08-4917-cv

To be argued by: REBEKAH DILLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL,

Plaintiffs-Appellees,

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, THOMAS R. FRIEDEN, in his official capacity as Director of the U.S. Centers for Disease Control and Prevention, and his successors, KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, and her successors, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, RAJIV SHAH, in his official capacity as Administrator of the United States Agency for International Development, and his successors,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs have no parent corporations and do not issue stock, so there are no publicly held companies holding 10% or more of their stock.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 08-4917-CV

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL,[*]

Plaintiffs-Appellees,

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, THOMAS R. FRIEDEN, in his official capacity as Director of the U.S. Centers for Disease Control and Prevention, and his successors, KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, and her successors, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, RAJIV SHAH, in his official capacity as Administrator of the United States Agency for International Development, and his successors,[**]

Defendants-Appellants.

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[*] InterAction, named as a plaintiff in the Second Amended Complaint (JA 1013), was erroneously omitted from this Court's official caption.

[**] Named officials have been automatically substituted for their predecessors. Fed. R. App. P. 43(c)(2).

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court was correct that Plaintiffs have standing to sue, where they have suffered concrete injuries from the government's violation of the First Amendment and where individual participation by the associational Plaintiffs' members is not required.

2. Whether the District Court was correct that the Policy Requirement, 22 U.S.C. § 7631(f), and the government's implementation of it, violate the First Amendment because they require Plaintiffs to espouse the government's viewpoint on prostitution, condition Plaintiffs' eligibility for public funds on holding favored beliefs, and prohibit Plaintiffs from saying or doing anything contrary to the government's viewpoint with their private funds.

3. Whether the Guidelines regarding the Policy Requirement are likewise unconstitutional, where they do nothing to relieve Plaintiffs of the obligation to espouse the government's viewpoint, continue to screen grantees by their beliefs, and impose onerous

separation requirements on privately funded affiliates wishing to exercise First Amendment rights.

4. Whether the Policy Requirement and Guidelines are unconstitutionally vague, where they fail to state what kinds of speech and activities violate the Policy Requirement, and fail to specify what degree of separation is required between a grantee and a privately funded affiliate wishing to exercise its First Amendment rights.

PRELIMINARY STATEMENT

The preliminary injunctions entered by the District Court should be affirmed because the Government's "Policy Requirement" violates the First Amendment.

Enacted as part of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act"), the Policy Requirement requires private non-profit organizations to adopt a specific viewpoint—a policy "explicitly opposing prostitution"—as a condition of receiving federal funds to fight HIV/AIDS. 22 U.S.C. § 7631(f). It also prohibits recipients from saying or doing anything that the Government deems "inconsistent with [an] opposition to prostitution," 75 Fed. Reg. 18,760 (Apr. 13, 2010); SPA 200, while failing to provide any guidance regarding which speech and activities are prohibited.

The Policy Requirement violates the First Amendment because it compels private organizations to espouse the government's message on a contested social issue and conditions eligibility for participation in a federal program upon a grantee's beliefs. Together, these conditions violate the First Amendment by effectively imposing an ideological litmus test on private organizations seeking federal grants to combat HIV/AIDS. The Policy Requirement and Guidelines are also unconstitutionally vague because they fail to provide notice regarding which activities and speech the government considers inconsistent with its viewpoint, and how much separation must be maintained between Plaintiffs and any privately funded organizations engaging in the forbidden activities.

The Government responds that such constitutional infringements are permissible because the Policy Requirement is a mere "funding condition." But fundamental rights cannot be trampled merely because the government is spending money. The Supreme Court has repeatedly struck down as presumptively impermissible attempts to compel adoption of the government's viewpoint as a condition of receiving government funds or participating in a government program. At a minimum, such restrictions cannot withstand constitutional scrutiny unless they are narrowly tailored to serve a substantial government interest—a showing the Government has failed to make. Indeed, it has not offered the slightest explanation as to how a statement of belief by non-profit grantees is tailored to

furthering the asserted interest in combating prostitution through the HIV/AIDS program.

