra note 19, at x.
26. See LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER 13 (2d ed. 1999) (arguing that greater heterogeneity in a population is likely to mean a larger nonprofit sector).
27. See JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 122 (John Gray ed. 1912) (1859) ("Government operations tend to be everywhere alike. With individuals and voluntary associations, on the contrary, there are varied experiments, and endless diversity of experience.").
28. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 599 (Penguin Classics ed. 2003) (1835) ("In the United States, as soon as several inhabitants have taken an opinion or an idea they wish to promote in society, they seek each other out and unite together once they have made contact. From that moment, they are no longer isolated but have become a power seen from afar whose activities serve as an example and whose words are heeded.").
organizations, though their beginnings can be traced to a much more recent past. The name for this disease was coined in 1982, after hundreds of thousands of people worldwide had been infected by the human immunodeficiency virus (HIV). By the early 1980s, a number of AIDS relief organizations sprung up in the United States, including the San Francisco AIDS Foundation, AIDS Project Los Angeles, and Gay Men’s Health Crisis. These organizations formed because of the gay and lesbian community’s outrage at the government’s lack of response to the epidemic. The nonprofits were primarily designed to educate people about the disease and to advocate for improved medical research and treatment. In 1986, the U.S. Surgeon General published its Report on AIDS, marking the government’s first major statement on what the nation should do to prevent the spread of AIDS.

As was the case with AIDS relief groups in the 1980s, nonprofit organizations often respond to pressing issues that have not yet been addressed by the government. Even if the government has responded, it will often enlist nonprofits to deliver additional services that it finances for efficiency reasons. The government has increasingly turned to nonprofit organizations to provide for delivery of most publicly financed services, and in so doing it has become the most important source of income for most charitable nonprofit organizations. Today, government funds

30. Id.
32. See id.
33. See History of AIDS up to 1986, supra note 29.
34. See SALAMON, supra note 26, at 11–13.
35. See id. at 13 (stating that there is “often a preference for some nongovernmental mechanism to deliver services and respond to public needs because of the cumbersomeness, unresponsiveness, and bureaucratization that often accompanies governmental action”).
account for nearly a third of nonprofit organizations' revenue, twice as much as all sources of private funding combined. Thus, as dependent as the government is on the nonprofit sector for assistance with public service, the nonprofit sector is equally dependent on government to make public service works possible.

The government-nonprofit relationship is not without conflict, as evidenced by the lawsuits brought by AIDS relief organizations challenging the constitutionality of the Leadership Act. The government, in providing financial resources, has an interest in ensuring that its funding is used in a way that is consistent with the government's objectives. Conversely, nonprofits, by accepting funding from the government, run the risk of losing their independence or distorting their missions by following the money. When a nonprofit's interests conflict with a

organizations depend on government support for over half of their revenues: for many, government support comprises their entire budget. In contrast to the traditional image of government and nonprofits as two independent sectors, the new relationship amounts to one of mutual dependence.


40. See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.").

government financier, it may face an identity crisis: align with the objectives of the government entity and start down the path of altering the mission of the nonprofit, or stay true to its mission and jeopardize the receipt of government funds and consequently the success of the programs for which government funding is needed.  

Regardless of how a nonprofit elects to resolve this dilemma, it is forced to weigh the choice of compromising its ultimate goals.

B. The Policy Basis for Respecting Nonprofit Organizations’ Speech Autonomy

Nonprofit organizations serve an important function in our democracy as a vehicle for individuals to come together and participate in civil society and affect government policy. The heterogeneity of U.S. society makes the nonprofit sector all the more vital, as the sector provides diverse decision-making method regarding what public benefits to provide. While Congress, as an elected body, is accountable to, and representative of, the majority, nonprofits are not bound by the same restraints, and can exercise more innovation and experimentation to produce secondary benefits falling outside the scope of those demanded by the majority.

In addition to providing a diverse range of public benefits, nonprofit organizations also bring diverse viewpoints. The majority’s view of what constitutes the public good rightfully should

42. See Minkoff & Powell, supra note 31, at 594 (“[T]he need for external legitimacy and survival tends to provide incentives for groups to compromise the missions that may have originally motivated them. . . . [N]onprofits face a choice between taking a more cautious or conservative interpretation of their mission versus pursuing a more flexible or innovative orientation.”).

43. See generally TOCQUEVILLE, supra note 28 (arguing that American democracy rests on the strength and influence of voluntary associations).


45. See Minkoff & Powell, supra note 31, at 591 (“Government provision of goods and services is typically targeted to the mainstream, to a stylized median voter.”).

46. See Simon et al., supra note 44, at 274.
be given strong consideration when policy decisions are made. Yet views of what constitutes the public good are often subjective, and the majority's view inevitably shifts over time. For these reasons, it is important that the views of the minority are not disregarded.

One view of the public good holds that the public interest is not any particular viewpoint, but rather a set of procedures for ensuring a competitive process for all relevant interests to be represented. This view supports a stronger democracy by allowing for more civic engagement through nonprofit advocacy, ensuring a broader representation of interests.

Minority groups tend to show a strong allegiance to nonprofit organizations whose missions are tailored to address the concerns of those groups. In order for nonprofits to enjoy the continued allegiance of those groups, it is critical for them to show a continued commitment to their missions.

Complicating a nonprofit's ability to adhere to its mission is the fact that the organizational structure of nonprofit organizations constrains the way in which these groups can generate funds. In addition to receiving tax-exempt status from the government, nonprofits are also heavily dependent on funding from government sources. Because of their dependence on government support, nonprofit organizations are vulnerable to political efforts to

47. See J. Craig Jenkins, Nonprofit Organizations and Political Advocacy, in THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK 307, 308 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) (“Interests are diverse and inherently subjective. One person's 'public good' may be another's 'public bad.' Those who claim to speak in the name of the general public can claim no privileged insight.”).
48. See id.
49. See id.
50. See Minkoff & Powell, supra note 31, at 591.
51. See id.
52. There are many legal barriers to how nonprofit organizations can raise and spend money, including limits on charitable solicitation, unrelated business activity, and substantial lobbying, to name a few. See generally Evelyn Brody, The Legal Framework for Nonprofit Organizations, in THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK 243 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) (explaining the structure of and legal restrictions on non-profit organizations).
53. See supra notes 36–38 and accompanying text.
leverage this support to limit the groups' advocacy efforts—or in the case of the Policy Requirement, to encourage advocacy of government views.54

Such is the dilemma AIDS relief organizations like DKT International ("DKT") and Alliance for Open Society Internation ("AOSI") face. Amicus curiae, in a memorandum in support of ASOI in AOSI I, explained the problems with accepting funding under the Leadership Act:

Compelling NGOs to adopt a policy statement opposing prostitution impedes their ability to reach out to sex workers, to teach them skills that would make it possible for them to leave prostitution, to promote safer sex practices among sex workers and their clients, to provide medical treatment and care for HIV-positive sex workers and their families, and to engage in further research into effective practices for preventing the spread of HIV.55

In 2000, the Joint United Nations Programme on HIV/AIDS (UNAIDS) conducted a case study on HIV prevention projects for female sex workers, which stated that "most mainstream societies have relegated [sex workers] to the margins, abused them, exploited them[,] and restricted their rights as citizens."56 However, sex workers have found an ally in AIDS relief organizations, who


have established trust with the sex worker population in order to effectively help them, and, in turn, benefit populations at risk of contracting HIV/AIDS. \(^57\) In view of the importance that trust plays in this relationship, "[i]t is folly to suggest that successful programs could possibly maintain their relationship with sex workers if they advocated for their continued criminalization, arrest and prosecution." \(^58\)

The counterargument to these policy arguments suggests that there are some groups for which the government clearly should not provide benefits, as these groups may promote hostility or antidemocratic values. \(^59\) Groups such as the Ku Klux Klan, neo-Nazis, and other similar groups come are examples in support of this point. This counterargument suggests that the government should be able to condition benefits based on the organization's speech so that such disfavored viewpoints do not spread because of government subsidies.

However, the answer to this issue of disfavored viewpoints need not, and should not, come in the form of the government conditioning funds on an organization's refrain from, or engagement in, protected speech. Instead, the solution can be found in the Supreme Court case of \textit{Bob Jones University v. United States}. \(^60\) In \textit{Bob Jones}, two nonprofit private schools that enforced

\textit{Leadership Act Markup} ("I believe that the United States should do everything within its power to combat and eliminate human trafficking and prostitution. By doing so, we will most certainly, as a direct consequence, mitigate the spread of HIV/AIDS.") (statement of Representative Christopher Smith, Vice Chairman, House Committee On International Relations).

\textit{Clemens}, \textit{supra} note 54, at 211–12 ("To what extent can a democracy tolerate—much less encourage—associations that cultivate divisiveness and intolerance among citizens? This is a central debate among theorists of liberalism . . . and one that signals the dangers of assuming that all associational participation nurtures civic skills and values.").

racially discriminatory admissions standards challenged the denial of their tax-exempt status. The schools argued that institutions would be entitled to § 501(c)(3) tax-exempt status if they qualified under one of the categories specified in the statute, which included institutions formed for "educational" purposes.

In upholding the denial of tax-exempt status, the Court determined that Congress had meant to incorporate the common law concept of "charity" into § 501(c)(3). While noting the danger associated with the IRS and the courts using their judgment to determine whether a nonprofit's activities are considered "charitable," the Bob Jones Court ruled that the schools' discriminatory policies were adverse to the public good and therefore fundamentally opposed to the meaning of "charity."

