Appropriations Law Year-in-Review

Matter of: U.S. Postal Service—Applicability of Appropriations Act Provision Under Continuing Resolution

File: B-324481

Date: Mar. 21, 2013

On February 6, the U.S. Postal Service (USPS) announced that beginning the week of August 5, it would reduce mail delivery to street addresses from six days a week to five days a week, despite a provision in the Financial Services and General Government Appropriations Act, 2012, which required USPS to continue six-day delivery and rural delivery of mail at not less than the 1983 level. USPS asserted that the six-day delivery provision does not apply during the Continuing Appropriations Resolution, 2013, because the Continuing Resolution appropriated no funds to USPS. GAO concludes that the six-day delivery provision continues to apply to USPS during the Continuing Resolution. Absent specific legislative language, a continuing resolution maintains the status quo regarding government funding and operations. Although the provision at issue here is an operational directive, not an appropriation, we see no language in the Continuing Resolution to indicate that Congress did not expect the provision to continue to apply during the Continuing Resolution.

Matter of: Bureau of Engraving and Printing—Currency Reader Program

File: B-324588

Date: June 7, 2013

The Bureau of Engraving and Printing (BEP) may use appropriated funds to purchase and give currency readers to blind and visually impaired individuals as part of its compliance with a federal district court order to provide such individuals with meaningful access to U.S. currency. BEP's proposed approach is reasonable and consistent with BEP's statutory mission. BEP's distribution of currency readers serves to achieve BEP's objective of providing immediate relief to blind and visually impaired individuals as BEP continues its efforts with regard to multiple accommodations, including the addition of tactile features, large high-contrast numerals, and different colors to each denomination of U.S. currency that it is permitted to alter.

Matter of: HUD Home Program Grants—Statutory Commitment Deadline

File: B-322077

Date: July 17, 2013

Section 218(g) of the HOME Investment Partnership Act (Act), 42 U.S.C. § 12748(g), imposes a two-year deadline by which participating jurisdictions must commit grant funds allocated to them under the HOME Investment Partnership Program (HOME program). Section 218(g) requires the Department of Housing and Urban Development (HUD) to recapture grant funds that remain uncommitted by participating jurisdictions after the statutory deadline and reallocate such funds through additional formula grants to participating jurisdictions. HUD's Office of Inspector General has identified instances where HUD has permitted some jurisdictions to retain and commit HOME program grant funds beyond the statutory deadline. By failing to recapture and reallocate uncommitted grant funds from the jurisdictions at issue, HUD has not complied with the requirements of section 218(g).

Matter of: March 1 Joint Committee Sequestration for Fiscal Year 2013

File: B-324723

Date: July 31, 2013

The failure of the Joint Select Committee on Deficit Reduction to propose, and Congress and the President to enact, legislation to reduce the deficit by $1.2 trillion triggered the sequestration process in section 251A of the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA), as amended. Section 251A required the Office of Management and Budget (OMB) to calculate, and the President to order, a sequestration of discretionary and direct spending on March 1, 2013. BBEDCA also required OMB to submit a report to Congress on that same date.

The House Budget Committee requested that GAO review several aspects of sequestration including the President's March 1 sequestration order and OMB's March 1 report; agencies' planning and implementation of sequestration and what alternatives were considered; and the effects of sequestration on agency operations and on services to the public. As agreed with the Committee, this opinion responds to the request that GAO review whether the March 1 actions—OMB's calculations, the President's sequestration order, and OMB's report—complied with section 251A of BBEDCA. GAO concludes that the March 1 actions satisfied the BBEDCA requirements.

Matter of: Department of Health and Human Services—Multiyear Contracting and the *Bona Fide* Needs Rule

File: B-322455

Date: Aug. 16, 2013

Without statutory authority, fixed period appropriations are only available for the genuine or *bona fide* needs arising in the period of availability for which they are made. Thus, an agency may not obligate current appropriations for the *bona fide* needs of future fiscal years without statutory authority. One provision of the Federal Acquisition Streamlining Act, now codified at 41 U.S.C. § 3903, provides a statutory exception to the so-called *bona fide* needs rule. Section 3903 authorizes executive agencies to obligate current appropriations to enter a multiyear contract for the acquisition of both nonseverable and severable services for the *bona fide* needs of up to five fiscal years.

The *bona fide* needs rule applies to cost-reimbursement contracts, just as it does to other contract types. An agency may use a cost-reimbursement contract to procure severable services that cross fiscal years if done in conjunction with multiyear contracting authority. When modifying a cost-reimbursement contract to procure additional severable services, an agency must also ensure the modification complies with the *bona fide* needs rule or one of its statutory exceptions at the time of modification.

Matter of: U.S. Commodity Futures Trading Commission—Customer Protection Fund

File: B-324469

Date: Nov. 8, 2013

The U.S. Commodity Futures Trading Commission (Commission) administers the Customer Protection Fund, which is available for the payment of awards to eligible whistleblowers, and the funding of customer education initiatives. In accordance with statute, the Commission shall deposit certain collected monetary sanctions into the Fund as long as the balance of the Fund at the time the monetary sanction is collected is less than $100 million. 7 U.S.C. § 26(g)(3). This applies even where the deposit would cause the balance of the Fund to exceed $100 million. Additionally, the Commission may use the Fund to pay travel expenses incurred by personnel of the Commission's Whistleblower Office for speaking engagements and attending conferences, at which the public will be informed and educated in accordance with section 26(g)(2), about the Whistleblower Office and the whistleblower provisions of the Commodity Exchange Act.

Matter of: Department of the Army, Aberdeen Proving Ground—Use of Appropriated Funds for Bottled Water

File: B-324781

Date: Dec. 17, 2013

Department of the Army appropriations are available to purchase bottled water to be made available to the occupants of a number of buildings located on the Aberdeen Proving Ground. The agency has determined that the buildings fail to comply with occupational safety and health standards concerning the provision of potable water in places of employment. The agency may similarly use appropriated funds to purchase bottled water for use in response to legitimately anticipated dangers and exigencies.

Matter of: Department of the Treasury—Acceptance of Voluntary Services

File: B-324214

Date: Jan. 27, 2014

The Department of the Treasury (Treasury) violated the voluntary services prohibition of the Antideficiency Act, 31 U.S.C. § 1342, when it accepted the unpaid services of four individuals. An agency may accept unpaid services when someone offering such services executes an advance written agreement that (1) states that the services are offered without expectation of payment, and (2) expressly waives any future pay claims against the government. Treasury obtained no such written agreements in this case.

Matter of: District of Columbia—Local Budget Autonomy Amendment Act of 2012

File: B-324987

Date: Jan. 30, 2014

In December 2012, the Council of the District of Columbia enacted the Local Budget Autonomy Amendment Act of 2012 (Budget Autonomy Act). The Mayor of the District of Columbia signed the measure in January 2013, and District voters approved it in April 2013. In the District of Columbia Home Rule Act, Congress established the District Government and delineated its budget process. Through the Budget Autonomy Act, the Council of the District of Columbia and District voters attempt to change the federal government's role in this budget process by removing Congress from the appropriation process of most District funds and by removing the President from the District's budget formulation process.

We conclude that provisions of the Budget Autonomy Act that attempt to change the federal government's role in the District's budget process have no legal effect. The District of Columbia Home Rule Act, as well as the Antideficiency Act and the Budget and Accounting Act, serve and protect Congress's constitutional power "to exercise exclusive Legislation in all Cases whatsoever" over the District, as well as its constitutional power of the purse. We conclude, therefore, that without affirmative congressional action otherwise, the requirements of the Antideficiency Act continue to apply and District officers and employees may not obligate or expend funds except in accordance with appropriations enacted by Congress. The District Government also remains bound by the Budget and Accounting Act, which requires it to submit budget estimates to the President.

In this opinion we express no views on the merit of greater budget autonomy for the District; it is a matter that rests with the Congress.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL. *v.* ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 12–10. Argued April 22, 2013—Decided June 20, 2013

In the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 22 U. S. C. §7601 *et seq.*, Congress has authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to combat HIV/AIDS worldwide. The Act imposes two related conditions: (1) No funds "may be used to promote or advocate the legalization or practice of prostitution," §7631(e); and (2) no funds may be used by an organization "that does not have a policy explicitly opposing prostitution," §7631(f). To enforce the second condition, known as the Policy Requirement, the Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID) require funding recipients to agree in their award documents that they oppose prostitution.

Respondents, recipients of Leadership Act funds who wish to remain neutral on prostitution, sought a declaratory judgment that the Policy Requirement violates their First Amendment rights. The District Court issued a preliminary injunction, barring the Government from cutting off respondents' Leadership Act funding during the litigation or from otherwise taking action based on their privately funded speech. The Second Circuit affirmed, concluding that the Policy Requirement, as implemented by the agencies, violated respondents' freedom of speech.

Held: The Policy Requirement violates the First Amendment by compelling as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Gov-

ernment program. Pp. 6–15.

(a) The Policy Requirement mandates that recipients of federal funds explicitly agree with the Government's policy to oppose prostitution. The First Amendment, however, "prohibits the government from telling people what they must say." *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 61. As a direct regulation, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition of federal funding. Pp. 6–7.