Likewise, the "Guidelines" issued by the government that purport to save the Policy Requirement are completely unresponsive to its constitutional flaws. The Guidelines continue to compel speech, continue to screen grantees by viewpoint, and continue to prohibit all privately-funded speech and conduct by the Plaintiffs that the government deems inconsistent with its viewpoint, unless conducted through a separate affiliate organization that is not able to speak for the grantee.

STATEMENT OF THE CASE

This appeal is a replay of the appeal heard by this panel three years ago and follows prolonged delays caused by the Government.

Plaintiffs, non-governmental organizations ("NGOs") engaged in the international fight against HIV/AIDS, challenge the Leadership Act's anti-prostitution "Policy Requirement," 22 U.S.C. § 7631(f), which compels federal grantees to adopt the government's viewpoint and make policy statements affirmatively "opposing prostitution" as a condition of receiving government funds. SPA 15A. Plaintiffs challenge this requirement because it compels them to espouse the government's viewpoint on a controversial issue, discriminates on the basis of viewpoint, prohibits contrary speech or conduct even when Plaintiffs are using their own private funds, and is unconstitutionally vague.

On May 9, 2006, the District Court granted a preliminary injunction to Plaintiffs Alliance for Open Society International ("AOSI") and Pathfinder International ("Pathfinder"). SPA 144. The court held that the Policy Requirement violates the First Amendment because it compels speech, discriminates based on viewpoint, and is not narrowly tailored to achieve Congress's goals. SPA 138.

At oral argument on the Government's appeal from this initial preliminary injunction, the Government announced for the first time that it intended to issue Guidelines implementing the Policy Requirement. *AOSI v. USAID*, 254 F. App'x 843, 846 (2d Cir. 2007). This Court therefore remanded the case to the District Court to "determine in the first instance whether the preliminary injunction should be granted in light of the new Guidelines." *Id.* Contrary to the Government's assertion (Gov't Br. 25), this Court did not instruct the District Court to apply the standard set forth in *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219 (2d Cir. 2006) ("*BLS*"). The panel "offer[ed] no opinion on the merits" with respect to "propriety of the guidelines or the constitutionality of the statutory regime" and stated that "the District Court on remand may consider any legal

arguments it deems relevant and take any additional evidence that may be appropriate." 254 F. App'x at 846.[1]

The Government delayed adopting regulations for almost a year and a half, while continuing to enforce the Policy Requirement against all NGOs except Plaintiffs AOSI and Pathfinder. SPA 16, 147. During that time, two associations of NGOs—InterAction and Global Health Council ("GHC") (together, the "associations")—renewed their request, originally made to the District Court shortly after the initial preliminary injunction order, to join the case to protect their members. SPA 147-149.

On remand, the District Court permitted an amendment of the Complaint to add the associations as plaintiffs, rejecting the Government's claim that they lacked standing. SPA 147-148. The District Court also ruled that the new Guidelines did not cure the Policy Requirement's defects because "the clause requiring Plaintiffs to adopt the government's view regarding the legalization of prostitution remains intact" (SPA 169), and the Guidelines impose significant burdens on Plaintiffs (SPA 175). The Government appealed from that order, and renewed its appeal from the District Court's initial order.

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[1] In its brief (Gov't Br. 25), the Government quotes a parenthetical about *BLS* that appeared in this Court's remand order, which explained the basis for the remand *in that case*. *AOSI*, 254 F. App'x at 846. The order explicitly offered no opinion on the merits of Plaintiffs' claims and instructed the District Court to consider any legal arguments it deemed relevant.

In July 2009, following the Government's appeal and on the eve of the deadline for Plaintiffs' brief to this Court, the Government confirmed that it intended to issue amended Guidelines. The parties stipulated to the withdrawal of the Government's appeal subject to reinstatement, and the Government subsequently reinstated its appeal on January 8, 2010.