In a concurring opinion, Justice Lewis Powell expressed a reticence to subscribe to the Court's interpretation of the statute, stating that this view "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints." While Justice Powell's fears were certainly warranted, the years following the Bob Jones decision have shown that the IRS will limit the denial of tax exempt status only to violations of clearly established policy. The aftermath of the Bob Jones decision reveals that the government does have a way in which it can choose not to support an organization by revoking its nonprofit status. However, the Bob Jones opinion suggests that policy considerations warrant the government's revocation of benefits for nonprofit organizations only in certain limited instances, and that absent such instances it is not within the province of the government to use its spending

61. Id. at 577.
62. Id. at 585–86.
63. Id. at 586–88.
64. Id. at 592 ("[A] declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.").
65. Id. at 609 (Powell, J., concurring).
66. See Simon et. al., supra note 44, at 280.
power to influence public debate through the speech of nonprofits.\footnote{67}

While one could argue that advocating for the legalization of prostitution and human sex trafficking runs counter to clearly established public policy, and therefore, under the rationale of \textit{Bob Jones}, the government could deny benefits to organizations that engage in such advocacy, it is much more difficult to suggest that an organization who takes no stance on the issue of legal prostitution is similarly situated to one who does take such a stance. To the contrary, reasoned arguments have been made for why the public interest is best served by AIDS relief organizations remaining neutral on the issue of prostitution and sex trafficking.\footnote{68} Given the strength of these arguments, public policy commands that the government should not attempt to drive out certain viewpoints on the issue through its spending power.\footnote{69}


\footnote{68. See supra notes 55–58 and accompanying text. \textit{See also} David M. Ullian, Note and Comment, "Well Beyond" Permissible: How Severing the Leadership Act's Policy Requirement Affirms Our Commitment to First Amendment Values, 38 AM. J.L. & MED. 713, 736 (2012) ("Reasonable minds can differ about the propriety of prostitution. . . By compelling opposition to prostitution and prohibiting all activities that are inconsistent with such a stance, the Policy Requirement restricts full and free discussion on the public issue and is therefore unconstitutional.").}

\footnote{69. \textit{But see} Ashutosh Bhagwat, \textit{Associational Speech}, 120 YALE L.J. 978, 1017–18 (2011) (arguing that government-sponsored community groups, "which are necessarily under heavy state influence, cannot play the kind of independent role in self-governance - including in forming values free of state interference and in overseeing and petitioning public officials - that the First Amendment envisions"). Professor Ashutosh Bhagwat's conclusion invites far-reaching implications for the speech rights of associations that rely on government funding because Bhagwat does not delineate what constitutes a "government-sponsored community group" undeserving of full First Amendment protection. \textit{See} Frances R. Hill, \textit{Speaking Truth to the Power that Funds Them: A Jurisprudence of Association for Advocacy Organizations Financially Dependent on Government Grants and Contracts}, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 363, 365 (2012) ("While this analysis may apply to some
One may argue, though, that the government is entitled to spend its money as it sees fit. If the government wants to condition a benefit on an organization relinquishing its free speech rights, it should be within the government's power to do so, as that organization will be no worse off than it was before the government benefit was offered. As such, the organization has not been deprived of anything, but rather has been given a choice as to whether it wants to be better off by accepting the benefit. It is only when the individual is truly coerced by the government, e.g., by threatening to revoke a pre-existing benefit, that a court should apply heightened scrutiny.

This argument, while persuasive, fails to fully capture the dynamic between government and the beneficiary. In her 1989 Article Unconstitutional Conditions, Professor Kathleen Sullivan offers an opposing argument based on a different perspective of the organizations, its general acceptance as a principle of the jurisprudence of association would have such broad application and such fundamental implications in contemporary circumstances that a very large share of associations would fall outside the jurisprudence of association. Limiting the First Amendment to self-financing organizations would impoverish the concept of association and impede the analysis of the roles of associations in an era of government outsourcing.

70. In their article Government Subsidies and Free Expression, 80 MINN. L. REV. 543 (1996), Martin H. Redish and Daryl I. Kessler analyze this logic, which they say is based on two premises:

First, by definition, a governmental subsidy is a matter of governmental largesse, and the greater governmental power to deny the subsidy logically includes the lesser power to grant the subsidy conditionally on the waiver of a constitutional right. Second, if the individual chooses to exercise her right of speech rather than receive the subsidy, she is in no worse a position than if the government had offered her no subsidy in the first place.

Id. at 549.

71. See Alliance for Open Soc'y Int'l v. U.S. Agency of Int'l Dev. (AOSI IVI), 651 F.3d 218, 246 (2d Cir. 2011) (Straub, J., dissenting) (arguing that a funding condition would be unconstitutional as a coercive penalty on the exercise of First Amendment rights "if it denied government benefits to which the recipient would otherwise be entitled and that are independent from those provided by the government program at issue (for example, by denying a property tax exemption for failure to take a loyalty oath)").
government-beneficiary dynamic. Sullivan contends that strict scrutiny should apply any time the government offers a conditional benefit with the purpose or effect of pressuring recipients to alter a choice about exercise of a protected right in a direction favored by the government. Sullivan argues, inter alia, that courts have wrongly applied the unconstitutional conditions doctrine by looking at the coerciveness of the condition on the individual. Instead, courts would do better to focus on the systemic effects that conditions on benefits have on the exercise of constitutionally protected rights. This is because, from the individual's perspective, a government benefit is something to which the beneficiary is not entitled, but is instead a product of government largesse; from a systemic view, however, government benefits are not handouts, but rather a redistribution of the wealth originally given to the government by the tax-paying public.

Redistribution of wealth is an essential function of government, as it results in the building of infrastructure, providing education, serving the needy, defending the country, and responding to disasters. While the people of the United States allow the government to redistribute wealth in many ways, normally subject to only minimal scrutiny, the people do not allow the distribution of power to be determined along the lines of relinquishing a constitutional right. This view supports the idea

73. See id. at 1499–1500.
74. Id. at 1490 (arguing that "coercion theory focuses too narrowly on the individual beneficiary...").
75. Id. at 1490.
76. Id. at 1490 ("Such an approach starts from the proposition that the preferred constitutional liberties at stake in unconstitutional conditions cases do not simply protect individual rightholders piecemeal. Instead, they also help determine the overall distribution of power between government and rightholders generally, and among classes of rightholders.").
77. Id. at 1425 ("Such gratuities, like all government action, must satisfy at least a requirement of minimal rationality.").
78. See id. at 1497 ("Wherever obligations of government evenhandedness are central to a right . . . conditions on a benefit designed to prefer one otherwise constitutionally protected choice to another will pose a danger.").
that all individuals in the United States have paid into a system designed to uphold certain liberties, and that the government cannot then use those payments to buy out individual liberties.\textsuperscript{79}

The rights secured by the Constitution for AIDS relief organizations and other charitable nonprofits is vital because, without them, the ways in which these organizations may go about bringing positive change in the world could be sharply circumscribed.\textsuperscript{80} Nonprofit organizations are so important for the very reason that they are not the government—they can address issues that the government will not or in ways in which the government is unable.\textsuperscript{81} With nonprofits as dependent on government funding as they have become,\textsuperscript{82} civil liberties are the primary force repelling an amalgamation of nonprofits and government.

\section*{C. The History and Purpose of the Leadership Act}

The report released by UNAIDS in 200 estimated that 34.3 million people worldwide were afflicted with HIV/AIDS at the turn of the millennium.\textsuperscript{83} In 1999 alone, there were an estimated 2.8 million deaths from AIDS and 5.4 million people were newly infected with HIV.\textsuperscript{84} These staggering numbers continued to climb, with, according to a Congressional finding, an estimated 42 million people across the globe infected with HIV/AIDS by then end of 2002.\textsuperscript{85} In his 2003 State of the Union address, President George W.

\begin{footnotes}
\item 79. See generally Charles A. Reich, \textit{The New Property}, 73 \textit{Yale L.J.} 733 (1964) (noting how government largesse from accumulated tax dollars has created increased dependency on government, and arguing that the government can use that largesse to buy up people’s liberties).
\item 80. See \textit{SMITH & LIPSKY}, supra note 36, at 182–83 (noting the ways in which the government has attempted to limit nonprofit advocacy).
\item 81. See \textit{supra} notes 34–35 and accompanying text.
\item 82. See \textit{supra} notes 37–38 and accompanying text.
\item 84. \textit{Id.}
\end{footnotes}
Bush urged Congress to address the global AIDS epidemic by pledging $15 billion to fight the disease. The 108th Congress promptly responded by enacting The Leadership Act of 2003, which granted billions in aid to U.S. and international nonprofit organizations and foreign governments to fight HIV/AIDS, tuberculosis, and malaria. Congress' stated purpose of the Act "is to strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics and other related and preventable infectious diseases as part of the overall United States health and development agenda." Notably absent from the statutory statement of purpose is any mention of prostitution or sex trafficking.

In April 2003, the House Committee on International Relations voted to add two prostitution-related conditions to the receipt of funding in the original text of the bill. The first, § 7631(e), mandates that no funds granted under the Act be used to "promote or advocate the legalization or practice of prostitution or

86. See George W. Bush, President of the United States of America, Address Before a Joint Session of Congress on the State of the Union, 1 PUB. PAPERS 82, 85 (Jan. 28, 2003).
87. Pub. L. No. 108-25, 117 Stat. 711 (codified at 22 U.S.C. §§ 7601 to 7682 (2006)). While the Act's focus on tuberculosis and malaria has not received much attention in the cases in which the Act has been challenged, these diseases continue to have a very real effect worldwide. Malaria is estimated to infect 350 to 500 million people each year, killing one million. See Malaria, UNICEF, http://www.unicef.org/health/index_malaria.html (last updated May 25, 2012). Tuberculosis is just as prevalent and deadly, with one-third of the world's population infected with TB, resulting in 1.4 million deaths in 2011. See Tuberculosis (TB) Data and Statistics, CDC, http://www.cdc.gov/tb/statistics/default.htm (last updated Sep. 26, 2012). TB is also a leading killer of people who are infected with HIV. See id.
89. See id.
sex trafficking.91 The second condition, § 7631(f), the one at issue in the most recent circuit court opinions,92 states:

No funds made available to carry out this Act, or any amendment made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.93

This section, known as the Policy Requirement, was introduced by Representative Christopher Smith of New Jersey.94 Representative Smith highlighted troubling facts about the prostitution industry and stressed that it must be the policy of the United States to deny funding to organizations that believe prostitution and sex trafficking are legitimate industries.95 Representative Smith's comments to the Committee focused more on the eradication of prostitution and sex trafficking rather than on how best to fight HIV/AIDS.96

91. 22 U.S.C. § 7631(e) (2006). This amendment to the original bill was introduced by Representative Henry J. Hyde, Chairman, House Committee On International Relations, and approved by the Committee on International Relations. Leadership Act Markup, supra note 90, at 92, 97.


94. Leadership Act Markup, supra note 90, at 148 (statement of Representative Christopher Smith, Vice Chairman, House Committee On International Relations).

95. Id. at 148–49.

96. This is reflected in the way in which Representative Smith presented the issue before the Committee:

The issue that is before us today is whether or not we will provide money to organizations that seek the legalization of prostitution and also enable the traffickers, and stand side by side with the traffickers and, regrettably, enable
It was initially unclear what effect the Policy Requirement would have on nonprofit organizations. At first, the U.S. Agency for International Development (USAID) did not apply the Policy Requirement to American-based nonprofits because the U.S. Department of Justice's Office of Legal Counsel (OLC) had determined that "the organization-wide restrictions, which would prevent or require certain advocacy or positions in activities completely separate from the federally funded programs...cannot be constitutionally applied to U.S. organizations." After the OLC later withdrew its determination, USAID issued a directive stating that, "as a condition of entering into this agreement or any subagreement, a non-governmental organization or public international organization recipient/subrecipient must have a policy explicitly opposing prostitution and sex trafficking." Organizations that felt their missions, and thus free speech rights, would be compromised by being forced to advocate against

them to enslave these women, whether or not we will provide the money to them.  

Id. at 149. Representative Smith did state that "I believe that the United States should do everything within its power to combat and eliminate human trafficking and prostitution. By doing so, we will most certainly, as a direct consequence, mitigate the spread of HIV/AIDS." Id. However, there is nothing else in his comments that suggest the goal of his amendment was to mitigate the spread of HIV/AIDS, and he offered no support for his conclusion that such mitigation would occur. See id. at 148–49.

