Case No. 16-4027

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PLANNED PARENTHOOD OF GREATER OHIO;
PLANNED PARENTHOOD OF SOUTHWEST OHIO REGION,

Plaintiffs-Appellees,

v.

LANCE HIMES, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Ohio, Western Division

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, SUPPORTING APPELLANTS AND REVERSAL

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INTEREST OF *AMICUS*[1]

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys regularly appear before the U.S. Supreme Court, federal courts of appeals (including this Court), and other courts as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *Matal v. Tam*, 137 S. Ct. 1744 (2017), addressing a variety of constitutional law issues, including the Free Speech Clause of the First Amendment.

SUMMARY OF THE ARGUMENT

The panel in this case misread the Supreme Court's decision in *Agency for International Development v. Alliance for Open Society International, Inc*. That case cannot be understood as a bar on all health education program selection criteria that relate to a funding recipient's identity. If that were so, the government would be forced to select any otherwise qualified organization to promote its messages, no matter how discordant the entity's outside advocacy is with the message the state wishes to promote. The National Organization for the Reform of Marijuana Laws

[1]All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

(NORML), for example, must be enlisted to promote a state's anti-drug use program. Neither the First Amendment nor the *Alliance* case so severely ties the government's hands in establishing program selection criteria.

The panel's decision is also incompatible with this Circuit's line of cases holding that government employees may be fired for private speech that conflicts with the government's policy where the employee bears responsibility for promoting that policy. If government may select employees who most credibly promote the government's policies, it should have equal if not greater autonomy to do so when selecting contractors who receive millions in taxpayer dollars.

ARGUMENT

This case raises the question whether the unconstitutional conditions doctrine precludes a state from establishing funding program selection criteria that bar taxpayer monies from flowing to a leading national opponent of a core state policy undergirding the program. The answer is no, and the Supreme Court's decision in *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013) does not compel a contrary conclusion.

The Supreme Court's abortion funding precedents establish that both the state and federal governments are free to discourage abortion, including through allocation of taxpayer dollars. *Rust v. Sullivan*, 500 U.S. 173, 200–01 (1991)

(upholding federal regulations prohibiting federal funds recipients from engaging in activities that directly or indirectly promoted abortion); *Maher v. Roe*, 432 U.S. 464, 465–66 (1977) (upholding state regulation denying payments for non-therapeutic abortions to Medicaid recipients). The government's prerogative to discourage abortion through the allocation of taxpayer dollars encompasses the power to establish health program selection criteria that ensure that the contracting entities will credibly promote the state's policy favoring childbirth. Criteria which result in the exclusion of a preeminent national opponent of a state's policy constitutionally prevent the state's policy and message from being undermined.

I. There is a Crucial Distinction between Permissible Eligibility Criteria and Unconstitutional Conditions.

Governments are entitled to espouse a policy, or to take a position, and in so doing, they represent the views of their citizens. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). States need not be indifferent to the attributes of applicants who seek taxpayer funds to participate in state education programs. The unconstitutional conditions doctrine does not require Ohio to allocate taxpayer funds to an organization that promotes an unrestricted abortion license, where that promotion is contradictory to the state's policy favoring childbirth.

"'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.'" *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)). State governments thus have the power, within limits, to establish eligibility criteria, even when those criteria touch upon an applicant's speech or viewpoint. "Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *NEA v. Finley*, 524 U.S. 569, 587–88 (1998). Would-be grantees must then satisfy those criteria in order to receive taxpayer funding as part of government programs.

If Congress need not fund "a program to encourage competing lines of political philosophy such as communism and fascism," when establishing a National Endowment for Democracy, *Rust*, 500 U.S. at 194, it follows that Congress may also exclude the National Communist Party as a funding recipient for programs related to the promotion of democracy – such as educational programs about federalism, separation of powers, free market capitalism, or even the history of Communist dictatorships. Regardless of whether the National Communist Party is able to provide educational materials on those particular topics, its identity as a leading

opponent of democracy outside the government program justifiably disqualifies it from being the government's paid messenger.

Similarly, a state program to provide health services for infants with Down's Syndrome ought to be free to disqualify groups that advocate for an unrestricted abortion license encompassing the termination of pregnancies for genetic abnormalities. Even though the state program's purpose is not specifically to discourage the abortion of Down's Syndrome babies, the state's chosen message that infants with Down's Syndrome are fully human and deserving of all necessary health services, would be significantly undermined by a program contractor that vigorously advocates for the abortion of babies for any reason (including babies with genetic abnormalities), even outside the scope of the government's program.

In the same vein, a state program funding an anti-smoking message to teens could disqualify tobacco companies, even if those companies agree that teens should not purchase or use cigarettes. The state could properly determine that an organization advocating, indeed profiting from tobacco use, could not effectively communicate the state's preferred message that smoking is to be avoided. In both of the foregoing scenarios, the state's policy – presumably reflecting the views of its citizenry – would be significantly undermined by funneling taxpayer dollars to a contractor that is devoted to advocacy in tension with the state's goal.