On April 13, 2010, the Department of Health and Human Services ("HHS") issued an amended regulation, and the United States Agency for International Development ("USAID") issued amended Guidelines. Both documents (collectively, the "Guidelines") are essentially identical to each other and make only slight, non-material modifications to the previous versions. SPA 182-199, 200-204. The Government continues to enforce the Policy Requirement and Guidelines against all NGOs not covered by the preliminary injunction.

STATEMENT OF FACTS

I. PLAINTIFFS

This case is brought on behalf of U.S.-based, non-profit NGOs (collectively, the "Plaintiffs") engaged in the worldwide effort to halt the spread of HIV/AIDS. InterAction is the largest alliance of U.S.-based, international development and humanitarian NGOs. SPA 151; JA 840-841 ¶¶ 4-5. GHC is the largest alliance of organizations dedicated to international public health. SPA 151; JA 704, 705-706 ¶¶ 4, 8. Pathfinder (a member of both InterAction and GHC) provides access to

family planning and reproductive health services, including HIV/AIDS prevention, in over twenty countries throughout Africa, Latin America, Asia, and the Near East. SPA 33-34; JA 364-365 ¶ 4. AOSI has provided HIV/AIDS prevention services in Central Asia and generally promotes public health, education and economic, legal and social reform efforts around the world. SPA 33; JA 232-233 ¶¶ 5, 9. This brief refers to Pathfinder, AOSI, and the members of GHC and InterAction collectively as "Plaintiffs."

Many members of GHC and InterAction, including Pathfinder, receive government funding under the Leadership Act to fight HIV/AIDS. SPA 33-34, 151. Their work includes, for example: (1) enabling Bangladeshi NGOs to "become technically and managerially self-sufficient in the provision of essential health services" (JA 434); (2) increasing the use of child survival and reproductive health services in Mozambique (JA 445); (3) supporting orphans and vulnerable children in Kenya and South Africa (JA 491); (4) providing services to children affected by and/or infected with HIV in nine sub-Saharan African countries (JA 879 ¶ 15); (5) expanding community home-based care activities for people living with HIV/AIDS in Tanzania (JA 426 ¶ 9); and (6) identifying and implementing best practices in maternal, child, and newborn health and nutrition in India (JA 896 ¶ 23).

Plaintiffs also receive significant funding from non-U.S. government sources ("private funds"). SPA 33-34, 151; JA 707 ¶ 11; JA 842 ¶ 8. Indeed, receipt of private funding is an explicit prerequisite for receiving funds from the government. JA 743-744 ¶ 28. For example, Pathfinder receives funding from several United Nations agencies; the World Bank; the governments of Sweden, Canada, and the Netherlands; and numerous private donors. JA 738 ¶ 7.

II. THE POLICY REQUIREMENT

A. The Government's Implementation

The Policy Requirement states that grantees must "have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency." 22 U.S.C. § 7631(f). On its face, the Policy Requirement expressly compels speech and discriminates based on viewpoint by requiring grantees to adopt a viewpoint and a policy "explicitly opposing prostitution."

As implemented by the Government, the Policy Requirement also bars Plaintiffs from engaging in privately funded speech or activities that the Government deems to be insufficiently opposed to prostitution. Because a separate Leadership Act provision, which Plaintiffs do not challenge (SPA 41), already bars the use of government funds "to promote or advocate the legalization or practice of

prostitution" (22 U.S.C. § 7631(e); SPA 15A), the Policy Requirement's impact falls squarely upon privately-funded speech and activities.