97. See AOSIV, 651 F.3d at 225.

98. Memorandum from the U.S. Department of Justice Office of Legal Counsel on the Constitutionally Permissible Funding Restrictions for Sex Trafficking and HIV/AIDS Prevention, available at http://brennan.3cdn.net/2fdb4d2e5c42284e0a_fcm6bxtl3.pdf. After a drawn out battle in court, the OLC was recently required to make public a copy of this memo. See Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. DOJ, 697 F.3d 184 (2d Cir. 2012).

prostitution, challenged the Policy Requirement soon after it was implemented.100

II. ADEQUATE ALTERNATIVE CHANNELS AND THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

In limited circumstances, Congress can limit speech by attaching conditions to the receipt of government funds, requiring the recipient to refrain from or engage in certain speech. Congress is able to attach conditions to funds pursuant to its spending power.101 The Spending Clause of the U.S. Constitution states that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."102

Despite the fact that "the Constitution created a Federal Government of limited powers,"103 the Supreme Court has interpreted the Spending Clause, in combination with the Necessary and Proper Clause,104 as conferring broad power on Congress to appropriate funds.105 Congress' power of the purse


101. See South Dakota v. Dole, 483 U.S. 203, 206 (1987) ("Incident to this [spending] power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.") (internal quotation marks omitted).


104. U.S. CONST. art. I, § 8, cl. 18. ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

105. See New York v. United States, 505 U.S. 144, 158 (1992) ("The Court's broad construction of Congress' power under the Commerce and Spending Clauses has of course been guided, as it has with respect to Congress' power generally, by the Constitution's Necessary and Proper Clause . . .").
gives it the ability to both collect taxes (and grant tax exemptions) and spend the revenues of those taxes.\textsuperscript{106}

Congress will often use its spending power to deter disfavored outcomes or encourage desirable outcomes by attaching conditions to a government benefit, such as conditioning the receipt of federal highway funds to states on setting the minimum legal drinking age at twenty-one.\textsuperscript{107} When Congress conditions the receipt of a government benefit, the Supreme Court has required that the condition further the general welfare, that it be unambiguous, and that it be related to the reason the funds are being given.\textsuperscript{108} Moreover, if Congress places a condition on a government benefit, and that condition implicates another provision of the Constitution, the provision may act as an independent bar to Congress's spending power.\textsuperscript{109}

When Congress conditions the receipt of a government benefit on a speech restriction, the Supreme Court has afforded a remedy for recipients through the unconstitutional conditions doctrine.\textsuperscript{110} Under this doctrine, the government cannot condition a benefit by requiring that an individual relinquish a constitutionally protected right, nor can the government deny a benefit for exercising a constitutional right.\textsuperscript{111} The Court has long applied this doctrine to safeguard the right of organizations to receive benefits from the government without being deprived of their constitutional right to free speech.\textsuperscript{112} As applied to First Amendment protections,

\textsuperscript{106} Although the Constitution does not explicitly authorize Congress to spend, the power has generally been understood as an implied extension of the power to tax. For an argument that the Constitution was not meant to give Congress the power to spend, see generally Jeffrey T. Renz, \textit{What Spending Clause? (or The President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution}, 33 \textit{J. Marshall L. Rev.} 81 (1999).


\textsuperscript{108} \textit{Id.} at 207.

\textsuperscript{109} \textit{Id.} at 208.

\textsuperscript{110} \textbf{ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES} 1009 (4th ed. 2011).

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} See Frost v. R.R. Comm'n of Cal., 271 U.S. 583, 594 (1926) ("If the state may compel the surrender of one constitutional right as a condition of its
the unconstitutional conditions doctrine "holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." Benefits that are implicated in the unconstitutional conditions doctrine are those that the government is permitted, but not compelled, to provide.

A straightforward reading of this doctrine suggests that it applies anytime a condition forces an individual to choose between receiving a government benefit and exercising their right to freedom of speech. In practice, however, whether the Court will find a restriction to be an unconstitutional condition has depended greatly on how the issue was framed. In the cases in which the Court has treated the condition as a penalty on speech, the unconstitutional conditions doctrine has applied. But when the condition has been treated as a decision by the government to not subsidize speech, the restriction has not been deemed an unconstitutional condition and has been upheld. There is no clear indication of when a condition is considered a "penalty" and when it is considered a "non-subsidy."
The Supreme Court does not, however, end its analysis once it has determined whether a condition is a penalty or a non-subsidy. The Court then also considers whether the recipient is afforded an alternative channel of communication for protected expression.\textsuperscript{120} The Court has yet to define this test for conditional speech restrictions, and whether an alternative channel exists has not proven determinative to the outcome of such a case.\textsuperscript{121}

However, the Supreme Court has clearly defined an adequate alternative channels test for cases involving speech restrictions in certain locations or forums.\textsuperscript{122} The Court has been more willing to allow restrictions of speech on certain property, as opposed to restrictions on the speaker, out of recognition for the government's need to balance freedom of speech with the need to minimize disruption of public places.\textsuperscript{123} The adequate alternative

\textit{supra} note 110, at 1013. “If the Court wishes to strike down a condition, it declares it to be an unconstitutional condition; if the Court wishes to uphold a condition, it declares that the government is making a permissible choice to subsidize some activities and not others.” \textit{Id. Cf:} Edward T. Chaney, Note and Recent Development, Velazquez v. Legal Services Corporation: Unconstitutional Conditions and First Amendment Rights of Nonprofit Organizations and Their Donors, 4 \textit{FIRST AMEND. L. REV.} 267, 280–81 (2006) (posing two interpretations of the Court's conditional speech cases: first, that there exists a strict dichotomy between unconstitutional conditions and permissible non-subsidies; and second, that when a condition is not deemed a permissible non-subsidy, the Court will then apply heightened scrutiny).

\textsuperscript{120} See \textit{infra} Parts II.A-B.

\textsuperscript{121} \textit{But cf:} Alliance for Open Soc'y Int'l v. U.S. Agency of Int'l Dev. (\textit{AOSI I}), 430 F. Supp. 2d 222, 261–62 (S.D.N.Y. 2006) (“[T]he Supreme Court's reliance in both \textit{Rust} and \textit{Regan} on the availability of alternate channels for grant recipients' First Amendment activity as a basis for upholding the challenged provisions in each of those cases is strongly persuasive here.”). In \textit{FCC v. League of Women Voters}, 648 U.S. 384 (1984), discussed \textit{infra} Part II.B, the Court did state in dicta that the presence of alternative channels would have allowed the condition to be upheld. \textit{Id.} at 400.


\textsuperscript{123} \textit{See} CHEMERINSKY, \textit{supra} note 110, at 1171.
channels test for forum doctrine was explicitly stated for the first time in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, where the Supreme Court noted that it has often upheld reasonable time, place, and manner restrictions on speech "provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information." As forum doctrine has developed, a time, place, or manner restriction must satisfy four elements in order to be upheld. The first element looks to whether the restriction is content-neutral or content-based. In order for a law to be considered content-neutral, it must be both viewpoint-neutral (not based on the ideology of the message) and subject-matter neutral (not based on the topic of the speech). If the restriction is found to be content-neutral, the court will apply intermediate scrutiny. "Intermediate" and "strict" scrutiny are both forms of heightened scrutiny, in which the burden of proof is on the government to show that its actions are constitutional. A law will survive intermediate scrutiny if it

125. Id. at 771 (emphasis added).
126. See Chemerinsky, supra note 110, at 962. Though the distinction between content-based and content-neutral laws is relevant to the holding of AOSI IV, this Note does not focus its full attention on this distinction. For a thorough discussion of the distinction between content-based and content-neutral laws, see id. at 960–69.
127. See id. at 961.
128. Laws subjected to strict scrutiny "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995). The Supreme Court has very rarely found laws to pass the strict scrutiny test, and as a result the test has been described as "strict in theory but fatal in fact." See Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). However, the Court has been hesitant to apply strict scrutiny to conditional speech restrictions, see infra Parts II.A, B, and for that reason the analysis in this Note proceeds on the assumption that, when the Court applies heightened scrutiny, it will more closely resemble intermediate scrutiny.
"serve[s] important governmental objectives and [is] substantially related to [the] achievement of those objectives." The requirement that the law be "substantially related" is also sometimes referred to as the "narrow-tailoring" requirement. The restriction will meet the narrow tailoring requirement if it "promotes a substantial government interest that would be achieved less effectively absent the regulation."

If the important government interest and narrow tailoring elements are satisfied, the time, place, or manner restriction must still leave open adequate alternative channels for expression in order to be upheld. This additional element ensures that the speaker will maintain effective communicative opportunities elsewhere or through another medium. This approach stems from the belief that the conveyance of the message is often more important than the mode of expression. The Court has not applied a bright-line rule for determining whether an alternative channel for expression will be considered "ample" or "adequate" — heightened scrutiny as a "more aggressive, less deferential type of judicial review than rationality review," which "involve[s] a presumption of unconstitutionality and put the burden on the government").

131. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989) ("[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests . . . ."). The Virginia Pharmacy Court did not state this part of the test in its opinion, but the omission may have been inadvertent. See Elisabeth Alden Langworthy, Note, Time, Place, or Manner Restrictions on Commercial Speech, 52 GEO. WASH. L. REV. 127, 135 n.47 (1983). The Supreme Court has also merged the narrow tailoring requirement and the adequate alternative channels requirement into one part of the standard. See Susan H. Williams, Content Discrimination and the First Amendment, 139 U. PA. L. REV. 615, 642 (1991).
132. Rock Against Racism, 491 U.S. at 799 (internal quotations omitted).
134. Id.
instead, the Court has made this determination on a case-by-case basis.  

For example, in Heffron v. International Society for Krishna Consciousness, Inc., the Court considered the constitutionality of a restriction designating a location within state fairgrounds where a religious organization could distribute religious literature and solicit donations. The Heffron Court applied intermediate scrutiny because the dissemination of religious views was protected First Amendment activity that was being curtailed by the government. The Court found that the State had a significant interest in restricting the plaintiffs' speech within the forum. The Court also stated that because plaintiffs maintained the ability to exercise their protected speech outside the fairgrounds or within the designated booths, there were alternate channels for expression adequate.