(b) The Spending Clause grants Congress broad discretion to fund private programs or activities for the "general Welfare," Art. I, §8, cl. 1, including authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust* v. *Sullivan*, 500 U. S. 173, 195, n. 4. As a general matter, if a party objects to those limits, its recourse is to decline the funds. In some cases, however, a funding condition can result in an unconstitutional burden on First Amendment rights. The distinction that has emerged from this Court's cases is between conditions that define the limits of the Government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the federal program itself.

Rust illustrates the distinction. In that case, the Court considered Title X of the Public Health Service Act, which authorized grants to health-care organizations offering family planning services, but prohibited federal funds from being "used in programs where abortion is a method of family planning." 500 U. S., at 178. To enforce the provision, HHS regulations barred Title X projects from advocating abortion and required grantees to keep their Title X projects separate from their other projects. The regulations were valid, the Court explained, because they governed only the scope of the grantee's Title X projects, leaving the grantee free to engage in abortion advocacy through programs that were independent from its Title X projects. Because the regulations did not prohibit speech "outside the scope of the federally funded program," they did not run afoul of the First Amendment. *Id.,* at 197. Pp. 7–11.

(c) The distinction between conditions that define a federal program and those that reach outside it is not always self-evident, but the Court is confident that the Policy Requirement falls on the unconstitutional side of the line. To begin, the Leadership Act's other funding condition, which prohibits Leadership Act funds from being used "to promote or advocate the legalization or practice of prostitution or sex trafficking," §7631(e), ensures that federal funds will not

Syllabus

be used for prohibited purposes. The Policy Requirement thus must be doing something more—and it is. By demanding that funding recipients adopt and espouse, as their own, the Government's view on an issue of public concern, the Policy Requirement by its very nature affects "protected conduct outside the scope of the federally funded program." *Rust*, *supra,* at 197. A recipient cannot avow the belief dictated by the condition when spending Leadership Act funds, and assert a contrary belief when participating in activities on its own time and dime.

The Government suggests that if funding recipients could promote or condone prostitution using private funds, "it would undermine the government's program and confuse its message opposing prostitution." Brief for Petitioners 37. But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government's policy of eradicating prostitution. That condition on funding violates the First Amendment. Pp. 11–15.

651 F. 3d 218, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. KAGAN, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 12–10

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., PETITIONERS *v.* ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 20, 2013]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 117 Stat. 711, as amended, 22 U. S. C. §7601 *et seq.*, outlined a comprehensive strategy to combat the spread of HIV/AIDS around the world. As part of that strategy, Congress authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight. The Act imposes two related conditions on that funding: First, no funds made available by the Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." §7631(e). And second, no funds may be used by an organization "that does not have a policy explicitly opposing prostitution and sex trafficking." §7631(f). This case concerns the second of these conditions, referred to as the Policy Requirement. The question is whether that funding condition violates a recipient's First Amendment rights.

I

Congress passed the Leadership Act in 2003 after finding that HIV/AIDS had "assumed pandemic proportions, spreading from the most severely affected regions, sub-Saharan Africa and the Caribbean, to all corners of the world, and leaving an unprecedented path of death and devastation." 22 U. S. C. §7601(1). According to congressional findings, more than 65 million people had been infected by HIV and more than 25 million had lost their lives, making HIV/AIDS the fourth highest cause of death worldwide. In sub-Saharan Africa alone, AIDS had claimed the lives of more than 19 million individuals and was projected to kill a full quarter of the population of that area over the next decade. The disease not only directly endangered those infected, but also increased the potential for social and political instability and economic devastation, posing a security issue for the entire international community. §§7601(2)–(10).

In the Leadership Act, Congress directed the President to establish a "comprehensive, integrated" strategy to combat HIV/AIDS around the world. §7611(a). The Act sets out 29 different objectives the President's strategy should seek to fulfill, reflecting a multitude of approaches to the problem. The strategy must include, among other things, plans to increase the availability of treatment for infected individuals, prevent new infections, support the care of those affected by the disease, promote training for physicians and other health care workers, and accelerate research on HIV/AIDS prevention methods, all while providing a framework for cooperation with international organizations and partner countries to further the goals of the program. §§7611(a)(1)–(29).

The Act "make[s] the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts." §7611(a)(12); see also §7601(15) ("Successful strategies to stem the spread of the HIV/AIDS pandemic will require . . . measures to

address the social and behavioral causes of the problem"). The Act's approach to reducing behavioral risks is multifaceted. The President's strategy for addressing such risks must, for example, promote abstinence, encourage monogamy, increase the availability of condoms, promote voluntary counseling and treatment for drug users, and, as relevant here, "educat[e] men and boys about the risks of procuring sex commercially" as well as "promote alternative livelihoods, safety, and social reintegration strategies for commercial sex workers." §7611(a)(12). Congress found that the "sex industry, the trafficking of individuals into such industry, and sexual violence" were factors in the spread of the HIV/AIDS epidemic, and determined that "it should be the policy of the United States to eradicate" prostitution and "other sexual victimization." §7601(23).

The United States has enlisted the assistance of nongovernmental organizations to help achieve the many goals of the program. Such organizations "with experience in health care and HIV/AIDS counseling," Congress found, "have proven effective in combating the HIV/AIDS pandemic and can be a resource in . . . provid[ing] treatment and care for individuals infected with HIV/AIDS." §7601(18). Since 2003, Congress has authorized the appropriation of billions of dollars for funding these organizations' fight against HIV/AIDS around the world. §2151b–2(c); §7671.

Those funds, however, come with two conditions: First, no funds made available to carry out the Leadership Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." §7631(e). Second, no funds made available may "provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except . . . 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." §7631(f). It is this second condition—the Policy Requirement—that is at issue here.

The Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID) are the federal agencies primarily responsible for overseeing implementation of the Leadership Act. To enforce the Policy Requirement, the agencies have directed that the recipient of any funding under the Act agree in the award document that it is opposed to "prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." 45 CFR §89.1(b) (2012); USAID, Acquisition & Assistance Policy Directive 12–04, p. 6 (AAPD 12–04).

II

Respondents are a group of domestic organizations engaged in combating HIV/AIDS overseas. In addition to substantial private funding, they receive billions annually in financial assistance from the United States, including under the Leadership Act. Their work includes programs aimed at limiting injection drug use in Uzbekistan, Tajikistan, and Kyrgyzstan, preventing mother-to-child HIV transmission in Kenya, and promoting safer sex practices in India. Respondents fear that adopting a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS. They are also concerned that the Policy Requirement may require them to censor their privately funded discussions in publications, at conferences, and in other forums about how best to prevent the spread of HIV/AIDS among prostitutes.

In 2005, respondents Alliance for Open Society International and Pathfinder International commenced this litigation, seeking a declaratory judgment that the Government's

implementation of the Policy Requirement violated their First Amendment rights. Respondents sought a preliminary injunction barring the Government from cutting off their funding under the Act for the duration of the litigation, from unilaterally terminating their cooperative agreements with the United States, or from otherwise taking action solely on the basis of respondents' own privately funded speech. The District Court granted such a preliminary injunction, and the Government appealed.

While the appeal was pending, HHS and USAID issued guidelines on how recipients of Leadership Act funds could retain funding while working with affiliated organizations not bound by the Policy Requirement. The guidelines permit funding recipients to work with affiliated organizations that "engage[] in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking" as long as the recipients retain "objective integrity and independence from any affiliated organization." 45 CFR §89.3; see also AAPD 12–04, at 6–7. Whether sufficient separation exists is determined by the totality of the circumstances, including "but not . . . limited to" (1) whether the organizations are legally separate; (2) whether they have separate personnel; (3) whether they keep separate accounting records; (4) the degree of separation in the organizations' facilities; and (5) the extent to which signs and other forms of identification distinguish the organizations. 45 CFR §§89.3(b)(1)–(5); see also AAPD 12–04, at 6–7.

The Court of Appeals summarily remanded the case to the District Court to consider whether the preliminary injunction was still appropriate in light of the new guidelines. On remand, the District Court issued a new preliminary injunction along the same lines as the first, and the Government renewed its appeal.

The Court of Appeals affirmed, concluding that respondents had demonstrated a likelihood of success on the

merits of their First Amendment challenge under this Court's "unconstitutional conditions" doctrine. 651 F. 3d 218 (CA2 2011). Under this doctrine, the court reasoned, "the 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." *Id.,* at 231 (citing *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972)). And a condition that compels recipients "to espouse the government's position" on a subject of international debate could not be squared with the First Amendment. 651 F. 3d, at 234. The court concluded that "the Policy Requirement, as implemented by the Agencies, falls well beyond what the Supreme Court . . . ha[s] upheld as permissible funding conditions." *Ibid.*

Judge Straub dissented, expressing his view that the Policy Requirement was an "entirely rational exercise of Congress's powers pursuant to the Spending Clause." *Id.,* at 240.

We granted certiorari. 568 U. S. ___ (2013).

III

The Policy Requirement mandates that recipients of Leadership Act funds explicitly agree with the Government's policy to oppose prostitution and sex trafficking. It is, however, a basic First Amendment principle that "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 61 (2006) (citing *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943), and *Wooley* v. *Maynard*, 430 U. S. 705, 717 (1977)). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 641 (1994); see *Knox* v.