Planned Parenthood has a principal purpose to advocate for an unrestricted abortion license.[2] The organization's stature as one of the nation's leading abortion advocates (and providers) cannot be gainsaid. In its 2016–2017 Annual Report, Planned Parenthood boasted that it defeated more than 130 pro-life bills just since 2010.[3] The organization has opposed virtually every bill dealing with abortion regulation from parental notification laws to bans on late term abortion and sex-selective abortion.

Planned Parenthood has also fought against legislative efforts to protect the health and safety of women in abortion clinics, even where the right to abortion was only tangentially (if at all) implicated. One example of many suffices. In *Planned Parenthood of Kansas & Mid-Missouri, Inc. v. Drummond*, No. 07-4164-CV-C-ODS, 2007 U.S. Dist. LEXIS 63119, at *1–12 (W.D. Mo. Aug. 27, 2007), Planned Parenthood challenged a law requiring "abortion clinics to meet the same standards as the ambulatory surgery centers in the state, ensuring the health and safety of

[2]*See, e.g.*, *Planned Parenthood 100 Years: 2016–2017 Annual Report*, Planned Parenthood, 24–25, [hereinafter *2016–2017 Annual Report*] https://www.plannedparenthood.org/uploads/filer_public/71/53/7153464c-8f5d-4a26-bead-2a0dfe2b32ec/20171229_ar16-17_p01_lowres.pdf (last visited July 12, 2018) (lobbying and litigation for abortion); *see also id.* at 31 (over 30,000 abortions done in reporting year).

[3]*2016–2017 Annual Report*, *supra* note 2, at 24.

women seeking abortions."

Most recently, Planned Parenthood has opposed Ohio legislation prohibiting abortion based on sex-selection or genetic disabilities.[4]

The First Amendment protects the rights of all organizations to advocate for any policy they choose. It does not require the government to contract with those organizations, or their affiliates, to deliver government services when the organization's status as a national opponent of a state's policy will undermine its affiliates' ability to promote the pertinent government policy.

II. The Supreme Court's Decision in *Agency for International Development v. Alliance for Open Society International, Inc.* Does Not Bar Ohio from Selecting Program Participants Who Do Not Advocate Against the State's Policy Favoring Childbirth.

The panel misread the Supreme Court's decision in *Agency for International Development*, ("*AID*"), which held that the government may not compel a grant recipient to adopt a particular belief as a condition of funding. 570 U.S. at 221. *AID*

[4] Ariana Eunjung Cha, Babies with Down Syndrome are put on Center Stage in the U.S. Abortion Fight, Wash. Post (Mar. 5, 2018), https://www.washingtonpost.com/news/to-your-health/wp/2018/03/05/down-syndrome-babies-are-taking-center-stage-in-the-u-s-abortion-fight/?utm_term=.7cf1b6adc1b5. Steven Ertelt, Planned Parenthood Opposes Ohio Bill to Ban Abortions on Babies with Down Syndrome, LifeNews.com (Apr. 10, 2015, 3:55 PM), http://www.lifenews.com/2015/04/10/planned-parenthood-opposes-ohio-bill-to-ban-abortions-on-babies-with-down-syndrome/.

involved the Leadership Act, a federal program to combat the spread of HIV/AIDS around the world. The program required funding recipients to adopt a policy of explicitly opposing prostitution and sex trafficking. *Id*. at 208. Alliance, the organization challenging the funding requirement, wished to remain neutral, particularly with respect to prostitution because it feared that express opposition to prostitution would alienate certain foreign governments. *Id*. at 211.

In striking down the requirement, the Court held that the funding requirement went beyond mere selection criterion. "This case is not about the [g]overnment's ability to enlist the assistance of those with whom it already agrees. It is about compelling a grant recipient to adopt a particular belief as a condition of funding." *Id*. at 218.

AID involved the governmental compulsion of speech from grant recipients who *preferred not to take a public position on prostitution*. *Id*. at 211. In contrast to Planned Parenthood's longstanding advocacy for an unrestricted right to abortion, the Alliance grant recipients were not leading advocates for an unqualified international right to prostitution. They did not actively undermine the government's policy outside the scope of the Leadership Act. *AID* therefore cannot be understood as a complete bar upon the government's authority to exclude program participants whose overarching purpose outside the program is to contradict a program-related

government policy.

Reading *AID* as the panel did also creates dissonance with this Court's decisions, discussed below, holding that confidential government employees can be terminated for far less contradictory advocacy than Planned Parenthood engages in.

III. The Panel's Decision Cannot Be Reconciled with this Court's Decision in *Rose v. Stevens* Extending the *Elrod/Branti* Doctrine to Employee Speech.

The panel's decision creates an anomaly in this Circuit: a government employee can be terminated for speaking "in a manner that undermines the trust and confidence that are central to his position," *Rose v. Stevens*, 291 F.3d 917, 923 (6th Cir. 2002), but a government contractor cannot. In *Rose*, this Court applied the Supreme Court's decisions in *Elrod v. Burns*, 427 U.S. 347, 359–60 (1976) and *Branti v. Finkl*, 445 U.S. 507 (1980) to government employee speech, holding that "it is insubordination for an employee whose position requires loyalty to speak on job-related issues in a manner contrary to the position of his employer." *Rose*, 291 F.3d at 923.