By contrast, in City of Ladue v. Gilleo, the Supreme Court invalidated a city ordinance that did not afford the plaintiffs adequate alternative channels for expression. City of Ladue involved an ordinance prohibiting homeowners from displaying any signs on their property except "'residence identification' signs, 'for sale' signs, and signs warning of safety hazards." The Court noted the unique value of displaying signs at one's home as a form of expression, and found that the plaintiffs' inability to display signs

135. See Eugene Volokh, Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones, 90 CORNELL L. REV. 1277, 1307 (2005) (“The Court has at times applied [ample alternative channels] in a demanding manner, for instance insisting that alternative channels aren't ample if they materially raise the price of speaking, make it harder for speakers to reach the same listeners, or subtly influence the content of the message by changing the medium. But at other times, the Justices have treated this requirement as only a weak constraint. Such a disparity is to be expected given the vagueness of the term 'ample.'”).
137. Id. at 642, 647–51.
138. Id. at 647–48.
139. Id. at 654.
140. Id. at 654–55.
142. Id. at 58–59.
143. Id. at 45.
at home left them with no adequate alternate channels through which they could shape their identities by expressing important ideas in a cheap and convenient manner.\textsuperscript{144}

While the Supreme Court has not explicitly defined adequate alternative channels for conditional speech restrictions, the test was applied to a conditional speech restriction by the Second Circuit Court of Appeals in \textit{Velazquez v. Legal Services Corp. (Velazquez I)}.\textsuperscript{145} The \textit{Velazquez I} court analyzed the holdings of three Supreme Court cases (discussed below) involving conditional speech restrictions, and interpreted those holdings to stand for the proposition that, “in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with \textit{adequate alternative channels} for protected expression.”\textsuperscript{146}

The following cases involved instances where the Court factored in the presence or absence of alternative channels of communication in considering whether an unconstitutional condition existed. A look into the alternative channels analysis in these cases demonstrates why lower courts have had difficulty applying the alternative channels test as well as the unconstitutional conditions doctrine.\textsuperscript{147}

\textbf{A. The “Permissible Non-Subsidy” Cases}

1. \textit{Regan v. Taxation with Representation}

In \textit{Regan v. Taxation with Representation}\textsuperscript{148} ("TWR"), Taxation with Representation of Washington brought suit after the Internal Revenue Service (IRS) denied TWR’s application for § 501(c)(3) tax-exempt status because “it appeared that a substantial part of TWR’s activities would consist of attempting to influence legislation.”\textsuperscript{149} Section 501(c)(3) of the Internal Revenue Code

\textsuperscript{144} ld. at 56–58.
\textsuperscript{145} 164 F.3d 757 (2d Cir. 1999).
\textsuperscript{146} ld. at 766 (emphasis added).
\textsuperscript{147} See infra Part III.
\textsuperscript{148} 461 U.S. 540 (1983).
\textsuperscript{149} ld. at 542.
mandates that no substantial part of a tax-exempt organization's activities are "carrying on propaganda, or otherwise attempting to influence legislation." Therefore, as a condition of receiving tax exemptions and tax deductibility, § 501(c)(3) organizations must forego the constitutional right to engage in substantial lobbying. TWR alleged that the prohibition against substantial lobbying in order to qualify as a § 501(c)(3) organization was an unconstitutional condition restricting the organization's right to free speech. The Supreme Court held that no First Amendment violation occurred, stating: "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying. We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.' Finding the speech restriction content-neutral, the Court declined to apply strict scrutiny, but suggested that strict scrutiny would have applied had Congress' purpose in restricting lobbying activity been "aimed at the suppression of dangerous ideas."

a. TWR's Alternative Channels Analysis

The Court also noted that TWR retained the ability to conduct its lobbying activities by creating a separate, tax-exempt § 501(c)(4) affiliate organization for lobbying. How central this finding of an alternative channel was to the outcome of the case is not entirely clear from the majority opinion, though the Court did suggest that lobbying through a § 501(c)(4) group would be an adequate alternative: "The IRS apparently requires only that the two groups be separately incorporated and keep records adequate

150. Id. at n.1.
151. Id. at 543.
152. Id. at 546 (quoting Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)).
153. Id. at 549–50 (quoting Cammarano, 358 U.S. at 513).
154. Id. at 544.
to show that tax-deductible contributions are not used to pay for lobbying. This is not unduly burdensome."

Justice Blackmun authored a concurring opinion in TWR, in which Justices Brennan and Marshall joined, wherein he wrote, "in my view the result under the First Amendment depends entirely upon the Court's necessary assumption—which I share—about the manner in which the Internal Revenue Service administers § 501." Justice Blackmun stated that, viewed alone, § 501(c)(3) would be unconstitutional because it denied "a significant benefit to organizations choosing to exercise their constitutional rights."

For Justice Blackmun, what saved the § 501(c)(3) classification from unconstitutionality was the fact that TWR maintained an alternative channel through which it could conduct substantial lobbying in the form of a § 501(c)(4) affiliate organization. While the statutory structure as written provided an adequate alternative channel for lobbying, Justice Blackmun cautioned that:

[A]n attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. . . . In my view, any such restriction would render the statutory scheme unconstitutional.

The concurring Justices were therefore satisfied that the otherwise unconstitutional § 501(c)(3) classification could be upheld because TWR was able to create an affiliate organization that allowed for an alternative means by which it could continue to receive tax benefits while still engaging in protected speech (lobbying activity).

155. Id. at 545 n.6.
156. Id. at 551 (Blackmun, J., concurring).
157. Id. at 552.
158. Id.
159. Id.
160. Id. at 553–54 (Blackmun, J., concurring).
2. Rust v. Sullivan

*Rust v. Sullivan*¹⁶¹ involved Department of Health and Human Services regulations that authorized funding for “Title X” projects promoting family planning with the stipulation that federal funds could not go to programs where abortion was a method of family planning.¹⁶² Plaintiffs, entities who received funds to help establish Title X projects and doctors who supervise Title X funds, argued that the regulations discriminated on the basis of viewpoint because they compelled grantees to promote continuing pregnancy to term while forbidding all discussion about abortion as a lawful option.¹⁶³ The Supreme Court rejected this argument, stating:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.¹⁶⁴

*a. Rust’s Alternative Channels Analysis*

Plaintiffs contended that the funding provision was an unconstitutional condition because they were forced to choose between accepting funding and exercising their free speech rights.¹⁶⁵ To rebut this argument, the Court relied on the concept of the government speech doctrine.¹⁶⁶ This doctrine provides that the First Amendment does not apply or provide a basis for challenging the

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¹⁶². *Id.* at 177–78.
¹⁶³. *Id.* at 192.
¹⁶⁴. *Id.* at 193.
¹⁶⁵. *Id.* at 196.
¹⁶⁶. See *id.* at 197–200.
government's actions when the government itself is the speaker.\textsuperscript{167} The \textit{Rust} Court distinguished the facts of the case from \textit{TWR}\textsuperscript{168} "in which the Government has placed a condition on the \textit{recipient} of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."\textsuperscript{169}

Whereas the conditions at issue in \textit{TWR} were placed on the grantees, thereby preventing them from engaging in their desired speech, the condition in \textit{Rust} was placed on the program itself.\textsuperscript{170} The grantees in \textit{Rust} could therefore "engage in abortion-related activity separately from activity receiving federal funding."\textsuperscript{171} The \textit{Rust} Court found there to be an adequate alternative channel for communication, and therefore upheld the condition.\textsuperscript{172}

The \textit{Rust} holding suggests that when the government speech doctrine applies, the adequacy of alternative channels need not be explored. It appears that so long as the speech restriction is limited to the scope of the government program, any channels for expression outside the program will be de facto adequate.

\textsuperscript{167} See CHEMERINSKY, supra note 110, at 1015.
\textsuperscript{168} See infra Part II.B.1.
\textsuperscript{169} \textit{Rust}, 500 U.S. at 197 (emphasis in original).
\textsuperscript{170} For an argument that distinguishing between a condition that attaches to a program versus a grantee is not as definite as the \textit{Rust} opinion suggests, see Chaney, supra note 119, at 285–86.
\textsuperscript{171} \textit{Id.} at 198.
\textsuperscript{172} \textit{Id.} at 203 ("Under the Secretary's regulations, however, a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered. It would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project, but the Constitution does not require that the Government distort the scope of its mandated program in order to provide that information.").
B. The “Penalty” Cases

1. FCC v. League of Women Voters of California

In FCC v. League of Women Voters of California, the Court was again faced with a conditional speech restriction, but this time applied the unconstitutional conditions doctrine to find a violation of an organization's First Amendment rights. At issue in League of Women Voters was the constitutionality of a government program to fund noncommercial educational broadcasting stations. The program restricted grantees from engaging in editorializing of any kind. As was the case in TWR, the restriction at issue was placed on the grantee rather than the program, because it prevented the grantee from conducting its protected speech activity regardless of whether that activity was publicly or privately financed.

The League of Women Voters Court determined that heightened scrutiny was warranted because the speech restriction was content-based, and also directed at a form of speech—editorial opinions—deserving of the highest degree of First Amendment protection. While the restriction as applied to another form of media would plainly be subject to strict scrutiny, the Court noted that unique considerations of the broadcast

174. Id. at 398–99.
175. Id. at 366.
176. Id. at 375.
177. See id.
178. Id. at 383 (“[I]n order to determine whether a particular statement by station management constitutes an ‘editorial’ proscribed by § 399, enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern ‘controversial issues of public importance.’”) (internal quotation marks omitted). One may wonder why this restriction was found to be content based, while the restriction in TWR was found to be content neutral—presumably one would have to “examine the content of the message that is conveyed” to determine whether the views expressed constituted lobbying.
179. Id. at 381. (“[E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values.”) (citation omitted).
industry had made it such that the Court has "never gone so far as to demand that such regulations serve 'compelling' governmental interests." As such, the Court applied a standard of review more closely resembling intermediate scrutiny asking whether the restriction was narrowly tailored to further a substantial government interest. The Court doubted the significance of the government's asserted interests in restricting editorializing without expressly finding those interests illegitimate, because regardless, the restriction failed the narrow tailoring requirement.

a. League of Women Voter's Alternative Channels Analysis

The Court found that the plaintiffs, owners and operators of broadcasting stations, were afforded no alternative channel through which they could conduct their editorial activities. Justice Brennan, writing for the majority, stated:

In this case, however, unlike the situation faced by the charitable organization in *Taxation With Representation*, a non-commercial educational station that receives only 1% of its overall income from CPB grants is barred absolutely from all editorializing . . . . Of course, if Congress were to adopt a revised version of § 399 that permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be

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180. *Id.* at 376.

181. See *id.* at 380 ("[T]hese restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest . . . .") (emphasis added).

182. See *id.* at 398 ("[E]ven if some of the hazards at which § 399 was aimed are sufficiently substantial, the restriction is not crafted with sufficient precision to remedy those dangers that may exist to justify the significant abridgment of speech worked by the provision's broad ban on editorializing.").