Service Employees, 567 U. S. ___, ___–___ (2012) (slip op., at 8–9) ("The government may not . . . compel the endorsement of ideas that it approves."). Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.

A

The Spending Clause of the Federal Constitution grants Congress the power "[t]o 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." Art. I, §8, cl. 1. The Clause provides Congress broad discretion to tax and spend for the "general Welfare," including by funding particular state or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust* v. *Sullivan*, 500 U. S. 173, 195, n. 4 (1991) ("Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.").

As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights. See, *e.g., United States* v. *American Library Assn., Inc.*, 539 U. S. 194, 212 (2003) (plurality opinion) (rejecting a claim by public libraries that conditioning funds for Internet access on the libraries' installing filtering software violated their First Amendment rights, explaining that "[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance"); *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 546 (1983) (dismissing "the

notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State" (internal quotation marks omitted)).

At the same time, however, we have held 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.'" *Forum for Academic and Institutional Rights*, *supra*, at 59 (quoting *American Library Assn., supra,* at 210). In some cases, a funding condition can result in an unconstitutional burden on First Amendment rights. See *Forum for Academic and Institutional Rights*, *supra*, at 59 (the First Amendment supplies "a limit on Congress' ability to place conditions on the receipt of funds").

The dissent thinks that can only be true when the condition is not relevant to the objectives of the program (although it has its doubts about that), or when the condition is actually coercive, in the sense of an offer that cannot be refused. See *post*, at 2–3 (opinion of SCALIA, J.). Our precedents, however, are not so limited. In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 547 (2001).

A comparison of two cases helps illustrate the distinction: In *Regan* v. *Taxation With Representation of Washington*, the Court upheld a requirement that nonprofit

organizations seeking tax-exempt status under 26 U. S. C. §501(c)(3) not engage in substantial efforts to influence legislation. The tax-exempt status, we explained, "ha[d] much the same effect as a cash grant to the organization." 461 U. S., at 544. And by limiting §501(c)(3) status to organizations that did not attempt to influence legislation, Congress had merely "chose[n] not to subsidize lobbying." *Ibid.* In rejecting the nonprofit's First Amendment claim, the Court highlighted—in the text of its opinion, but see *post*, at 5—the fact that the condition did not prohibit that organization from lobbying Congress altogether. By returning to a "dual structure" it had used in the past—separately incorporating as a §501(c)(3) organization and §501(c)(4) organization—the nonprofit could continue to claim §501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its §501(c)(4) capacity with separate funds. *Ibid.* Maintaining such a structure, the Court noted, was not "unduly burdensome." *Id.,* at 545, n. 6. The condition thus did not deny the organization a government benefit "on account of its intention to lobby." *Id.*, at 545.

In *FCC* v. *League of Women Voters of California*, by contrast, the Court struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds. 468 U. S. 364, 399–401 (1984). Even a station receiving only one percent of its overall budget from the Federal Government, the Court explained, was "barred absolutely from all editorializing." *Id.*, at 400. Unlike the situation in *Regan*, the law provided no way for a station to limit its use of federal funds to noneditorializing activities, while using private funds "to make known its views on matters of public importance." 468 U. S., at 400. The prohibition thus went beyond ensuring that federal funds not be used to subsidize "public broadcasting station editorials," and instead leveraged the

federal funding to regulate the stations' speech outside the scope of the program. *Id.,* at 399 (internal quotation marks omitted).

Our decision in *Rust* v. *Sullivan* elaborated on the approach reflected in *Regan* and *League of Women Voters*. In *Rust*, we considered Title X of the Public Health Service Act, a Spending Clause program that issued grants to nonprofit health-care organizations "to assist in the establishment and operation of voluntary family planning projects [to] offer a broad range of acceptable and effective family planning methods and services." 500 U. S., at 178 (internal quotation marks omitted). The organizations received funds from a variety of sources other than the Federal Government for a variety of purposes. The Act, however, prohibited the Title X federal funds from being "used in programs where abortion is a method of family planning." *Ibid.* (internal quotation marks omitted). To enforce this provision, HHS regulations barred Title X projects from advocating abortion as a method of family planning, and required grantees to ensure that their Title X projects were "'physically and financially separate'" from their other projects that engaged in the prohibited activities. *Id.*, at 180–181 (quoting 42 CFR §59.9 (1989)). A group of Title X funding recipients brought suit, claiming the regulations imposed an unconstitutional condition on their First Amendment rights. We rejected their claim.

We explained that Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem. In Title X, Congress had defined the federal program to encourage only particular family planning methods. The challenged regulations were simply "designed to ensure that the limits of the federal program are observed," and "that public funds [are] spent for the purposes for which they were authorized." *Rust*, 500 U. S., at 193, 196.

In making this determination, the Court stressed that "Title X expressly distinguishes between a Title X *grantee* and a Title X *project*." *Id.,* at 196. The regulations governed only the scope of the grantee's Title X projects, leaving it "unfettered in its other activities." *Ibid.* "The Title X *grantee* can continue to . . . engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." *Ibid.* Because the regulations did not "prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program," they did not run afoul of the First Amendment. *Id.*, at 197.

B

As noted, the distinction drawn in these cases—between conditions that define the federal program and those that reach outside it—is not always self-evident. As Justice Cardozo put it in a related context, "Definition more precise must abide the wisdom of the future." *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 591 (1937). Here, however, we are confident that the Policy Requirement falls on the unconstitutional side of the line.

To begin, it is important to recall that the Leadership Act has two conditions relevant here. The first—unchallenged in this litigation—prohibits Leadership Act funds from being used "to promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U. S. C. §7631(e). The Government concedes that §7631(e) by itself ensures that federal funds will not be used for the prohibited purposes. Brief for Petitioners 26–27.

The Policy Requirement therefore must be doing something more—and it is. The dissent views the Requirement as simply a selection criterion by which the Government identifies organizations "who believe in its ideas to carry them to fruition." *Post*, at 1. As an initial matter, what-

ever purpose the Policy Requirement serves in selecting funding recipients, its effects go beyond selection. The Policy Requirement is an ongoing condition on recipients' speech and activities, a ground for terminating a grant after selection is complete. See AAPD 12–04, at 12. In any event, as the Government acknowledges, it is not simply seeking organizations that oppose prostitution. Reply Brief 5. Rather, it explains, "Congress has expressed its purpose 'to eradicate' prostitution and sex trafficking, 22 U. S. C. §7601(23), and it wants recipients *to adopt* a similar stance." Brief for Petitioners 32 (emphasis added). This case is not about the Government'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.

By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects "protected conduct outside the scope of the federally funded program." *Rust*, 500 U. S., at 197. A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient. See *ibid.* ("our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *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").

The Government contends that the affiliate guidelines, established while this litigation was pending, save the program. Under those guidelines, funding recipients are

permitted to work with affiliated organizations that do not abide by the condition, as long as the recipients retain "objective integrity and independence" from the unfettered affiliates. 45 CFR §89.3. The Government suggests the guidelines alleviate any unconstitutional burden on the respondents' First Amendment rights by allowing them to either: (1) accept Leadership Act funding and comply with Policy Requirement, but establish affiliates to communicate contrary views on prostitution; or (2) decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds, thereby "cabin[ing] the effects" of the Policy Requirement within the scope of the federal program. Brief for Petitioners 38–39, 44–49.

Neither approach is sufficient. When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program. See *Rust*, *supra*, at 197–198. Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy. The guidelines themselves make that clear. See 45 CFR §89.3 (allowing funding recipients to work with affiliates whose conduct is "inconsistent with *the recipient's opposition* to the practices of prostitution and sex trafficking" (emphasis added)).

The Government suggests that the Policy Requirement is necessary because, without it, the grant of federal funds could free a recipient's private funds "to be used to promote prostitution or sex trafficking." Brief for Petitioners 27 (citing *Holder* v. *Humanitarian Law Project*, 561 U. S.

1, ___–___ (2010) (slip op., at 25–26)). That argument assumes that federal funding will simply supplant private funding, rather than pay for new programs or expand existing ones. The Government offers no support for that assumption as a general matter, or any reason to believe it is true here. And if the Government's argument were correct, *League of Women Voters* would have come out differently, and much of the reasoning of *Regan* and *Rust* would have been beside the point.

The Government cites but one case to support that argument, *Holder* v. *Humanitarian Law Project*. That case concerned the quite different context of a ban on providing material support to terrorist organizations, where the record indicated that support for those organizations' nonviolent operations was funneled to support their violent activities. 561 U. S., at ___ (slip op., at 26).

Pressing its argument further, the Government contends that "if organizations awarded federal funds to implement Leadership Act programs could at the same time promote or affirmatively condone prostitution or sex trafficking, whether using public *or private* funds, it would undermine the government's program and confuse its message opposing prostitution and sex trafficking." Brief for Petitioners 37 (emphasis added). But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government's policy of eradicating prostitution. As to that, we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U. S., at 642.

* * *

The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained. The judgment of the Court of Appeals is affirmed.

It is so ordered.