For approximately 16 months after the Policy Requirement was enacted, the government declined to enforce it against U.S.-based organizations. The government had been warned by the Department of Justice, in a memorandum authored by the Office of Legal Counsel ("OLC") but never disclosed to Plaintiffs, that application of the requirement to such organizations would be unconstitutional. *See* SPA 42-43; JA 143 n.10, 155-156. OLC later reversed course, opining that "reasonable arguments" existed to support the constitutionality of enforcing the requirement against U.S.-based organizations. JA 155; SPA 43. Accordingly, the Government began enforcement against U.S. organizations in June 2005. SPA 43; JA 381-388, 390-391.

The government has never articulated the precise contours of the Policy Requirement, despite Plaintiffs' repeated requests for guidance. SPA 44-48; JA 236-240 ¶¶ 24-37. For example, the government has never specified the range of speech and activities that are prohibited by the Policy Requirement, even though it claims the authority to police Plaintiffs' speech and conduct that supposedly is inconsistent with the government's viewpoint on prostitution. SPA 48; Gov't Br. 32-34. The government has stated that "advocating for the legalization of the institution of prostitution" or "organizing or unionizing prostituted people for the

purpose of advocating for the legalization of prostitution" are examples of activities that would violate the Policy Requirement. SPA 16-17; *see also* SPA 48; JA 389. But it refuses to say whether any other speech and activities may violate the Policy Requirement. For example, the government has never stated whether it agrees with the view—put forward by some members of Congress—that the Policy Requirement bars grantees from using private funds to advocate for prostitutes working together to "address the health and social contexts that increase their vulnerability to HIV infection" or to collaborate with or fund other groups doing such work. JA 179 (internal quotation marks omitted); *see also* SPA 132; JA 399-405. To the contrary, the amended Guidelines expressly decline to provide guidance on what constitutes a "restricted" activity. SPA 202.

B. Effect On Plaintiffs' Independence And Missions

To be clear, Pathfinder, AOSI, and many of the associations' members do not support or wish to support prostitution. Rather, they seek to educate and assist women in finding alternatives that are healthier and safer for individuals and societies. But the Policy Requirement severely impacts Plaintiffs by forcing them to take a policy position that undermines their ability to function as independent, humanitarian NGOs and to stop the spread of HIV/AIDS.

By mandating that Plaintiffs declare their opposition to prostitution, the Policy Requirement harms Plaintiffs' credibility and integrity as NGOs, which

generally avoid taking controversial policy positions likely to offend host nations, partner organizations, or groups that Plaintiffs seek to educate and help. SPA 107-110; JA 244-245 ¶¶ 56, 58; JA 368-369 ¶ 20; JA 715-716 ¶¶ 34-35; JA 846-847 ¶ 22; JA 897 ¶ 27. The Policy Requirement requires Plaintiffs to risk offending all of these groups whose approach to HIV/AIDS may differ from that of the government and to stigmatize people whose trust they must earn to stop the spread of HIV/AIDS. JA 715 ¶¶ 32-33; JA 847-848 ¶ 25; JA 882 ¶ 23; JA 897-898 ¶ 28.

In addition, the Policy Requirement bars Plaintiffs from using their private funds to undertake vital HIV/AIDS work. USAID and other public health authorities recognize that many of the most successful efforts to fight HIV/AIDS involve organizing marginalized groups such as prostitutes and working cooperatively with them and their organizations. SPA 37-38; JA 58-62 ¶¶ 24-27, 30-31; JA 63-70, ¶¶ 35, 39-43, 45-48, 54; JA 229-230; JA 882 ¶ 23. Consequently, as the World Health Organization ("WHO") and the United Nations ("U.N.") have made clear, in some regions, the most effective HIV prevention efforts necessitate advocating a change in the legal and policy environment surrounding prostitution, to prevent prostitutes from going "underground" and avoiding treatment and outreach. SPA 37-38, 123; JA 56-57 ¶ 20; JA 58-59 ¶ 25; JA 61-64 ¶¶ 31-32, 35-36; JA 69 ¶ 52. Yet the Policy Requirement bars Plaintiffs

from using private funds to engage in—or even discuss—these efforts, except through a separate organization.