183. *Id.* at 399–400.
valid under the reasoning of *Taxation With Representation*.\textsuperscript{184} Though speaking in dicta, the *League of Women Voters* Court clearly felt that the possibility for the group to create an affiliate organization to engage in editorializing would have saved an otherwise unconstitutional condition.\textsuperscript{185} The Court viewed the restriction as a penalty because, without the ability to establish affiliates, grantees could not engage in their protected speech using funds from private sources, and so were left without adequate alternate channels to editorialize.\textsuperscript{186}

What is interesting about the Court's adequate alternative channels analysis is that the Court would have upheld the restriction had adequate alternative channels existed, even though the restriction was content-based and the important government interests and narrow tailoring requirements had not been met. The opinion invites the troubling possibility that courts will be satisfied that a conditional speech restriction can be upheld so long as adequate alternative channels for expression are afforded. More troubling still is the fact that the Court summarily found that the creation of an affiliate organization to engage in editorializing would be an adequate alternative, which suggests that a reviewing court could not only ignore the requirements that a restriction be content-neutral, serve important government interests, and be narrowly tailored, but a court could also view alternative channels under a lower scrutiny standard.\textsuperscript{187}

By relying on *TWR*'s determination that affiliate organizations afford an adequate alternative without conducting an

\textsuperscript{184} *Id.* at 400.

\textsuperscript{185} *Id.* ("Under such a statute, public broadcasting stations would be free, in the same way that the charitable organization in *Taxation With Representation* was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities.").

\textsuperscript{186} *Id.* at 400–01.

\textsuperscript{187} Cf. Lee, *supra* note 133, at 809 ("[I]n cases in which the Court has presumed the availability of alternatives, the minimal scrutiny applied to the substantiality of the government's interests and the narrowness of the government's methods has guaranteed that the regulation will be sustained.").
inquiry into the adequacy of such an affiliate for the purpose of editorializing, the League of Women Voters opinion comes close to announcing a per se rule that affiliate organizations will serve as adequate alternatives for conditional speech restrictions. This “one size fits all” in adequate alternative channels analysis would in no way guarantee the protection of an organization’s speech rights in each particular circumstance.\(^{188}\)

2. Legal Services Corp. v. Velazquez (Velazquez II)

*Legal Services Corp. v. Velazquez*\(^{189}\) involved a restriction in the Legal Services Corporation Act that prohibited grantees from representing clients challenging existing welfare law.\(^{190}\) The Act was designed to provide financial support for legal assistance to indigent clients in noncriminal matters.\(^{191}\)

The Supreme Court invalidated the restriction.\(^{192}\) The Court interpreted *Rust*’s government speech doctrine as permitting viewpoint-based restrictions where the government is the speaker or enlists private speakers to “transmit specific information pertaining to its own program.”\(^{193}\) Because grantees under the LSC program were meant to speak on behalf of their clients and not on behalf of the government, the Court found the government speech doctrine inapplicable and thus the regulation to be impermissibly viewpoint-based.\(^{194}\) Refuting the government’s argument that the restriction was necessary to define the scope of the program, the Court stated that “Congress cannot recast a condition on funding as

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188. Cf. *id.* at 810 (“Absent careful analysis of the adequacy of alternative means of communication, the Court abrogates its responsibility to ensure that expression remains free.”).
190. *Id.* at 539.
191. *Id.* at 536.
192. *Id.* at 549.
193. *Id.* at 541.
194. *Id.* at 542. (“The lawyer is not the government’s speaker. The attorney defending the decision to deny benefits will deliver the government’s message in the litigation. The LSC lawyer, however, speaks on the behalf of his or her private, indigent client.”).
a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.\textsuperscript{195}

\textbf{a. Velazquez II's Alternative Channels Analysis}

The government also argued that attorneys seeking to represent clients in challenges to existing welfare law could simply withdraw from the program.\textsuperscript{196} Having declined to apply the government speech doctrine, the Court engaged in a more searching review of the adequacy of alternative channels for expression. The Court did not focus on the speech of the direct recipient of government funds, the legal organizations, but instead looked to the indirect beneficiaries of the government funds, the indigent clients, and the effect of the condition on their right to receive information.\textsuperscript{197} If an attorney would be forced to withdraw from the program because the client sought to challenge existing welfare law, "[t]here often will be no alternative source for the client to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits."\textsuperscript{198}

The Court compared the effect of the condition on the indirect beneficiaries of the government funds to the situation in \textit{Rust}\.\textsuperscript{199} The Court stated:

[In \textit{Rust}], a patient could receive the approved Title X family planning counseling funded by the Government and later could consult an affiliate or independent organization to receive abortion counseling. Unlike indigent clients who seek LSC representation, the patient in \textit{Rust} was not required to forfeit the Government-funded advice when she also

\textsuperscript{195} \textit{Id.} at 547.
\textsuperscript{196} \textit{Id.} at 546.
\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{Id.} at 547.
received abortion counseling through alternative channels.  

Because the client would likely be unable to find another attorney to advise him and argue his case for the welfare statute's invalidity, there was "no alternative channel for expression of the advocacy Congress seeks to restrict." 

III. THE D.C. CIRCUIT-SECOND CIRCUIT SPLIT

A. The DKT II Court Upholds the Policy Requirement

DKT International (DKT), based in Washington D.C., is a nonprofit organization designed "to promote family planning and HIV/AIDS prevention through social marketing," and today is "the largest private provider of contraceptives and family planning services in the developing world." In 2005, DKT received sixteen percent of its total budget from USAID, one agency responsible for awarding Leadership Act grants to organizations. DKT refused to adopt the policy opposing prostitution because it believed that doing so might result in "stigmatizing and alienating many of the people most vulnerable to HIV/AIDS—the sex workers."

When it did not receive funding under the Act, DKT brought suit in the United States District Court for the District of Columbia. DKT argued that the Policy Requirement, which conditioned federal grants on the grantees' explicit statement opposing prostitution and sex trafficking, was an unconstitutional condition on their free speech rights. DKT advanced three points in support of this argument: the Policy Requirement constituted a

200. Id.
201. Id. at 546–47 (emphasis added).
204. Id. at 761 (internal quotation marks omitted).
206. Id. at 7.
viewpoint-based restriction on speech; its viewpoint-based nature called for strict scrutiny; and the Requirement failed strict scrutiny because it was not narrowly tailored to advance a compelling government interest.\textsuperscript{207}

USAID argued that strict scrutiny was not proper because DKT's speech was not directly restricted—they could always decline funding and advocate their position with private funds.\textsuperscript{208} USAID maintained that Congress was not obligated to subsidize DKT's policy stances.\textsuperscript{209} They argued that the Policy Requirement should not be evaluated under the framework of the First Amendment, but rather through the Spending Clause, which "implicitly authorized [the government] to legislate funding eligibility restrictions."\textsuperscript{210}

The district court found the Policy Requirement to be a viewpoint and content-based restriction, therefore calling for strict scrutiny.\textsuperscript{211} The court stated that "[t]he government's interest in preventing garbling of its message, maintaining integrity of federal programs, and speaking in a single voice cannot result in compelling organizations, like DKT, to parrot the government's policies."\textsuperscript{212} Section 7631(e), which prevented funding from going to any organization who advocated for the legalization of prostitution or sex trafficking, was found to be narrowly tailored; but § 7631(f) went too far by refusing funds to any group without a statement denouncing prostitution.\textsuperscript{213} The court stated that, "[b]ecause 7631(f) casts too wide a net and is not narrowly tailored, DKT's exercise of its private speech funded by private means is infringed. In other words, because § 7631(f) is not narrowly tailored, it broadly and impermissibly binds both the private and public funds of DKT."\textsuperscript{214}

\begin{thebibliography}{9}
\bibitem{207} Id. at 10–11.
\bibitem{208} Id. at 11.
\bibitem{209} Id.
\bibitem{210} Id.
\bibitem{211} Id. at 12–13.
\bibitem{212} Id. at 13–14.
\bibitem{213} Id. at 14.
\bibitem{214} Id.
\end{thebibliography}
The district court therefore struck down the requirement as a violation of DKT's First Amendment speech rights.\textsuperscript{215}

On appeal, the Court of Appeals for the D.C. Circuit also found the Policy Requirement to "discriminate on the basis of viewpoint."\textsuperscript{216} However, the \textit{DKT II} court reversed the district court,\textsuperscript{217} relying primarily on \textit{Rust}'s application of the government speech doctrine—that the government can employ private speakers to espouse its own message.\textsuperscript{218} The \textit{DKT II} court acknowledged that like the restriction in \textit{Rust}, the Policy Requirement was a restriction on a project rather than a grantee.\textsuperscript{219} However, the court was persuaded that the dispositive element for the Supreme Court upholding the restriction in \textit{Rust} was the fact that the grantees were not prohibited from "engaging in the protected conduct outside the scope of the federally funded program."\textsuperscript{220} Thus, the \textit{DKT II} court found the facts of the present case to be more analogous to those in \textit{TWR}, where a restriction placed on the grant recipient was upheld because the grantees could create an affiliate organization in order to engage in the proscribed speech.\textsuperscript{221} Therefore, an adequate alternative channel existed because "[n]othing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution."\textsuperscript{222} The D.C. Circuit therefore held that the Policy Requirement did not violate the First Amendment because there were alternative means by which DKT could engage in its speech.\textsuperscript{223}

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\textsuperscript{215} \textit{Id.} at 18.
\textsuperscript{216} DKT Int'l, Inc. v. U.S. Agency for Int'l Dev. (\textit{DKT II}), 477 F.3d 758, 761 (D.C. Cir. 2007).
\textsuperscript{217} \textit{Id.} at 759.
\textsuperscript{218} \textit{Id.} at 761.
\textsuperscript{219} \textit{Id.} at 763.
\textsuperscript{220} \textit{Id.} (citation omitted).
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.}
\textsuperscript{223} \textit{Id.} at 764.
\end{flushleft}
B. The AOSI Court Strikes Down the Policy Requirement

In *Alliance for Open Society International, Inc. v. U.S. Agency for International Development (AOSI I)*, the U.S. District Court for the Southern District of New York heard the same challenge to the Policy Requirement involved in the *DKT* case. The parties who brought suit in *AOSI I* included the Open Society Institute (OSI, though now known as the Open Society Foundations), Alliance for Open Society International, Inc. (AOSI), and the Pathfinder Institute. OSI is a New York-based nonprofit foundation that supports a network of foundations operating worldwide. AOSI, a member of OSI, is a nonprofit organization whose mission is to "promote democratic governance, human rights, public health and economic, legal and social reform in Central Asia." Pathfinder is a nonprofit organization that "provides family planning and reproductive health services in twenty countries."