KAGAN, J., took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 12–10

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., PETITIONERS *v.* ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 20, 2013]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Leadership Act provides that "any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking" may not receive funds appropriated under the Act. 22 U. S. C. §7631(f). This Policy Requirement is nothing more than a means of selecting suitable agents to implement the Government's chosen strategy to eradicate HIV/AIDS. That is perfectly permissible under the Constitution.

The First Amendment does not mandate a viewpoint-neutral government. Government must choose between rival ideas and adopt some as its own: competition over cartels, solar energy over coal, weapon development over disarmament, and so forth. Moreover, the government may enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas. That seems to me a matter of the most common common sense. For example: One of the purposes of America's foreign-aid programs is the fostering of good will towards this country. If the organization Hamas—reputed to have an efficient system for delivering welfare—were excluded from a program for the distribution of U. S. food assis-

tance, no one could reasonably object. And that would remain true if Hamas were an organization of United States citizens entitled to the protection of the Constitution. So long as the unfunded organization remains free to engage in its activities (including anti-American propaganda) "without federal assistance," *United States* v. *American Library Assn., Inc.*, 539 U. S. 194, 212 (2003) (plurality), refusing to make use of its assistance for an enterprise to which it is opposed does not abridge its speech. And the same is true when the rejected organization is not affirmatively opposed to, but merely unsupportive of, the object of the federal program, which appears to be the case here. (Respondents do not promote prostitution, but neither do they wish to oppose it.) A federal program to encourage healthy eating habits need not be administered by the American Gourmet Society, which has nothing against healthy food but does not insist upon it.

The argument is that this commonsense principle will enable the government to discriminate against, and injure, points of view to which it is opposed. Of course the Constitution does not prohibit government spending that discriminates against, and injures, points of view to which the government is opposed; every government program which takes a position on a controversial issue does that. Anti-smoking programs injure cigar aficionados, programs encouraging sexual abstinence injure free-love advocates, etc. The constitutional prohibition at issue here is not a prohibition against discriminating against or injuring opposing points of view, but the First Amendment's prohibition against the coercing of speech. I am frankly dubious that a condition for eligibility to participate in a minor federal program such as this one runs afoul of that prohibition even when the condition is irrelevant to the goals of the program. Not every disadvantage is a coercion.

But that is not the issue before us here. Here the views

that the Government demands an applicant forswear—or that the Government insists an applicant favor—are relevant to the program in question. The program is valid only if the Government is entitled to disfavor the opposing view (here, advocacy of or toleration of prostitution). And if the program can disfavor it, so can the selection of those who are to administer the program. There is no risk that this principle will enable the Government to discriminate arbitrarily against positions it disfavors. It would not, for example, permit the Government to exclude from bidding on defense contracts anyone who refuses to abjure prostitution. But here a central part of the Government's HIV/AIDS strategy is the suppression of prostitution, by which HIV is transmitted. It is entirely reasonable to admit to participation in the program only those who believe in that goal.

According to the Court, however, this transgresses a constitutional line between conditions that operate *inside* a spending program and those that control speech *outside* of it. I am at a loss to explain what this central pillar of the Court's opinion—this distinction that the Court itself admits is "hardly clear" and "not always self-evident," *ante*, at 8, 11—has to do with the First Amendment. The distinction was alluded to, to be sure, in *Rust* v. *Sullivan*, 500 U. S. 173 (1991), but not as (what the Court now makes it) an invariable requirement for First Amendment validity. That the pro-abortion speech prohibition was limited to "inside the program" speech was relevant in *Rust* because the program itself was not an anti-abortion program. The Government remained neutral on that controversial issue, but did not wish abortion to be promoted within its family-planning-services program. The statutory objective could not be impaired, in other words, by "outside the program" pro-abortion speech. The purpose of the limitation was to prevent Government funding from providing the *means* of pro-abortion propaganda, which

the Government did not wish (and had no constitutional obligation) to provide. The situation here is vastly different. Elimination of prostitution *is* an objective of the HIV/AIDS program, and *any* promotion of prostitution—whether made inside or outside the program—*does* harm the program.

Of course the most obvious manner in which the admission to a program of an ideological opponent can frustrate the purpose of the program is by freeing up the opponent's funds for use in its ideological opposition. To use the Hamas example again: Subsidizing that organization's provision of social services enables the money that it would otherwise use for that purpose to be used, instead, for anti-American propaganda. Perhaps that problem does not exist in this case since the respondents do not affirmatively promote prostitution. But the Court's analysis categorically rejects that justification for ideological requirements in *all* cases, demanding "record indica[tion]" that "federal funding will simply supplant private funding, rather than pay for new programs." *Ante,* at 14. This seems to me quite naive. Money is fungible. The economic reality is that when NGOs can conduct their AIDS work on the Government's dime, they can expend greater resources on policies that undercut the Leadership Act. The Government need not establish by record evidence that this will happen. To make it a valid consideration in determining participation in federal programs, it suffices that this is a real and obvious risk.

None of the cases the Court cites for its holding provide support. I have already discussed *Rust.* As for *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983), that case *upheld* rather than invalidated a prohibition against lobbying as a condition of receiving 26 U. S. C. §501(c)(3) tax-exempt status. The Court's holding rested on the conclusion that "a legislature's decision not to subsidize the exercise of a fundamental right does not

infringe the right." 461 U. S., at 549. Today's opinion, *ante*, at 9, stresses the fact that these nonprofits were permitted to use a separate §501(c)(4) affiliate for their lobbying—but that fact, alluded to in a footnote, *Regan*, 461 U. S., at 545, n. 6, was entirely nonessential to the Court's holding. Indeed, that rationale prompted a separate concurrence precisely because the majority of the Court did not rely upon it. See *id.*, at 551–554 (Blackmun, J., concurring). As for *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364 (1984), the ban on editorializing at issue there was disallowed precisely because it did not further a relevant, permissible policy of the Federal Communications Act—and indeed was simply incompatible with the Act's "affirmativ[e] encourage[ment]" of the "vigorous expression of controversial opinions" by licensed broadcasters. *Id.*, at 397.

The Court makes a head-fake at the unconstitutional conditions doctrine, *ante*, at 12, but that doctrine is of no help. There is no case of ours in which a condition that is relevant to a statute's valid purpose and that is not in itself unconstitutional (*e.g.,* a religious-affiliation condition that violates the Establishment Clause) has been held to violate the doctrine.* Moreover, as I suggested earlier, the contention that the condition here "coerces" respondents' speech is on its face implausible. Those organizations that wish to take a different tack with respect to prostitution "are as unconstrained now as they were before the enactment of [the Leadership Act]." *National Endowment for Arts* v. *Finley*, 524 U. S. 569, 595 (1998) (SCALIA, J., concurring in judgment). As the Court acknowledges, "[a]s a general matter, if a party objects to a condition on the

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*In *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533 (2001), upon which the Court relies, the opinion specified that "in the context of this statute there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives," *id.*, at 548.

receipt of federal funding, its recourse is to decline the funds," *ante,* at 7, and to draw on its own coffers.

The majority cannot credibly say that this speech condition is coercive, so it does not. It pussyfoots around the lack of coercion by invalidating the Leadership Act for "*requiring* recipients to profess a specific belief" and "*demanding* that funding recipients adopt—as their own—the Government's view on an issue of public concern." *Ante,* at 12 (emphasis mine). But like King Cnut's commanding of the tides, here the Government's "requiring" and "demanding" have no coercive effect. In the end, and in the circumstances of this case, "compell[ing] *as a condition* of federal funding the affirmation of a belief," *ante,* at 15 (emphasis mine), is no compulsion at all. It is the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject. Section 7631(f) "defin[es] the recipient" only to the extent he decides that it is in his interest to be so defined. *Ante,* at 12.

* * *

Ideological-commitment requirements such as the one here are quite rare; but making the choice between competing applicants on relevant ideological grounds is undoubtedly quite common. See, *e.g., Finley*, *supra*. As far as the Constitution is concerned, it is quite impossible to distinguish between the two. If the government cannot demand a relevant ideological commitment as a condition of application, neither can it distinguish between applicants on a relevant ideological ground. And that is the real evil of today's opinion. One can expect, in the future, frequent challenges to the denial of government funding for relevant ideological reasons.

The Court's opinion contains stirring quotations from cases like *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), and *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622 (1994). They serve only to distract attention

from the elephant in the room: that the Government is not forcing *anyone* to say *anything*. What Congress has done here—requiring an ideological commitment relevant to the Government task at hand—is approved by the Constitution itself. Americans need not support the Constitution; they may be Communists or anarchists. But "[t]he Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support [the] Constitution." U. S. Const., Art. VI, cl. 3. The Framers saw the wisdom of imposing affirmative ideological commitments prerequisite to assisting in the government's work. And so should we.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 2, 2012 Decided August 13, 2013
Ordered Held in Abeyance August 3, 2012

No. 11-1271

IN RE: AIKEN COUNTY, ET AL.,
PETITIONERS

STATE OF NEVADA,
INTERVENOR

On Petition for Writ of Mandamus

Andrew A. Fitz, Senior Counsel, Office of the Attorney General for the State of Washington, argued the cause for petitioners. With him on the briefs were *Robert M. McKenna*, Attorney General, *Todd R. Bowers*, Senior Counsel, *Thomas R. Gottshall*, *S. Ross Shealy*, *Alan Wilson*, Attorney General, Office of the Attorney General for the State of South Carolina, *William Henry Davidson II*, *Kenneth Paul Woodington*, *James Bradford Ramsay*, *Robin J. Lunt*, *Barry M. Hartman*, *Christopher R. Nestor*, and *Robert M. Andersen*.

