

Client Alert

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U.S. Supreme Court Declines to Extend Constitutional Protection to Foreign Affiliates of Domestic Nongovernmental Organizations

On June 29, 2020, the U.S. Supreme Court issued a 5-3 decision in *Agency for International Development v. Alliance for Open Society International, Inc.*, No. 19-177, a case challenging the constitutionality of certain conditions imposed on nongovernmental organizations (“NGOs”) that receive funding under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act, 22 U.S.C. § 7601 *et seq.* (the “Leadership Act”). Through the Leadership Act, the United States has provided billions in funding to domestic and foreign NGOs that work to combat HIV/AIDS internationally. At issue in *Alliance for Open Society International* was the Leadership Act’s so-called “Policy Requirement,” which requires organizations seeking funding to “have, or agree to have, a policy explicitly opposing prostitution and sex trafficking.” In 2013, the Court had invalidated this provision as unconstitutional under the First Amendment to the U.S. Constitution as-applied to *domestic* NGOs—organizations whose business is based out of the United States or that have a physical presence in the United States.

With its decision here, the Court has now concluded that *foreign* NGOs—organizations based in a foreign country and that operate entirely abroad—remain subject to the Leadership Act’s Policy Requirement, regardless of whether the foreign NGO is affiliated with a domestic NGO. The Court relied on “two bedrock principles” to reach that result. *First*, the Court reaffirmed that foreign citizens and businesses “outside U.S. Territory do not possess rights under the U.S. Constitution.” *Second*, the Court noted that “it is long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations.”

Applying those general legal principles, the Court held that foreign affiliates of domestic NGOs “are foreign organizations, and foreign organizations operating abroad have no First Amendment rights.” Thus, as was relevant in this case, the Court explained that domestic NGOs “cannot export their own First Amendment rights to shield foreign organizations from Congress’s funding conditions.” The Court did recognize that some domestic NGOs are “closely identified” with foreign affiliates—including sharing similar names, logos, and brands—but it declined to create an exception for those organizations notwithstanding the potential for conflicting organizational messaging. Whatever its benefits, that “proposed line-drawing among foreign organizations would blur a clear rule of American law: Foreign organizations operating abroad do not possess rights under the U.S. Constitution.”

The Court’s decision directly affects foreign NGOs and domestic NGOs with foreign affiliates in a variety of ways. With respect to the Leadership Act, foreign NGOs and foreign affiliates of domestic NGOs that seek or intend to seek funding under the Act (1) should determine whether they are subject to the Policy Requirement, and (2) if they are subject to the Policy Requirement, ensure that they are in compliance. More broadly, organizations should consider whether their policies, practices, or procedures assume the application of U.S. constitutional law. The Court’s decision makes clear that the specific facts surrounding business operations and an organization’s physical presence in the U.S. are critical in answering those questions.

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