In addition to USAID, the plaintiffs in *AOSI I* named the U.S. Department of Health and Human Services (HHS) and the U.S. Centers for Disease Control and Prevention (CDC) as defendants. HHS also distributes funds under the Leadership Act, and the CDC coordinates HHS’s Global AIDS Program, which "assists with surveillance, training, monitoring, evaluation, and implementation of HIV/AIDS prevention, treatment, and care programs, by partnering with governments, non-governmental organizations ('NGOs'), international organizations, U.S.-based universities and the private sector." Both AOSI and Pathfinder had received funding from USAID pursuant to the Leadership Act

225. *Id.* at 229.
226. *Id.* at 230.
227. *Id.*
228. *Id.* (internal quotations marks omitted).
229. *Id.*
230. *Id.* at 228–29.
231. *Id.* at 231.
(and Pathfinder also received funding through HHS and CDC), and both groups also received funding from private sources.\(^{232}\)

The \textit{AOSI I} court emphasized the value of the restricted speech in the case, noting the plaintiffs' involvement in "eminently debatable questions such as what may be the most appropriate or effective policy to engage high-risk groups in such efforts," and that "[t]he Policy Requirement, to the extent it prevents NGOs from speaking openly on such questions with their private funds, contravenes our national commitment [to] open debate and our First Amendment values."\(^{233}\)

The court found the opinions of \textit{TWR, League of Women Voters}, and \textit{Rust} to provide the framework for resolving the issue.\(^{234}\) Under this framework the court found heightened scrutiny to be appropriate, while acknowledging that those Supreme Court cases gave "no settled articulation of the heightened standard of review in this area of the law."\(^{235}\) The court rejected the government's argument for rational basis review in part because plaintiffs were not afforded adequate alternative channels of communication.\(^{236}\) Instead, the court looked to whether the restriction was narrowly tailored to achieve the government's stated purpose, a test more closely resembling intermediate scrutiny.\(^{237}\) The court chose this test, which is more deferential than the strict scrutiny applied in \textit{DKT I}, because the "narrow tailoring test has been applied in analogous situations in which a regulation or statute touches on competing constitutional interests, or where there is some

\begin{itemize}
\item 232. \textit{Id.} at 229–30. OSI did not receive funding under the Leadership Act, but feared that it could jeopardize AOSI's Leadership Act funds by not also explicitly opposing prostitution and sex trafficking. \textit{Id.} at 229. The \textit{AOSI I} court did not find for OSI because they were not subject to the Policy Requirement, either as a grantee or as a sub-grantee. \textit{Id.} at 277.
\item 233. \textit{Id.} at 263.
\item 234. \textit{Id.} at 260 ("Taken together, these decisions suggest that when Congress burdens the First Amendment rights of recipients of government benefits by placing restrictions on the eligibility for or use of such benefits, it must leave the recipients with adequate freedom to engage in protected expression through unregulated means.").
\item 235. \textit{Id.} at 267.
\item 236. \textit{Id.} at 261–62.
\item 237. \textit{Id.} at 267.
\end{itemize}
government justification for speech-related harm—for example, in both the commercial speech context and also in the analysis of time, place, and manner restrictions.

The district court found that the government had failed to show a significant interest in the restriction because certain organizations were exempted from the Policy Requirement. The court also found the Policy Requirement was not narrowly tailored because plaintiffs were forced to state their opposition to prostitution and sex trafficking outside the scope of the government program. Responding to the government’s contention that plaintiffs always maintained the ability to speak freely by not participating in the government program, the court stated:

The outcome for which the Government advocates would result in a potentially troublesome government funding arena, one in which the government would have the unmitigated ability to wield its spending power to play favorites, as described above, by supporting and thereby strengthening only those NGOs, entities, and individuals that convey messages supportive of the government’s viewpoint, while placing at a disadvantage, and potentially weakening, those that decline to endorse the government’s message. Insofar as the government engages in this form of viewpoint favoritism among significant players in the public debate of vital issues, whether by coercion or by inducements available only to those who would agree with

238. Id. at 268.

239. Id. at 269 (“The Government’s purported fear of its message being garbled by organizations that accept the Agencies’ funds while simultaneously using their own funds to [endorse], either implicitly or explicitly, the very practices that the program aims to eliminate . . . is not sufficient to warrant the blanket ban on Plaintiffs’ privately funded speech when the exempted organizations are free under the Act to make just such endorsements should they see fit.”) (internal quotation marks omitted).

240. Id. at 270.
the government’s line, the practice would tend to offset the delicate balance of the power relationship between the government and the public that the First Amendment works to calibrate.\textsuperscript{241}

The \textit{AOSI I} court, recognizing the implications of government using its spending power to shift public debate on vital issues, found the Policy Requirement to be an unconstitutional prohibition of the plaintiffs’ First Amendment right to free speech.\textsuperscript{242}

After the \textit{AOSI I} decision was handed down, HHS and USAID developed new Guidelines in 2007 designed to alleviate some of the burden placed on organizations who sought funding under the Act by allowing for affiliate structures.\textsuperscript{243} The Guidelines permitted grant recipients to partner with affiliate organizations that did not comply with the Policy Requirement, provided that the two organizations maintained “adequate separation.”\textsuperscript{244} This separation would be found if (1) legal separation existed between the organizations; (2) no Leadership Act funds were used to aid the affiliate; and (3) the organizations were “physically and financially separate.”\textsuperscript{245} In light of these new Guidelines, the Second Circuit remanded the case for the district court to determine whether an injunction continued to be a necessary remedy.\textsuperscript{246}

On remand, AOSI and Pathfinder sought to add Global Health Council (GHC), an alliance of organizations dedicated to international public health, and InterAction, “the largest alliance of United States-based international development and humanitarian non-governmental organizations (‘NGOs’),” to the complaint, and

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\item \textsuperscript{241} Id. at 276.
\item \textsuperscript{242} Id. at 278.
\item \textsuperscript{244} Id. at 226.
\item \textsuperscript{245} Id. Additional guidance promulgated by HHS and USAID in 2010 revised the Guidelines to no longer require legal separation (though it would still be a factor), and to no longer consider separate management as a relevant factor in determining physical and financial separation. \textit{Id.} at 227.
\item \textsuperscript{246} Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev. (\textit{AOSI II}), No. 06-4035-CV, 2007 WL 3334335, at *846 (2d. Cir. Nov. 8, 2007).
\end{itemize}
to extend the preliminary injunction to them. The trial court granted the motion to add these plaintiffs, and despite the new Guidelines, affirmed its previous holding that the Policy Requirement was an unconstitutional condition of plaintiff organizations' speech.

The court affirmed the application of heightened scrutiny, and posited two primary reasons for finding the Guidelines inadequate as curative measures for the constitutional defects of the Policy Requirement. First, "while the Guidelines may or may not provide an adequate alternate channel for Plaintiffs to express their views regarding prostitution, the clause requiring Plaintiffs to adopt the Government’s view regarding the legalization of prostitution remains intact." Also, "the Guidelines require more separation than is reasonably necessary to satisfy the Government’s legitimate interest, embodied in the Policy Requirement, and that the Guidelines are not narrowly tailored to achieve Congress’s goals."

On appeal for the second time, defendants argued that, because Congress has broad powers under the Spending Clause, and because the organizations were free to decline funding should they wish not to comply with the conditions, the Policy Requirement of the Leadership Act should only be subjected to minimal scrutiny. The Second Circuit Court of Appeals, in AOSI IV, rejected this argument. The court outlined the

248. Id. at 550. It is interesting to note that DKT is a member organization of GHC, and as such, was barred from relief in the case because of the principle of res judicata. See id.
249. Id. at 547.
250. See id. at 545–49.
251. Id. at 545.
252. Id. at 549.
254. Id. at 234.
unconstitutional conditions doctrine and then looked to Supreme Court cases involving conditional speech restrictions, analyzing the holdings of TWR, League of Women Voters, Rust, and Velazquez II. To the court, a synthesis of these cases showed that heightened scrutiny applied when the government restriction was content-based, but that, "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." Also, the restriction could be upheld if, as in Rust, the government itself was the speaker or enlisted private speakers to promote the government's message. Using the framework developed from those cases, the court identified two facets of the Policy Requirement that warranted heightened scrutiny: the viewpoint-based nature of the speech restriction, and the fact that plaintiffs were affirmatively required to speak that viewpoint.

The opinion suggests that the majority found affirmative restrictions (compelled speech) to be inherently more suspect than negative restrictions (compelled silence), stating that "[u]nlike the funding conditions in the cases discussed above, the Policy Requirement does not merely restrict recipients from engaging in certain expression . . . but pushes considerably further and mandates that recipients affirmatively say something." The court went on to say that "[c]ompelling speech as a condition of receiving a government benefit cannot be squared with the First Amendment."

255. Id. at 231 (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)) ("[T]he government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance.").
256. Id. at 231–33.
257. Id.
258. Id. at 233 (quoting Velazquez v. Legal Services Corp. (Velazquez I), 164 F.3d 757, 766 (2d Cir. 1999).
259. Id.
260. Id. at 235–36. The court never explains whether it applied intermediate or strict scrutiny. See id. at 234–36.
261. Id. at 234 (emphasis in original).
Amendment,"262 citing the Supreme Court cases of Wooley v. Maynard,263 Speiser v. Randall,264 and West Virginia State Board of Education v. Barnette.265 These cases involved instances where individuals were compelled to express the government’s view. While Speiser involved a conditional speech restriction, Wooley and Barnette involved speech compelled through threat of government reprimand.266

The court also found the Policy Requirement to be viewpoint based “because it requires recipients to take the government’s side on a particular issue.”267 Furthermore, the court determined heightened scrutiny to be particularly necessary where the restricted viewpoints constituted views on matters of public importance, stating that “[t]he right to communicate freely on such matters of public concern lies at the heart of the First Amendment.”268 The court stressed that the restriction commanded heightened scrutiny not because the grantees’ position was correct, but because the speech concerned a controversial public issue, a type of speech receiving the highest degree of First Amendment protection.269

262. Id.
265. 319 U.S. 624 (1943).
266. Compare Speiser, 357 U.S. at 516 (invoking California law conditioning a property-tax exemption for veterans on the veteran signing a statement on his tax return stating that he would not advocate for the overthrow of the U.S. or California governments), with Wooley, 430 U.S. at 707 (regarding a New Hampshire statute making it a misdemeanor to obstruct from view the motto “Live Free or Die” on vehicle license plates), and Barnette, 319 U.S. at 626–29 (invoking the West Virginia State Board of Education requiring students to salute the American flag or face expulsion).
268. Id. at 236 (citing 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.”)).
The government argued that the Policy Requirement was necessary to transmit information related to a government program, and that the condition should therefore be upheld under Rust's government speech doctrine.\(^{270}\) The court found the government speech doctrine inapplicable because, unlike in Rust, the condition in this case required grantees to voice the government's viewpoint as if it were their own.\(^{271}\) While noting that this type of condition may be permissible in instances where the government's program is in effect its message, the court found that exception inapplicable here because the purpose of the program was to combat HIV/AIDS, not to campaign against prostitution.\(^{272}\) The court rejected the government's argument that advocating against prostitution was central to the program because § 7631(f) expressly exempted certain other AIDS and international organizations from the Policy Requirement.\(^{273}\)

The court concluded by rejecting the government's argument that the agency Guidelines addressed any compelled speech problems in the Policy Requirement.\(^{274}\) The court looked to the adequate alternative channels test from Velazquez I and found that the Guidelines did not satisfy the test, stating that:

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the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.”).  

270. AOSI IV, 651 F.3d. at 236–37.  

271. Id. at 237 (“Suffice it to say that Rust would have been a very different case had the government gone as far as requiring Title X recipients to affirmatively adopt a policy statement opposing abortion, in the way the Leadership Act mandates the adoption of a policy statement opposing prostitution.”).  