Jerry Stouck and *Anne W. Cottingham* were on the brief for *amicus curiae* Nuclear Energy Institute, Inc. in support of petitioners.

Charles E. Mullins, Senior Attorney, U.S. Nuclear Regulatory Commission, argued the cause for respondent.

With him on the brief were *Stephen G. Burns*, General Counsel, *John F. Cordes Jr.*, Solicitor, and *Jeremy M. Suttenberg*, Attorney.

Martin G. Malsch argued the cause for intervenor State of Nevada. With him on the briefs were *Charles J. Fitzpatrick* and *John W. Lawrence*.

Before: GARLAND, *Chief Judge*, KAVANAUGH, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH, with whom *Senior Circuit Judge* RANDOLPH joins except as to Part III.

Concurring opinion filed by *Senior Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Chief Judge* GARLAND.

KAVANAUGH, *Circuit Judge*: This case raises significant questions about the scope of the Executive's authority to disregard federal statutes. The case arises out of a longstanding dispute about nuclear waste storage at Yucca Mountain in Nevada. The underlying policy debate is not our concern. The policy is for Congress and the President to establish as they see fit in enacting statutes, and for the President and subordinate executive agencies (as well as relevant independent agencies such as the Nuclear Regulatory Commission) to implement within statutory boundaries. Our more modest task is to ensure, in justiciable cases, that agencies comply with the law as it has been set by Congress. Here, the Nuclear Regulatory Commission has continued to violate the law governing the Yucca Mountain licensing

process. We therefore grant the petition for a writ of mandamus.

I

This case involves the Nuclear Waste Policy Act, which was passed by Congress and then signed by President Reagan in 1983. That law provides that the Nuclear Regulatory Commission "shall consider" the Department of Energy's license application to store nuclear waste at Yucca Mountain and "shall issue a final decision approving or disapproving" the application within three years of its submission. 42 U.S.C. § 10134(d). The statute allows the Commission to extend the deadline by an additional year if it issues a written report explaining the reason for the delay and providing the estimated time for completion. *Id.* § 10134(d), (e)(2).

In June 2008, the Department of Energy submitted its license application to the Nuclear Regulatory Commission. As recently as Fiscal Year 2011, Congress appropriated funds to the Commission so that the Commission could conduct the statutorily mandated licensing process. Importantly, the Commission has at least $11.1 million in appropriated funds to continue consideration of the license application.

But the statutory deadline for the Commission to complete the licensing process and approve or disapprove the Department of Energy's application has long since passed. Yet the Commission still has not issued the decision required by statute. Indeed, by its own admission, the Commission has no current intention of complying with the law. Rather, the Commission has simply shut down its review and consideration of the Department of Energy's license application.

Petitioners include the States of South Carolina and Washington, as well as entities and individuals in those States. Nuclear waste is currently stored in those States in the absence of a long-term storage site such as Yucca Mountain.

Since 2010, petitioners have sought a writ of mandamus requiring the Commission to comply with the law and to resume processing the Department of Energy's pending license application for Yucca Mountain. Mandamus is an extraordinary remedy that takes account of equitable considerations. The writ may be granted "to correct transparent violations of a clear duty to act." *In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (internal quotation marks omitted); *see also Arizona v. Inter Tribal Council of Arizona, Inc.*, No. 12-71, slip. op. at 17 n.10 (U.S. 2013) (noting that if the federal Election Assistance Commission did not act on a state's statutorily permitted request, "Arizona would be free to seek a writ of mandamus to 'compel agency action unlawfully withheld or unreasonably delayed'") (quoting 5 U.S.C. § 706(1)).

In 2011, a prior panel of this Court indicated that, if the Commission failed to act on the Department of Energy's license application within the deadlines specified by the Nuclear Waste Policy Act, mandamus likely would be appropriate. *See In re Aiken County*, 645 F.3d 428, 436 (D.C. Cir. 2011). In 2012, after a new mandamus petition had been filed, this panel issued an order holding the case in abeyance and directing that the parties file status updates regarding Fiscal Year 2013 appropriations. At that time, we did not issue the writ of mandamus. Instead, in light of the Commission's strenuous claims that Congress did not want the licensing process to continue and the equitable considerations appropriately taken into account in mandamus

cases, we allowed time for Congress to clarify this issue if it wished to do so. But a majority of the Court also made clear that, given the current statutory language and the funds available to the Commission, the Commission was violating federal law by declining to further process the license application. And the Court's majority further indicated that the mandamus petition eventually would have to be granted if the Commission did not act or Congress did not enact new legislation either terminating the Commission's licensing process or otherwise making clear that the Commission may not expend funds on the licensing process. *See* Order, *In re Aiken County*, No. 11-1271 (D.C. Cir. Aug. 3, 2012).

Since we issued that order more than a year ago on August 3, 2012, the Commission has not acted, and Congress has not altered the legal landscape. As things stand, therefore, the Commission is simply flouting the law. In light of the constitutional respect owed to Congress, and having fully exhausted the alternatives available to us, we now grant the petition for writ of mandamus against the Nuclear Regulatory Commission.

II

Our analysis begins with settled, bedrock principles of constitutional law. Under Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory *mandates* so long as there is appropriated money available and the President has no constitutional objection to the statute. So, too, the President must abide by statutory *prohibitions* unless the President has a constitutional objection to the prohibition. If the President has a constitutional objection to a statutory mandate or prohibition, the President may decline to follow the law unless and until a

final Court order dictates otherwise. But the President may not decline to follow a statutory mandate or prohibition simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions.

Those basic constitutional principles apply to the President and subordinate executive agencies. And they apply at least as much to independent agencies such as the Nuclear Regulatory Commission. *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 525-26 (2009) (opinion of Scalia, J., for four Justices) (independent agency should be subject to same scrutiny as executive agencies); *id.* at 547 (opinion of Breyer, J., for four Justices) (independent agency's "comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law").

In this case, however, the Nuclear Regulatory Commission has declined to continue the statutorily mandated Yucca Mountain licensing process. Several justifications have been suggested in support of the Commission's actions in this case. None is persuasive.

First, the Commission claims that Congress has not yet appropriated the *full* amount of funding necessary for the Commission to *complete* the licensing proceeding. But Congress often appropriates money on a step-by-step basis, especially for long-term projects. Federal agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary to complete a

project. *See City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (when statutory mandate is not fully funded, "the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint"). For present purposes, the key point is this: The Commission is under a legal obligation to continue the licensing process, and it has at least $11.1 million in appropriated funds – a significant amount of money – to do so. *See* Commission Third Status Report, at 2 (Apr. 5, 2013).

Second, and relatedly, the Commission speculates that Congress, in the future, will not appropriate the additional funds necessary for the Commission to complete the licensing process. So it would be a waste, the Commission theorizes, to continue to conduct the process now. The Commission's political prognostication may or may not ultimately prove to be correct. Regardless, an agency may not rely on political guesswork about future congressional appropriations as a basis for violating existing legal mandates. A judicial green light for such a step – allowing agencies to ignore statutory mandates and prohibitions based on agency speculation about future congressional action – would gravely upset the balance of powers between the Branches and represent a major and unwarranted expansion of the Executive's power at the expense of Congress.

Third, the Commission points to Congress's recent appropriations to the Commission and to the Department of Energy for the Yucca Mountain project. In the last three years, those appropriations have been relatively low or zero. The Commission argues that those appropriations levels demonstrate a congressional desire for the Commission to shut down the licensing process.

But Congress speaks through the laws it enacts. No law states that the Commission should decline to spend previously appropriated funds on the licensing process. No law states that the Commission should shut down the licensing process. And the fact that Congress hasn't yet made additional appropriations over the existing $11.1 million available to the Commission to continue the licensing process tells us nothing definitive about what a future Congress may do. As the Supreme Court has explained, courts generally should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated. *See TVA v. Hill*, 437 U.S. 153, 190 (1978) (doctrine that repeals by implication are disfavored "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act"); *United States v. Langston*, 118 U.S. 389, 394 (1886) ("a statute fixing the annual salary of a public officer at a named sum . . . should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years"); *cf.* 1 GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW at 2-49 (3d ed. 2004) ("a mere failure to appropriate sufficient funds will not be construed as amending or repealing prior authorizing legislation").

In these circumstances, where previously appropriated money is available for an agency to perform a statutorily mandated activity, we see no basis for a court to excuse the agency from that statutory mandate.

