

Do Foreigners Have Free Speech Rights, Especially When Advocating for Prostitution

The United States Supreme Court has taken up some interesting and seemingly benign issues that have brought implications for the future. One of those cases is *Agency for International Development vs. Alliance for Open Society International, Inc.*, 2020 U.S. LEXIS 3514 (June 29, 2020) Kavanaugh, J.

In 2003, Congress passed and President George W. Bush signed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act, known as the Leadership Act. 117 Stat. 711, as amended, 22 U.S.C. §7601 et seq. intended to enhance America's response to the ravages of the global HIV/AIDS crisis, the Leadership Act launched "the largest international public health program of its kind ever created." §7601(29). The Act has helped save an estimated 17 million lives, primarily in Africa, and is widely viewed as the most successful American foreign aid program since the Marshall Plan.

Plaintiffs were American nongovernmental organizations that received Leadership Act funds to fight HIV/AIDS abroad. Plaintiffs maintained that they did not want to express their agreement with the American commitment to eradicating prostitution. Plaintiffs considered a public stance of neutrality toward prostitution more helpful to their sensitive work in some parts of the world and also to their full participation in the global efforts to prevent HIV/AIDS.

After enactment of the Leadership Act, Plaintiffs challenged the Policy Requirement, alleging that it violated the First Amendment. In 2013, this Court agreed, concluding that the Policy Requirement ran afoul of the free speech principle that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected.... freedom of speech." *Agency for Int'l Development vs. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 214, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013) (internal quotation marks omitted). Therefore, the Policy Requirement no longer applied to *American* organizations that received Leadership Act funds, meaning that American organizations could obtain Leadership Act funds even if they did not have a policy explicitly opposing prostitution and sex trafficking. Prostitution and sex trafficking have been major issues for women throughout the world and opposing such behaviors has been a strong bipartisan policy in the United States.

The Court granted certiorari and reversed the judgment of the Second Circuit. Plaintiff's position runs headlong into two bedrock principles of American law. It is long settled said the Court that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution. Foreign citizens in the United States may enjoy certain constitutional rights such as due process. Plaintiff's foreign affiliates were incorporated in other countries and were found to be largely separate from Plaintiff American

organizations. Plaintiffs did not ask the Court to pierce the corporate veil nor did they invoke any other relevant exception to the fundamental corporate law principle that foreign organizations remain distinct from the American organizations.

As foreign organizations operating abroad, Plaintiff's foreign affiliates possessed no rights under the First Amendment. Plaintiff's foreign affiliates are foreign organizations, and foreign organizations operating abroad have no First Amendment rights.

The Court avoided the more thorny question as to whether congressional enactment may require certain behaviors which arguably pertain to free speech and therefore invoke the First Amendment. This sage decision is supportive of congressional intent, without trampling on those First Amendment rights possessed by United States citizens.

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