272. Id. at 237–38 (“If the government were to fund a campaign urging children to ‘Just Say No’ to drugs, we do not doubt that it could require grantees to state that they oppose drug use by children. But in that scenario, the government's program is, in effect, its message. . . . Defendants cannot now recast the Leadership Act's global HIV/AIDS-prevention program as an anti-prostitution messaging campaign.” (emphasis in original)).  

273. Id. at 238. See 22 U.S.C. § 7631(f) (2006) (“[T]his subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.”).  

274. AOSI IV, 651 F.3d. at 239.
The curative function of an "adequate alternative channel" is to alleviate the burden of a constraint on speech by providing an outlet that allows an organization to engage—through the use of an affiliate—in the privately funded expression that otherwise would have been impermissibly prohibited by the federal program. It simply does not make sense to conceive of the Guidelines here as somehow addressing the Policy Requirement's affirmative speech requirement by affording an outlet to engage in privately funded silence; in other words, by providing an outlet to do nothing at all.275

Thus, the use of an affiliate organization was inadequate as an alternative channel of communication because even if an affiliate group was created to oppose prostitution, the requirement for denouncing it remained intact. Also, the AOSI IV court struck down the Policy Requirement,276 splitting with the D.C. Circuit on the issue of what constitutes adequate alternative channels. The Supreme Court will not draw a bright-line rule for what constitutes an adequate alternative channel on appeal, but the Court will nonetheless be forced to resolve the issue of whether creating an affiliate organization in order to remain silent suffices as an adequate alternative.

C. The AOSI IV Court's Affirmative/Negative Speech Distinction Jeopardizes Its Holding on Appeal

As noted above, the AOSI IV court found that because the Policy Requirement forces groups to affirmatively endorse the government's viewpoint, it warranted heightened scrutiny.277 The

275. Id. (emphasis in original).
276. Id.
277. Id. at 234.
AOSI IV court’s suggestion that compelling speech is more suspect than compelling silence is without strong precedential support.278

There is, however, some support in two Supreme Court cases to which the AOSI IV court cited. In Barnette, which involved compelling students to salute the flag in school, the Court stated that “[i]t would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.”279 Thus, Barnette suggests that the government’s justifications must be stronger when it compels speech than when it mandates silence.280

The AOSI IV court also cited to Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (“FAIR”),281 a case involving the constitutionality of the Solomon Amendment, which withheld federal grants from law schools that denied military recruiters access equal to that of other employment recruiters because of the military’s stance on homosexuality.282 Consistent with this requirement, schools seeking federal grants would be compelled to speak, and thus suggest support for the military’s viewpoint, by way of sending emails and posting notices informing students of the military recruiters, assuming they did the same for other recruiters.283 The Court distinguished the compelled speech cases of Barnette and Wooley, noting that “[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.”284 However, this quote from FAIR does not seem to support the AOSI IV court’s affirmative/negative speech distinction when read in context of the opinion.285 As Circuit Judge Chester Straub points out in his dissent in AOSI IV, the FAIR

278. See id. at 256–58 (Straub, J., dissenting).
280. See AOSI IV, 651 F.3d at 242 (Straub, J., dissenting) (“[T]he Supreme Court has suggested, without holding, that the government may be required to assert an even more compelling interest when it infringes the right to refrain from speaking than is required when it infringes the right to speak.”).
282. FAIR, 547 U.S. at 51.
283. Id. at 61–62.
284. Id. at 62.
285. AOSI IV, 651 F.3d at 258 (quoting FAIR, 547 U.S. at 61–62).
Court was not drawing a distinction based on affirmative or negative speech restrictions, but rather on the content of the speech involved in the cases. While the compelled speech in *Barnette* (salute to the flag) and *Wooley* (displaying state motto on license plates) both depended on the content of the message, the compelled speech at issue before the *FAIR* Court did "not dictate the content of the speech at all." While *Barnette* (and *FAIR* to a much lesser extent) may lend some support to the *AOSI IV* court's conclusion, the Supreme Court has been more consistent in finding the right to speak and the right to silence to be on equal footing. The *Wooley* Court stated that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" The Supreme Court has also explicitly said that "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." The *AOSI IV* court attempted to recast *Wooley* and *Barnette* as unconstitutional condition cases in order to support the proposition that affirmative speech restrictions "push considerably further" than the negative conditional speech restrictions.

286. Id. at 257–58 (Straub, J., dissenting).

287. *FAIR*, 547 U.S. at 62. ("Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.").

288. See, e.g., Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974) ("The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.") (citation omitted).


previously at issue before the Supreme Court. The majority acknowledged that Wooley and Barnette did not involve unconstitutional conditions, yet framed the facts of those cases as if they did. The court’s reliance on the distinction between compelled speech and compelled silence is not only without support, but it was also unnecessary to apply heightened scrutiny. The Supreme Court has long held that viewpoint based speech regulations are subject to heightened scrutiny, which the AOSI IV court applied to the Policy Requirement. Far from lending support to the holding, the affirmative/negative distinction the AOSI IV court draws places an otherwise well-reasoned opinion on unstable ground. If the Supreme Court decides to reverse the Second Circuit, this unfounded basis for applying heightened scrutiny will undoubtedly provide fuel for the fire.

IV. THE NEED TO CLARIFY ADEQUATE ALTERNATIVE CHANNELS IN THE SUPREME COURT’S AOSI DECISION

A. The Supreme Court Should Follow the AOSI IV Court’s Method for When to Apply the Adequate Alternative Channels Test

While the Court will be able to invalidate the Policy Requirement in the AOSI case without upsetting established

291. AOSI IV, 651 F.3d at 214.
292. The majority describes Wooley as “finding unconstitutional requirement that drivers, as condition of using the roads, display state motto ‘Live Free or Die’ on license plates....” Id. (emphasis added). In a similar fashion, Barnette is described as “finding unconstitutional requirement that schoolchildren, as condition of going to school, salute the flag.” Id. (emphasis added).
293. See Alexander P. Wentworth-Ping, Note, Funding Conditions and Free Speech for HIV/AIDS NGOs: He Who Pays the Piper Cannot Always Call the Tune, 81 FORDHAM L. REV. 1097, 1141-42 (2012) (arguing that the concept of compelled speech is not relevant to the unconstitutional conditions analysis). But see Ullian, supra note 68, at 731 (“The Supreme Court in [FAIR] clearly indicated that a funding condition that forced a recipient to endorse government-mandated speech would be an unconstitutional condition.”).
precedent, the Court should seize the opportunity to clarify the unconstitutional conditions doctrine so as to avoid further confusion. As seen above, the Supreme Court’s conditional speech restriction cases have been far from consistent in determining when a restriction amounts to an unconstitutional condition. Whether the condition is termed a “penalty” or a “non-subsidy” has proven a determinative factor in whether the unconstitutional conditions doctrine applies, and yet there is no guidance from the Court to indicate what about a condition will cause it to fall under one of these categories, nor is there an indication of whether the line between the two can be clearly defined. This lack of clarity is problematic for the government when it seeks to restrict speech and for the lower courts when they are asked to determine the constitutionality of such restrictions.

This Note argues that this problem can be alleviated by expressly defining an adequate alternative channels test for conditional speech cases. As seen in the cases discussed above, the Supreme Court has not yet expressly stated that it will apply an adequate alternative channels test for conditional speech cases, and also has not stated at what point in its analysis it will look to alternative channels.

If the adequate alternative channels test is not explicitly defined in the conditional speech context, it invites the possibility for judges to apply the test as a way to justify using less exacting scrutiny in balancing competing interests. This situation may have already played out to some extent in TWR. As discussed above, Justice Blackmun and two others concurred in that case to express

294. See Ullian, supra note 68, at 740 (“Invalidating the Policy Requirement . . . is based largely on longstanding precedent and does not require the overturning or modification of any current case law.”).

295. See Robert C. Post, Recuperating First Amendment Doctrine, 47 STAN. L. REV. 1249 (1995). Professor Post describes the Court’s application of the adequate alternative channels test as “extraordinarily lenient,” and that, “[s]een from a sufficiently detached perspective, of course, ‘alternative’ channels of communication will always exist.” Id. at 1263. Post expresses concern for what he sees as the Court’s use of the adequate alternative channels test as a means of disguising a balancing inquiry. Id. at 1264.

296. See supra Part II.A.1.
that TWR’s ability to establish an affiliate organization was the key reason for upholding the statute.\textsuperscript{297} Blackmun may have concurred because the majority would have upheld the statute regardless of whether TWR had an adequate alternative channel available. If this is the case, then it would seem unnecessary for the majority to have engaged in this analysis at all. That the Court did so might suggest that it was speaking in dicta, or perhaps that it was providing a basis for the statute to be reviewed in a more deferential light.\textsuperscript{298}

If the Supreme Court continues using an adequate alternative channels test for conditional speech restrictions, it should explicitly state the test so as to provide guidance for when and how the test will apply. As for when the test should apply, the Court should look to the \textit{AOSI IV} court’s opinion. The \textit{AOSI IV} court applied the adequate alternative channels test only after determining that heightened scrutiny applied to the Policy Requirement. The court expressly recognized adequate alternative channels as being a “curative function” for an otherwise impermissible speech restriction.\textsuperscript{299} By recognizing the constitutional deficiency of the speech restriction before looking to alternative channels, a court gives more teeth to the test through more searching inquiry into whether the alternative is truly “adequate,” rather than an inquiry simply into whether alternatives exist.\textsuperscript{300} Viewed under heightened scrutiny, the presence of

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\item \textsuperscript{297} Regan v. Taxation With Representation, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring) (“The constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4).”).
\item \textsuperscript{298} See Chaney, \textit{supra} note 119, at 279–80 (arguing that a different standard of review applies in “permissible non-subsidy” cases, where the Supreme Court will apply an “undue burden” test instead of the adequate alternative channels test).
\item \textsuperscript{299} Alliance for Open Soc’y Int’l v. U.S. Agency of Int’l Dev. (\textit{AOSI IV}), 651 F.3d 218, 239 (2d Cir. 2011), cert. granted, ___ U.S. ___, 133 S. Ct. 928 (2013).
\item \textsuperscript{300} See Lee, \textit{supra} note 133, at 806 (“[T]he adequacy of alternatives cannot be assumed; a detailed analysis of factors such as autonomy from gatekeepers, cost, and the ability to reach the intended audience is necessary.”). The \textit{DKT II} court, for example, never expressly recognized any constitutional deficiency in the Policy Requirement. The court looked to whether an alternative channel existed, and seemed satisfied when the
adequate alternative channels allows the government to overcome the presumption that the restriction is unconstitutional.\(^{301}\)

**B. The AOSI IV Majority Correctly Applied the Adequate Alternative Channels Test**

As discussed above, the Supreme Court should follow the AOSI IV court in explaining *when* to apply the adequate alternative channels test. In light of the theory behind the adequate alternative channels test it is clear that, of the circuit court opinions applying the test, the AOSI IV majority was also the one to correctly determine *how* it is to be applied.