Fourth, the record suggests that the Commission, as a policy matter, simply may not want to pursue Yucca Mountain as a possible site for storage of nuclear waste. But Congress sets the policy, not the Commission. And policy

disagreement with Congress's decision about nuclear waste storage is not a lawful ground for the Commission to decline to continue the congressionally mandated licensing process. To reiterate, the President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress. *See Lincoln v. Vigil*, 508 U.S 182, 193 (1993) ("Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes . . . ."); 18 Comp. Gen. 285, 292 (1938) ("the question with the accounting officers is not the apparent general merit of a proposed expenditure, but whether the Congress, controlling the purse, has by law authorized the expenditure").[1]

[1] Like the Commission here, a President sometimes has policy reasons (as distinct from constitutional reasons, *cf. infra* note 3) for wanting to spend less than the full amount appropriated by Congress for a particular project or program. But in those circumstances, even the President does not have unilateral authority to refuse to spend the funds. Instead, the President must propose the rescission of funds, and Congress then may decide whether to approve a rescission bill. *See* 2 U.S.C. § 683; *see also Train v. City of New York*, 420 U.S. 35 (1975); Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President (Dec. 1, 1969), *reprinted in Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 279, 282 (1971) ("With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent.").

III[2]

We thus far have concluded that the Commission's inaction violates the Nuclear Waste Policy Act. To be sure, there are also two principles rooted in Article II of the Constitution that give the Executive authority, in certain circumstances, to decline to act in the face of a clear statute. But neither of those principles applies here.

First, the President possesses significant independent authority to assess the constitutionality of a statute. *See* U.S. CONST. art. II, § 1, cl. 1 (Executive Power Clause); U.S. CONST. art. II, § 1, cl. 8 (Oath of Office Clause); U.S. CONST. art. II, § 3 (Take Care Clause). But that principle does not help the Commission.

To explain: The President is of course not bound by Congress's assessment of the constitutionality of a statute. The Take Care Clause of Article II refers to "Laws," and those Laws include the Constitution, which is superior to statutes. *See* U.S. CONST. art. VI (Constitution is "supreme Law of the Land"). So, too, Congress is not bound by the President's assessment of the constitutionality of a statute. Rather, in a justiciable case, the Supreme Court has the final word on whether a statutory mandate or prohibition on the Executive is constitutional. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (Presidential Recordings and Materials Preservation Act is constitutional); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring) (congressional statutes that together preclude President from seizing steel mills are constitutional); *see generally Marbury v. Madison*, 5 U.S. 137 (1803).

[2] Judge Kavanaugh alone joins Part III of the opinion.

So unless and until a final Court decision in a justiciable case says that a statutory mandate or prohibition on the Executive Branch is constitutional, the President (and subordinate executive agencies supervised and directed by the President) may decline to follow that statutory mandate or prohibition if the President concludes that it is unconstitutional. Presidents routinely exercise this power through Presidential directives, executive orders, signing statements, and other forms of Presidential decisions. *See, e.g.*, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (based on Article II, Presidents Bush and Obama refused to comply with statute regulating passports of individuals born in Jerusalem); *Myers v. United States*, 272 U.S. 52 (1926) (based on Article II, President Wilson refused to comply with statutory limit on the President's removal power); *see also Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (President has "the power to veto encroaching laws or even to disregard them when they are unconstitutional") (citation omitted); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel 199, 199-200 (1994) (Walter Dellinger) (describing as "uncontroversial" and "unassailable" the proposition that a President may decline to execute an unconstitutional statute in some circumstances); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (Jonathan Elliot ed., 2d ed. 1836) ("the President of the United States could shield himself, and refuse to carry into effect an act that *violates* the Constitution") (statement of James Wilson).[3]

[3] In declining to follow a statutory *mandate* that the President independently concludes is unconstitutional, the President generally may decline to expend funds on that unconstitutional program, at least unless and until a final Court order rules otherwise. But in

But even assuming arguendo that an independent agency such as the Nuclear Regulatory Commission possesses Article II authority to assess the constitutionality of a statute and thus may decline to follow the statute until a final Court order says otherwise,[4] the Commission has not asserted that the relevant statutes in this case are unconstitutional. So that Article II principle is of no help to the Commission here.

declining to follow a statutory *prohibition* that the President independently concludes is unconstitutional (and not just unwise policy, *cf. supra* note 1), the Appropriations Clause acts as a separate limit on the President's power. It is thus doubtful that the President may permissibly expend more funds than Congress has appropriated for the program in question. *See* U.S. CONST. art. I, § 9, cl. 7 (Appropriations Clause); *see also OPM v. Richmond*, 496 U.S. 414, 425 (1990) ("Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury."). It is sometimes suggested, however, that the President may elect not to follow a statutory prohibition on how *otherwise available appropriated funds* are spent if the President concludes that the prohibition is unconstitutional, at least unless and until a final Court order rules otherwise. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 740 (2008). This case does not require analysis of those difficult questions.

[4] It is doubtful that an independent agency may disregard a statute on constitutional grounds unless the President has concluded that the relevant statute is unconstitutional. But we need not delve further into that question here. *Compare Humphrey's Executor v. United States*, 295 U.S. 602 (1935), *with Myers*, 272 U.S. 52, *and Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010).

Second, it is also true that, under Article II, the President possesses a significant degree of prosecutorial discretion not to take enforcement actions against violators of a federal law. But that principle does not support the Commission's inaction here. To demonstrate why, the contours of the Executive's prosecutorial discretion must be explained.

The Presidential power of prosecutorial discretion is rooted in Article II, including the Executive Power Clause, the Take Care Clause, the Oath of Office Clause, and the Pardon Clause. *See* U.S. CONST. art. II, § 1, cl. 1 (Executive Power Clause); U.S. CONST. art. II, § 1, cl. 8 (Oath of Office Clause); U.S. CONST. art. II, § 2, cl. 1 (Pardon Clause); U.S. CONST. art. II, § 3 (Take Care Clause); *see also* U.S. CONST. art. I, § 9, cl. 3 (Bill of Attainder Clause). The President may decline to prosecute certain violators of federal law just as the President may pardon certain violators of federal law.[5] The President may decline to prosecute or may pardon because of the President's own constitutional concerns about a law *or* because of policy objections to the law, among other reasons.[6] *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) ("The power to decide when to investigate,

[5] The power to pardon encompasses the power to commute sentences. *See Schick v. Reed*, 419 U.S. 256, 264 (1974).

[6] One important difference between a decision not to prosecute and a pardon is that a pardon prevents a future President from prosecuting the offender for that offense. Prosecutorial discretion, meanwhile, might be exercised differently by a future President – subject to statute of limitations issues or any due process limits that might apply when an offender has reasonably relied on a prior Presidential promise not to prosecute particular conduct.

and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws . . . ."); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause."); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101, 125 (1984) (Theodore B. Olson) ("the constitutionally prescribed separation of powers requires that the Executive retain discretion with respect to whom it will prosecute for violations of the law"); *id.* at 115 ("The Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals."); Congressman John Marshall, Speech to the House of Representatives (1800), *reprinted in* 18 U.S. app. at 29 (1820) (The President may "direct that the criminal be prosecuted no further. This is . . . the exercise of an indubitable and a constitutional power."); *see also United States v. Klein*, 80 U.S. 128, 147 (1871) ("To the executive alone is intrusted the power of pardon; and it is granted without limit.").

In light of the President's Article II prosecutorial discretion, Congress may not *mandate* that the President prosecute a certain kind of offense or offender. The logic behind the pardon power further supports that conclusion. As has been settled since the Founding, the President has absolute authority to issue a pardon at any time after an unlawful act has occurred, even *before* a charge or trial. *See Ex parte Grossman*, 267 U.S. 87, 120 (1925) ("The Executive

can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes . . . ."). So it would make little sense to think that Congress constitutionally could compel the President to prosecute certain offenses or offenders, given that the President has undisputed authority to pardon all such offenders at any time after commission of the offense. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 179 (2005) ("greater power to pardon subsumed the lesser power to simply decline prosecution").[7]

The Executive's broad prosecutorial discretion and pardon powers illustrate a key point of the Constitution's separation of powers. One of the greatest *unilateral* powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior – more precisely, the power either not to seek charges against violators of a federal law or to pardon violators of a federal law.[8] The Framers saw the separation of the power to prosecute from the power to legislate as essential

[7] If the Executive selectively prosecutes someone based on impermissible considerations, the equal protection remedy is to dismiss the prosecution, not to compel the Executive to bring another prosecution. *See United States v. Armstrong*, 517 U.S. 456, 459, 463 (1996); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *cf. Linda R.S. v. Richard D.*, 410 U.S. 614, 618-19 (1973).