As documented in Plaintiffs' submissions, the Policy Requirement has already impeded Plaintiffs' ability to use private funding to discuss their HIV/AIDS work and research—such as the highly effective HIV/AIDS prevention programs run by GHC and InterAction member CARE in India and Bangladesh—in publications, on websites, and at conferences. SPA 142-143, 155; JA 704-705 ¶¶ 7-8; JA 711-713 ¶¶ 24-26; JA 748-749 ¶¶ 41-43; JA 850 ¶ 31; JA 882-883 ¶ 24; JA 898 ¶ 31. The Policy Requirement has also impeded Plaintiffs from conducting privately-funded HIV/AIDS prevention work in accordance with recognized best public health practices, such as: CARE's sex worker peer education programs in Bangladesh and India; Pathfinder's work organizing prostitutes in India so that they can collectively agree to engage in HIV prevention; and Pathfinder's outreach to brothel owners, pimps, and others to promote safe sex practices. SPA 53; JA 370-371 ¶¶ 26-28; JA 713-714 ¶ 27; JA 881-883 ¶¶ 19-24; JA 898 ¶ 30. The Policy Requirement's vagueness has exacerbated the situation. Already, CARE has been investigated by USAID and has been accused by a member of Congress of violating the Policy Requirement based on its privately funded activities in India and associations with sex worker groups. JA 881-882 ¶¶ 20-22.

The Government has not disputed these facts, and there is no contrary evidence in the record.

III. THE GUIDELINES

The government's Guidelines do nothing to remedy the constitutional infirmities of the Policy Requirement.

A. Scope Of The Guidelines

The Guidelines principally govern the degree of separation required between grantees and other "affiliated" organizations that do not have anti-prostitution policies, or that espouse viewpoints about prostitution with which the Government disagrees. SPA 188-189, 202-203. But the Guidelines do not remedy the First Amendment problems inherent in the Policy Requirement.

Significantly, the Guidelines do nothing to alter the compelled speech and viewpoint discrimination requirements that apply to federal *grantees* under the Policy Requirement. Indeed, under the Guidelines, grantees must not only express the policy view that "they are opposed to the practice[] of prostitution," but must further state a specific reason for opposing prostitution, namely "the psychological and physical risks [that prostitution] pose[s] for women, men, and children." SPA 203; *see also* SPA 188. Nor do the Guidelines alleviate the Policy Requirement's prohibition on speech and activities contrary to the government's viewpoint. The Guidelines principally govern the degree of separation required between grantees

and other "affiliated" organizations. But no degree of separation changes the fact that as grantees *Plaintiffs* still must hold and espouse the mandated organizational viewpoint in order to be eligible to participate in the federal program. Whether the separate affiliated organization can speak or do things contrary to the government's viewpoint does not change the heavy burden on Plaintiffs to conform their beliefs to those of the government.

The Guidelines also offer no clarification as to what activities or speech would violate the statute's Policy Requirement. SPA 202.

B. Burdens On Grantees

Instead, the Guidelines compound the First Amendment problem by creating vague and burdensome separation requirements for grantees and affiliates. Specifically, the Guidelines provide that grantees must be separate, "to the extent practicable in the circumstances," from undefined "affiliated organizations" that do not have an anti-prostitution policy. SPA 188-189, 203-204. Whether a grantee and affiliate are sufficiently separate is to be decided on a "case-by-case basis," according to five non-exclusive factors: (1) legal separation; (2) separate personnel or other allocation of personnel that maintains "adequate" separation; (3) separate timekeeping and accounting records; (4) the degree of separation of the grantee's facilities from facilities in which restricted activities occur; and (5) distinct signage and other distinguishing factors. *Id.* The Guidelines give no indication about

which additional factors will be taken into account, or how any of the factors will be weighed. Given this lack of clarity, and the severe consequences that result from a finding that a Plaintiff is in violation of the separation requirement, the only reasonable thing for Plaintiffs to do is to maintain the maximum level of separation indicated by each of the five factors.