The DKT II court found an adequate alternative channel because, while the Policy Requirement alone required DKT to disavow prostitution both inside and outside the scope of the program, DKT could remain neutral and create an affiliate that government could show that an alternative did exist without probing into its adequacy, as evidenced by an exchange at oral argument:

COURT: Suppose that DKT just spins off a subsidiary corporation, and the subsidiary takes the pledge, but the parent organization does not. Is that okay? There's nothing in the regulations that would prohibit that, is there?

GOVERNMENT COUNSEL: There's absolutely nothing in the regulations that could prohibit it. . . . There's nothing preventing them from doing that.

COURT: All their complaints could be solved by a corporate reorganization?

GOVERNMENT COUNSEL: That's right.


301. See Ullian, *supra* note 68, at 729 ("In circumstances involving government speech or adequate alternative channels, the presumption of unconstitutionality for laws abridging freedom of speech can be overcome."). Some restrictions will not overcome the presumption regardless of whether adequate alternative channels exist, such as when strict scrutiny is applied to a content-based restriction. See Volokh, *supra* note 135, at 1307 ("[T]he Court has been right . . . to treat content-based restrictions as presumptively unconstitutional without an inquiry into how much the restriction burdens speech or into whether the restriction leaves open ample alternative channels.").
would receive Leadership Act funds and pledge an opposition to prostitution.\footnote{DKT Int'l, Inc. v. U.S. Agency for Int'l Dev. \textit{(DKT II)}, 477 F.3d 758, 763 (D.C. Cir. 2007).} The court did not provide more in-depth analysis, and for that reason it may be helpful to look to \textit{AOSI IV}'s dissenting opinion to illuminate the argument that alternative channels were adequate in the \textit{DKT II}.

In a lengthy and strongly-worded dissent, Judge Straub argued that a condition is not unconstitutional where the government seeks to control the message of its own program\footnote{Alliance for Open Soc'y Int'l v. U.S. Agency of Int'l Dev. \textit{(AOSI IV)}, 651 F.3d 218, 240 (2d Cir. 2011) (Straub, J., dissenting), cert. granted, ___ U.S. ___, 133 S. Ct. 928 (2013).} and the conditions do not limit free speech outside the scope of the government program.\footnote{\textit{Id.} at 248 (Straub, J., dissenting).} Judge Straub stated that "\textasciitilde[w]hen adequate alternative channels are available, any restrictions on protected First Amendment activity imposed within the scope of the federal program only apply to that federally funded program and therefore are not the equivalent of direct restrictions" like the criminal charges at issue in \textit{Wooley}.\footnote{\textit{Id.} at 249 (Straub, J., dissenting).} The Agency Guidelines clearly demonstrated that adequate alternative channels existed because plaintiffs were allowed to "create affiliate organizations to receive Leadership Act funds" and still "continue to remain silent or to espouse a pro-prostitution message with non-Leadership Act funds."\footnote{\textit{Id.} at 259 (Straub, J., dissenting).} Judge Straub accordingly sided with the \textit{DKT II} court in finding that the Policy Requirement does not restrict First Amendment speech outside the scope of the Leadership Act program.\footnote{\textit{Id.} at 258.}

Responding to the majority's argument that the affiliate structure cannot remedy a compelled speech condition "by affording an outlet to engage in privately funded silence,"\footnote{\textit{Id.} at 259 (emphasis in original).} Judge Straub stated that:

\begin{itemize}
  \item \footnote{DKT Int'l, Inc. v. U.S. Agency for Int'l Dev. \textit{(DKT II)}, 477 F.3d 758, 763 (D.C. Cir. 2007).}
  \item \footnote{Alliance for Open Soc'y Int'l v. U.S. Agency of Int'l Dev. \textit{(AOSI IV)}, 651 F.3d 218, 240 (2d Cir. 2011) (Straub, J., dissenting), cert. granted, ___ U.S. ___, 133 S. Ct. 928 (2013).}
  \item \footnote{\textit{Id.} at 248 (Straub, J., dissenting).}
  \item \footnote{\textit{Id.} at 249 (Straub, J., dissenting).}
  \item \footnote{\textit{Id.} at 259 (Straub, J., dissenting).}
  \item \footnote{\textit{Id.} at 258.}
  \item \footnote{\textit{Id.} at 259 (emphasis in original).}
\end{itemize}
The cases we summarized... all dealt with subsidy conditions that imposed negative restrictions on speech and therefore it is no surprise that the dual-structures contemplated were thought of as “adequate alternative channels” for restricted speech rather than for the right to refrain from speaking. In this case, it may be that it does not make sense to think of the Guidelines as providing an “outlet to engage in privately funded silence”... but that does not affect whether affiliate provisions, like the Guidelines, prevent subsidy conditions, like the Policy Requirement, from amounting to penalties on First Amendment rights. I see no reason why an affirmative-speech subsidy condition should be treated differently.\textsuperscript{309}

Judge Straub is correct that the Court had not previously dealt with the adequacy of alternative channels for plaintiffs who were compelled to speak as a condition of receiving a government benefit. However, his analysis falls short to the extent that it suggests that an affiliate structure would cure the constitutional defects of the condition ipso facto.\textsuperscript{310}

The curative function of the adequate alternative channel is that it offers a way for the grantee to receive the government benefit without wholly surrendering his constitutional right to free speech. Announcing a per se rule that affiliate organizations serve as adequate alternatives reduces the adequate alternative channels test to an “alternative channels test,” relieving the government of

\textsuperscript{309} Id. at 259 n.5.

\textsuperscript{310} The idea of affiliate organizations serving as an “adequate” alternative has been challenged. One commentator noted: “In practice, this wasteful and duplicative alternative is impossible. Of the approximately 200 legal services programs nationwide, only a handful have even attempted to set up such facilities, and those few that have done so have struggled.” Madeline Lee, \textit{Why I'm Suing the Federal Government}, \textsc{Found. News & Comment.} 24 (May/June 2002), available at \url{http://www.foundationnews.org/CME/article.cfm?ID=1953}. 2013] ALTERNATIVE CHANNELS TEST 691
its burden in each case to show that the plaintiff's particular message can be adequately conveyed in an alternative manner.\textsuperscript{311}

The deficiency of the affiliate structure as a curative measure in \textit{AOSI IV} can be seen in comparison with the affiliate structure in \textit{TWR}. TWR, acting alone, could not conduct the speech activity it preferred (substantial lobbying) and receive government benefits (tax exemption). However, treating TWR and its affiliate as one entity, TWR could both conduct its preferred speech activity and receive government benefits. By contrast, \textit{AOSI IV} plaintiffs, acting alone, could not conduct the speech activity they preferred (silence) and receive government benefits (Leadership Act funds). Together with an affiliate structure, \textit{AOSI IV} plaintiffs still are unable to have both.

Judge Straub and the \textit{DKT II} court may respond by saying that one should only look to the individual organization to determine whether the restriction on the organization has been remedied, without looking to the organization and its affiliate as a whole. Under this approach, one could say that \textit{AOSI IV} plaintiffs are able to both remain neutral and conduct AIDS relief work with government funds (albeit in a very limited sense, as the organizations are required to maintain adequate separation from the affiliate receiving Leadership Act funds).

The problem with this approach is that it creates a legal fiction whereby the constitutional violation evaporates because it is forced upon an affiliate organization. If the \textit{AOSI IV} plaintiffs accepted Leadership Act funds and pledged opposition to prostitution and sex trafficking, could it reasonably be argued that

\textsuperscript{311} See Ullian, \textit{supra} note 68, at 729, 735–36 (arguing that the adequate alternative channels doctrine is not applicable to the Policy Requirement, and that “the presumption of unconstitutionality remains”); Wentworth-Ping, \textit{supra} note 293, at 1143 (arguing that the affiliate organization structure in \textit{AOSI} does not save the Policy Requirement from unconstitutionality). But see Cole Davis, Case Note, \textit{Unconstitutional Conditions: The Second Circuit Splits with the D.C. Circuit and Erroneously Finds Anti-Prostitution Pledge Required for HIV/AIDS Funding Unconstitutional}, 65 SMU L. REV. 213, 218 (2012) (“[T]he recipients are free to form subsidiaries to accept the funds and adopt the anti-prostitution pledge, while at the same time the parent organization may maintain its neutral or even prop-prostitution views. The Act’s guidelines are the same as those that saved the restrictions in \textit{Rust} and \textit{TWR}.”)}
their constitutional rights have been restored when they create an affiliate organization to remain silent and express neutrality on the issue? It is difficult to see how the affiliate organization will have changed the circumstances for the plaintiffs. If this hypothetical suggests that the grantees would still be deprived of their speech rights, why would the result be any different if it were the affiliate organization bearing the burden of making the pledge in order to receive Leadership Act funds? By focusing only on each individual organization, the issue remains that the affiliate organization now is having its constitutional rights violated. If the affiliate were to subsequently bring suit, it could just as easily make the same argument as the original AOSI plaintiffs — that the government placed an unconstitutional condition on Leadership Act funds through the Policy Requirement.

The Supreme Court should therefore pattern its adequate alternative channels analysis after the AOSI IV court’s application of the test if it is to be consistent with the test’s purpose of protecting an organization’s ability to communicate its message effectively.312 The AOSI IV court recognized that the Policy Requirement was unlike the restriction in Rust because the condition attached to the plaintiff organizations rather than to the program—the nonprofits could not advocate for prostitution even with wholly private funds. The court found the organizations to be without adequate alternatives to express their views on prostitution and sex trafficking, unlike the group in TWR.313 Regardless of the ability to create an affiliate, the restriction would perpetuate “organizations’ inability to make known their views . . . without incurring the unconstitutional penalty.”314 Once a speaker is compelled to convey a message, the creation of an affiliate to allow him to speak contrary to that message cannot undo the effect of, and thus does not cancel out, the message originally conveyed.315

312. See supra notes 131–32 and accompanying text.
313. See supra notes 272–73 and accompanying text.
315. See Wentworth-Ping, supra note 293, at 1144 (“[T]he NGO [cannot] disavow the Policy Requirement once it has been declared. The condition
V. CONCLUSION

The circuit split over the constitutionality of the Policy Requirement of the Leadership Act is understandable in light of the opaque Supreme Court precedent regarding the unconstitutional conditions doctrine. While the AOSI IV court reached the correct holding, the questionable reasoning it employed by drawing a distinction between affirmative and negative speech restrictions makes it unlikely that the Supreme Court will adhere to its rationale. However, the Supreme Court can and should explicitly adopt the adequate alternative channels test used by the AOSI IV court. In so doing, the Court would provide more certainty for when a speech restriction might rise to the level of an unconstitutional condition. Invalidating the Policy Requirement of the Leadership Act would not only be consistent with Supreme Court precedent, but would also support policy considerations for respecting the speech autonomy of charitable nonprofit organizations.