[8] Congress obviously has tools to deter the Executive from exercising authority in this way – for example by using the appropriations power or the advice and consent power to thwart other aspects of the Executive's agenda (and ultimately, of course, Congress has the impeachment power). But Congress may not overturn a pardon or direct that the Executive prosecute a particular individual or class of individuals.

to preserving individual liberty. *See* THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., rev. ed. 1999) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); 1 MONTESQUIEU, THE SPIRIT OF LAWS bk. 11, ch. 6, at 163 (Thomas Nugent trans., 1914) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."). After enacting a statute, Congress may not mandate the prosecution of violators of that statute. Instead, the President's prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed (and still further protection comes from later review by an independent jury and Judiciary in those prosecutions brought by the Executive).[9]

[9] It is likely that the Executive may decline to seek *civil* penalties or sanctions (including penalties or sanctions in administrative proceedings) on behalf of the Federal Government in the same way. Because they are to some extent analogous to criminal prosecution decisions and stem from similar Article II roots, such civil enforcement decisions brought by the Federal Government are presumptively an exclusive Executive power. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'") (quoting U.S. CONST. art. II, § 3); *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985); *Confiscation Cases*, 74 U.S. 454, 457 (1868); *see*

To be sure, a President's decision to exercise prosecutorial discretion and to decline to seek charges against violators (or to pardon violators) of certain laws can be very controversial. For example, if a President disagreed on constitutional or policy grounds with certain federal marijuana or gun possession laws and said that the Executive Branch would not initiate criminal charges against violators of those laws, controversy might well ensue, including public criticism that the President was "ignoring" or "failing to enforce" the law (and if a court had previously upheld the law in question as constitutional, additional claims that the President was also "ignoring" the courts). But the President has clear constitutional authority to exercise prosecutorial discretion to decline to prosecute violators of such laws, just as the President indisputably has clear constitutional authority to pardon violators of such laws. *See, e.g.*, 1963 Attorney Gen. Ann. Rep. 62, 62-63 (1963) (President Kennedy commuted the sentences of many drug offenders sentenced to mandatory minimums); Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), *in* 11 THE WRITINGS OF THOMAS JEFFERSON 42, 43-44 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) (President Jefferson both pardoned those convicted under the Sedition Act and refused to prosecute violators of the Act); President George

also Butz v. Economou, 438 U.S. 478, 515 (1978); *Seven-Sky v. Holder*, 661 F.3d 1, 50 & n.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (referring to possibility that a President might exercise prosecutorial discretion not to seek civil penalties against violators of a statute). That said, it has occasionally been posited that the President's power not to initiate a civil enforcement action may not be entirely absolute (unlike with respect to criminal prosecution) and thus might yield if Congress expressly mandates civil enforcement actions in certain circumstances. *Cf. Heckler*, 470 U.S. at 832-33.

Washington, Proclamation (July 10, 1795), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 181 (James D. Richardson ed., 1896) (President Washington pardoned participants in the Pennsylvania Whiskey Rebellion).[10] The remedy for

[10] As a general matter, there is widespread confusion about the differences between (i) the President's authority to disregard statutory mandates or prohibitions on the Executive, based on the President's constitutional objections, and (ii) the President's prosecutorial discretion not to initiate charges against (or to pardon) violators of a federal law. There are two key practical differences. *First*, the President may disregard a statutory mandate or prohibition on the Executive only on constitutional grounds, not on policy grounds. By contrast, the President may exercise the prosecutorial discretion and pardon powers on any ground – whether based on the Constitution, policy, or other considerations. *Second*, our constitutional structure and tradition establish that a President is bound to comply with a final Court decision holding that a statutory mandate or prohibition on the Executive is constitutional. But in the prosecutorial discretion and pardon context, when a Court upholds a statute that regulates private parties as consistent with the Constitution, that ruling simply *authorizes* prosecution of violators of that law. Such a Court ruling does not *require* the President either to prosecute violators of that law or to refrain from pardoning violators of that law. So the President may decline to prosecute or may pardon violators of a law that the Court has upheld as constitutional. To take one example, a President plainly could choose not to seek (or could commute) federal death sentences because of the President's own objections to the death penalty, even though the Supreme Court has upheld the death penalty as constitutional. *See* Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1189-90 (2012) ("President Jefferson ended pending prosecutions under the Sedition Act and pardoned individuals previously convicted under that Act, even though the courts had upheld the Act's constitutionality. . . . [I]t can hardly be said that his pardons

Presidential abuses of the power to pardon or to decline to prosecute comes in the form of public disapproval, congressional "retaliation" on other matters, or ultimately impeachment in cases of extreme abuse.

So having said all of that, why doesn't the principle of prosecutorial discretion justify the Nuclear Regulatory Commission's inaction in this case? The answer is straightforward. Prosecutorial discretion encompasses the Executive's power to decide whether to initiate charges for legal wrongdoing and to seek punishment, penalties, or sanctions against individuals or entities who violate federal law. Prosecutorial discretion does not include the power to disregard other statutory obligations that apply to the Executive Branch, such as statutory requirements to issue rules, *see Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (explaining the difference), or to pay benefits, or to implement or administer statutory projects or programs. Put another way, prosecutorial discretion encompasses the discretion not to *enforce* a law against private parties; it does not encompass the discretion not to *follow* a law imposing a mandate or prohibition on the Executive Branch.[11]

disregarded a duty to enforce or defend a congressional statute, given that the pardon power, by its nature, involves undoing the prior enforcement, via conviction, of a statute. And although the abatement of pending prosecutions failed in one sense to enforce the Sedition Act, given the breadth of prosecutorial discretion – whether rooted in the Constitution, in the presumed intention of Congress, or in some combination of the two – it is hard to view Jefferson as having disregarded a congressional mandate.") (footnotes omitted).

[11] Of course, for reasons already discussed, the President may decline to follow a law that purports to *require* the Executive

This case does not involve a Commission decision not to prosecute violations of federal law. Rather, this case involves a Commission decision not to follow a law mandating that the Commission take certain non-prosecutorial action. So the Executive's power of prosecutorial discretion provides no support for the Commission's inaction and disregard of federal law here.

IV

At the behest of the Commission, we have repeatedly gone out of our way over the last several years to defer a mandamus order against the Commission and thereby give Congress time to pass new legislation that would clarify this matter if it so wished. In our decision in August 2012, the Court's majority made clear, however, that mandamus likely would have to be granted at some point if Congress took no further action. *See* Order, *In re Aiken County*, No. 11-1271 (D.C. Cir. Aug. 3, 2012). Since then, Congress has taken no further action on this matter. At this point, the Commission is simply defying a law enacted by Congress, and the Commission is doing so without any legal basis.

We therefore have no good choice but to grant the petition for a writ of mandamus against the Commission.[12]

Branch to prosecute certain offenses or offenders. Such a law would interfere with the President's Article II prosecutorial discretion.

[12] In his dissent, Chief Judge Garland cites several cases to explain his vote against granting mandamus in this case. Of the eight cases he cites, however, five did not involve a statutory mandate with a defined deadline, as we have here. In the other three cases, the Court made clear that either the agency had to act or the Court would grant mandamus in the future. *See In re United*

This case has serious implications for our constitutional structure. It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by

Mine Workers of America International Union, 190 F.3d 545, 554 (D.C. Cir. 1999) ("however modest [an agency's] personnel and budgetary resources may be, there is a limit to how long it may use these justifications to excuse inaction"); *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 477 (D.C. Cir. 1998) (denying mandamus partly because "this is not a case where an agency has been contumacious in ignoring court directions to expedite decision-making"); *In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) (mandamus inappropriate where it would interfere with agency priorities set by applying agency expertise but noting that "[w]here the agency has manifested bad faith, as by . . . asserting utter indifference to a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities"). Consistent with those precedents, we followed a cautious approach in our decision more than a year ago when we declined to issue mandamus against the Commission at that time. But the Court's majority clearly warned that mandamus would eventually have to be granted if the Commission did not act or if Congress did not change the law. Since then, despite the clear warning, the Commission has still not complied with the statutory mandate. On the contrary, the Commission has reaffirmed that it has no plans to comply with the statutory mandate. In the face of such deliberate and continued agency disregard of a statutory mandate, our precedents strongly support a writ of mandamus. Our respectful factbound difference with Chief Judge Garland, then, is simply that we believe – especially given the Court's cautious and incremental approach in prior iterations of this litigation, the significant amount of money available for the Commission to continue the licensing process, and the Commission's continued disregard of the law – that the case has by now proceeded to the point where mandamus appropriately must be granted.

the Nuclear Regulatory Commission. Our decision today rests on the constitutional authority of Congress, and the respect that the Executive and the Judiciary properly owe to Congress in the circumstances here. To be sure, if Congress determines in the wake of our decision that it will never fund the Commission's licensing process to completion, we would certainly hope that Congress would step in before the current $11.1 million is expended, so as to avoid wasting that taxpayer money. And Congress, of course, is under no obligation to appropriate additional money for the Yucca Mountain project. Moreover, our decision here does not pre-judge the merits of the Commission's consideration or decision on the Department of Energy's license application, or the Commission's consideration or decision on any Department of Energy attempt to withdraw the license application. But unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, the Nuclear Regulatory Commission must promptly continue with the legally mandated licensing process. The petition for a writ of mandamus is granted.

So ordered.

RANDOLPH, *Senior Circuit Judge*, concurring: I join all of the majority opinion except part III, which I believe is unnecessary to decide the case.