Elrod and *Branti* applied the unconstitutional conditions doctrine to cases where government employees were terminated for their political affiliation. *Elrod* held that an Illinois Sheriff imposed an unconstitutional condition upon certain non-civil-service employees when he fired them for not being members of the

Democratic Party. 427 U.S. at 359–60. *Branti* held that assistant public defenders' continued employment could not be conditioned on allegiance to the Democratic Party. 445 U.S. at 519.

Both *Elrod* and *Branti* recognized an exception, however, for public employees in policymaking or confidential positions. Requiring politically loyal employees is permissible where the government demonstrates that the requirement is necessary to ensure that representative government is not "undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Elrod*, 427 U.S. at 367; *see also Branti*, 445 U.S. at 517.

In *Rose*, this Court joined three other Circuits holding that the *Elrod/Branti* exception applies "where a policymaking or confidential employee is discharged on the basis of actual speech rather than political affiliation." 291 F.3d at 921; *see also Barker v. City of Del. City*, 215 F.3d 1134, 1139 (10th Cir. 2000); *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 971–72 (7th Cir. 2001) (stating that it would be a "strange rule" that protects actual attacks by policymaking employees but not mere affiliation in the "wrong party"); *Flynn v. City of Bos.*, 140 F.3d 42, 47

(1st Cir. 1998). Incorporating the *Connick/Pickering* balancing test[5] applicable to government employee speech, this Court concluded that "where an employee is in a policymaking or confidential position and is terminated for speech related to his political or policy views, the *Pickering* balance favors the government as a matter of law." 291 F.3d at 922. The court explained:

> This rule flows logically from the Supreme Court's recognition in the political patronage cases that the government has a legitimate interest in securing employees who will loyally implement its policies. Permitting the government to dismiss employees who fall within the policymaking or confidential categories when they voice opinions on political or policy-related issues is an appropriate means of promoting that interest because the government already enjoys the right to choose or dismiss those employees on the basis of their political views. As noted above, it would make little sense to permit the government to preemptively dismiss employees on the basis of political affiliation alone, while restricting its ability to respond to an overt act of disloyalty by an employee in the same position.
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> . . . .
>
> When such an employee speaks in a manner that undermines the trust and confidence that are central to his position, the balance definitively tips in the government's favor because an overt act of disloyalty necessarily causes significant disruption in the working relationship between a confidential employee and his superiors.

[5]In *Connick v. Myers*, 461 U.S. 138, 140 (1983), the Supreme Court established a two-part test for evaluating whether the discharge of a public employee violates the First Amendment. The threshold question asks whether the employee's speech addresses a "matter[] of public concern." If the speech relates to a matter of public concern, then the court employs the balancing test outlined in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), to determine if the employee's free speech interests outweigh the efficiency interests of the government as an employer.

Id. at 922–23 (citations omitted).

Although *Rose* applies to government *employees*, there is no principled basis upon which to distinguish between government employees and *contractors* hired by the state, especially when the contractors are paid to promote the state's policies. Recognizing the difficulty of determining when an employee's position justifies termination for his political affiliation, the *Branti* Court stated that responsibility for communicating the government's message would certainly be dispositive. 445 U.S. at 518. "It is . . . clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments." *Id*.

Were Planned Parenthood a state employee responsible for promoting Ohio's Public Health programs policies, it could certainly be terminated for its outside advocacy under this Court's government employee speech cases. For example, in *Dixon v. University of Toledo*, 702 F.3d 269, 277 (6th Cir. 2012), this Court held that a state university could fire Dixon, an African-American employee, for writing a local newspaper column opining that homosexuality is not an immutable trait like race. Even though Dixon never explicitly stated that the University diversity policies should not extend to LGBT students and employees, this Court held that Dixon's

immutability op-ed undermined the university's policy that LGBT students were entitled to civil rights protections, a policy Dixon was responsible for implementing. *Id*.

Planned Parenthood's advocacy contradicting the pro-child birth policy of Ohio's Public Health Programs dwarfs that which cost Dixon her job. And, as a funding recipient, Planned Parenthood is responsible for communicating Ohio's policies in each of the Public Health programs. It makes no sense to hold that government employees can be fired for a single communicative act that does not even directly contradict the government's policy, but government contractors may receive millions in taxpayer funds to promote the government's pro-childbirth policy while simultaneously mounting a national campaign opposing all state measures related to abortion.

In the light of the policies that Ohio's Public Health Programs seek to promote, a less credible spokesman than Planned Parenthood can hardly be imagined. The unconstitutional conditions doctrine should not be interpreted to force the state of Ohio to enlist Planned Parenthood's participation.

CONCLUSION

For the foregoing reasons, Amicus respectfully asks this Court to reverse the District Court's judgment.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 3,240 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word processing software in 14-pt Times New Roman font.

Dated: July 30, 2018

/s/ Jay A. Sekulow
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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2018, I electronically filed a copy of the foregoing *Amicus Curiae* Brief using the ECF System which will send notification of that filing to all counsel of record in this litigation. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 30, 2018

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