I also believe some background information is needed to understand what has occurred here. The Nuclear Waste Policy Act states that the Commission "shall consider" the Yucca Mountain license application and "shall issue a final decision approving or disapproving" the application "not later than" three years after its submission. 42 U.S.C. § 10134(d). The Department of Energy filed the Yucca Mountain application in June 2008, *see* Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008), and Congress later provided substantial appropriations for the licensing process, *see* U.S. NUCLEAR REGULATORY COMMISSION, NUREG-1100, VOL. 26, CONGRESSIONAL BUDGET JUSTIFICATION FOR FY 2011 94–95 (2010). Although the Commission had a duty to act on the application and the means to fulfill that duty, former Chairman Gregory Jaczko orchestrated a systematic campaign of noncompliance. Jaczko unilaterally ordered Commission staff to terminate the review process in October 2010; instructed staff to remove key findings from reports evaluating the Yucca Mountain site; and ignored the will of his fellow Commissioners. *See* U.S. NUCLEAR REGULATORY COMMISSION, OFFICE OF THE INSPECTOR GENERAL, OIG CASE NO. 11-05, NRC CHAIRMAN'S UNILATERAL DECISION TO TERMINATE NRC'S REVIEW OF DOE YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION 7–10, 17, 44–46 (2011). These transgressions prompted an investigation by the Commission's Inspector General, as well as a letter from all four of the Commission's other members expressing "grave concerns" about Jaczko's performance in office. *See* Matthew Daly, *Nuclear Agency's Commissioners and Chief Trade War of Words*, WASH. POST, Dec. 10, 2011, at A18. After we heard oral argument in this case, Jaczko resigned.

Today's judgment should ensure that the Commission's next chapter begins with adherence to the law. In the Nuclear Waste Policy Act Congress required the Commission to rule on the Yucca Mountain application, and it appropriated funds for that purpose. The Commission's duty is to comply with the law and our duty is to make sure it does so. "Once Congress . . . has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

GARLAND, *Chief Judge*, dissenting: Mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted). Even if a petitioner can show that it has a "clear and indisputable" right to the writ, issuing the writ remains "a matter vested in the discretion of the court." *Id*. at 381, 391. Likewise, "mandamus[] does not necessarily follow a finding of a [statutory] violation." *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999) (second alteration in original) (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991)). To the contrary, this court has not hesitated to deny the writ even when an agency has missed a statutory deadline by far more than the two years that have passed in this case. *See id.* at 546, 551 (declining to issue the writ, notwithstanding that the agency missed an "express" statutory deadline by 8 years in "clear violation" of the statute).[1] Finally, and most relevant

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[1] *See also, e.g.*, *In re Core Commc'ns, Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008) (noting that the court had declined to issue the writ after the agency failed to respond to the court's remand for 3 years, but issuing the writ when the delay reached 6 years); *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100-01 (D.C. Cir. 2003) (vacating and remanding the district court's determination that a 5-year delay was unreasonable, due to the district court's failure to consider the agency's resource constraints); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 477-78 (D.C. Cir. 1998) (declining to order agency action notwithstanding a 10-year delay in issuing a rule and a 20-year delay in achieving the rule's statutory objective); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1146-47, 1150 (D.C. Cir. 1992) (noting that the court had declined to issue the writ after a 3-year delay, but issuing the writ when the delay reached 6 years); *In re Monroe Commc'ns Corp.*, 840 F.2d 942, 945-47 (D.C. Cir. 1988) (declining to issue the writ despite the agency's 3-year delay since the ALJ's initial decision, and 5-year delay since the start of agency proceedings); *Oil, Chem. & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (declining to issue the writ after a 5-year delay).

here, "[c]ourts will not issue the writ to do a useless thing, even though technically to uphold a legal right." *United States ex rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228, 232 (D.C. Cir. 1936).[2]

Unfortunately, granting the writ in this case will indeed direct the Nuclear Regulatory Commission to do "a useless thing." The NRC has not refused to proceed with the Yucca Mountain application. Rather, by unanimous votes of both the Commission and its Atomic Safety and Licensing Board, it has suspended the application proceeding until there are sufficient funds to make meaningful progress. *See* Mem. and Order at 1-2 (N.R.C. Sept. 9, 2011); Mem. and Order (Suspending Adjudicatory Proceeding) at 3 (A.S.L.B. Sept. 30, 2011); NRC Br. 53; NRC Resp. Br. 5; Oral Arg. Tr. 36. Five months prior to that suspension, Congress had given the Commission only the minimal amount it requested to "support work related to the orderly closure of the agency's Yucca Mountain licensing support activities." NRC, CONG. BUDGET JUSTIFICATION FOR FY 2011, at 95 (2010); *see* Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1423, 125 Stat. 38, 126 (2011). The following year, Congress completely zeroed out the Commission's funding for the project. And the year following that -- after we held this case in abeyance so that Congress could indicate whether it intended to fund the project going forward, *see* Order, *In re Aiken County*, No. 11-1271 (D.C. Cir. Aug. 3, 2012) -- Congress once again appropriated no money for Yucca Mountain activities.

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[2] *See Weber v. United States*, 209 F.3d 756, 760 (D.C. Cir. 2000) (declaring that the writ "is not to be granted in order to command a gesture"); *Realty Income Trust v. Eckerd*, 564 F.2d 447, 458 (D.C. Cir. 1977) (holding that "equity should not require the doing of a 'vain or useless thing'").

As a consequence, the agency has only about $11 million left in available funds. No one disputes that $11 million is wholly insufficient to complete the processing of the application. By way of comparison, the Commission's budget request for the most recent year in which it still expected the Yucca Mountain proceeding to move forward was $99.1 million. *See* Inspector Gen. Mem. at 8 (June 6, 2011) (describing NRC's FY 2010 performance budget request, which Congress did not grant).[3] The only real question, then, is whether the

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[3]To put the size of the application process in concrete terms, at the time the NRC suspended its licensing proceeding, 288 contentions -- claims that must be resolved before the application can be granted -- remained outstanding. *See* Mem. and Order (Suspending Adjudicatory Proceeding) at 3 (A.S.L.B. Sept. 30, 2011); *see also* Mem. and Order at 2 (N.R.C. June 30, 2009) (noting that the Yucca Mountain proceeding "is the most extensive . . . in the agency's history"). Over 100 expert witnesses had been identified for depositions, to address contentions on such diverse subjects as hydrology, geochemistry, climate change, corrosion, radiation, volcanism, and waste transport -- and those were just for the first phase of the proceeding. *See* Mem. and Order (Identifying Participants and Admitted Contentions), Attachment A at 1-10 (A.S.L.B. May 11, 2009); Dep't of Energy Mot. to Renew Temporary Suspension ("DOE Mot.") at 5 n.14 (A.S.L.B. Jan. 21, 2011).

Nor is funding for the NRC the only problem. The Department of Energy (DOE) is the license applicant and an indispensable party in the application process; it bears the burden of proof on each of the remaining 288 contentions. *See* 10 C.F.R. § 2.325. But Congress has zeroed out DOE's Yucca Mountain funding for three years running. It, too, has only a comparatively small amount of carryover funds available -- enough for less than two months' participation. *See* U.S. Amicus Br. 6; *see also infra* note 4.

Of course, processing the application is itself only the tip of the iceberg. Completing the project, including constructing the Yucca

Commission can make any meaningful progress with $11 million.

The Commission has concluded that it cannot. *See* NRC Resp. Br. 5; U.S. Amicus Br. 9; *see also* NRC Br. 42. And we are not in a position -- nor do we have any basis -- to second-guess that conclusion. Two years ago, citing insufficient funds to proceed and the need to preserve the materials it had collected, the NRC shuttered the licensing program, dismantled the computer system upon which it depended, shipped the documents to storage, and reassigned the program's personnel to projects that did have congressional funding. *See* Mem. and Order at 1-2 (N.R.C. Sept. 9, 2011); NRC Br. 3; Pet'rs Br. 16; Oral Arg. Tr. 45. The Commission believes it will take a significant part of the $11 million to get the process started again. *See* Oral Arg. Tr. 45-49; *see also* U.S. Amicus Br. 6.[4] Nor would that leave the Commission with the remainder to spend on moving the application along, however slightly. In light of the NRC's previous three years of appropriations experience, the only responsible use for the remaining money would be to spend it on putting the materials back into storage -- in order to preserve them for the day (if it ever arrives) that Congress provides additional funds. *See* Oral Arg. Tr. 48-49.

Mountain facilities themselves, would require another $50 billion, none of which has been appropriated. *See* Oral Arg. Tr. 63.

[4]The Department of Energy is in a position similar to that of the NRC. The DOE office with responsibility for the Yucca Mountain project ceased operations in September 2010. *See* DOE Mot. at 4-5. "An active licensing proceeding would thus require DOE to, among other things, re-hire employees, enter into new contracts for necessary services, and re-create capabilities . . . ." *Id.* at 5; *see also supra* note 3.

In short, given the limited funds that remain available, issuing a writ of mandamus amounts to little more than ordering the Commission to spend part of those funds unpacking its boxes, and the remainder packing them up again. This exercise will do nothing to safeguard the separation of powers, which my colleagues see as imperiled by the NRC's conduct. *See* Court Op. at 7, 21-22. And because "[i]t is within our discretion not to order the doing of a useless act," *Sierra Land & Water*, 84 F.2d at 232, I respectfully dissent.[5]

[5] *Cf. In re Barr Labs.*, 930 F.2d at 76 ("Congress sought to get generic drugs into the hands of patients at reasonable prices -- fast. The record before us reflects a defeat of those hopes. There are probably remedies[, including] more resources. . . . [N]one is within our power, and a grant of [the] petition [for mandamus] is no remedy at all.").