Each factor imposes significant burdens on Plaintiffs, who operate in numerous foreign countries with varied and often difficult legal and policy regimes. Most countries in which Plaintiffs operate impose significant hurdles to establishing and operating NGOs, including difficult registration requirements and restrictive visa approvals, making the creation and operation of an affiliate organization extremely burdensome. *See*, *e.g.*, SPA 175; JA 719-720 ¶¶ 46-49; JA 850-851 ¶¶ 33-34; JA 887-889 ¶¶ 32-36; JA 899-900 ¶¶ 33-34; JA 906-928 ¶¶ 12-67. Maintaining separate personnel and separate facilities also presents severe logistical and financial obstacles. *See, e.g.*, JA 755-766 ¶¶ 61-65, 70-71, 78-88, 93-97; JA 907-908 ¶ 16.

In addition, a newly formed entity has no proven track record to qualify for funding from the government (*see* 22 U.S.C. § 2151u(a)) or to attract private sector donations. *See*, *e.g.*, JA 690; JA 752-754 ¶¶ 52-57; JA 851 ¶ 35; JA 900 ¶ 34; JA 910 ¶ 22. Furthermore, the inefficiencies in having duplicate facilities in order to

maintain separate affiliates will make Plaintiffs less attractive to private donors. JA 756-757 ¶¶ 66-69; JA 853 ¶ 39; JA 910-911 ¶¶ 23-25.

These facts are undisputed by the Government, and there is no contrary evidence in the record.

SUMMARY OF ARGUMENT

The preliminary injunctions entered by the District Court should be affirmed because the government's "Policy Requirement" violates the First Amendment.

First, Plaintiffs clearly have standing to bring this suit. AOSI, Pathfinder, and numerous members of InterAction and GHC have been forced to espouse the government's views on a matter of great controversy and are subject to an eligibility test for federal funds that turns on a grantee's beliefs. They also have been forced to constrain their privately funded speech and conduct and are subject to unconstitutionally vague standards. Moreover, the relevant questions of law and fact in this case are common to all of InterAction's and GHC's aggrieved members and do not require individualized determinations.

Second, the Policy Requirement violates the First Amendment because it compels private organizations to speak the government's message and determines eligibility for federal funds based on a group's beliefs. The Policy Requirement goes even further, barring grantees from speaking or acting with their private funds in any way contrary to the government's message. The First Amendment's

prohibitions against compelled speech and viewpoint discrimination apply with undiminished force even in the context of government funding. Accordingly, the Policy Requirement is presumptively invalid and, at minimum, subject to heightened scrutiny.

The Government nonetheless insists that it should be able to vet its grantees by their viewpoint and command a policy statement in order to ensure that its message is not distorted. But the Government has failed to present, and Congress never considered, *any* evidence that the government's interests in combating prostitution in its HIV/AIDS program would be endangered by either a grantee's failure affirmatively to adopt an anti-prostitution message or its *silence* on the issue. Nor has the Government offered any explanation as to why the anti-prostitution restriction on the use of federal funds—a restriction that Plaintiffs do not challenge—is not sufficient to further its interest. In fact, the Policy Requirement goes far beyond what is reasonably necessary to maintain the integrity of government-funded programs and to minimize any risk of diluting or distorting the government's message in those programs. It thus is not narrowly tailored to achieve a substantial government interest.

The government's implementing "Guidelines" also fail to cure the Policy Requirement's fatal constitutional defects. The existence of other, separate organizations cannot cure the constitutional infirmity inherent in forcing an

independent non-profit organization to speak the government's viewpoint and conform to a belief-based test for participation in a government program. Contrary to the Government's suggestion, the Supreme Court has made clear that an "alternative channel" of communication cannot cure compelled speech and viewpoint discrimination under circumstances like this. And even if the alternative channel test were appropriate—which it is not—the significant burdens placed on grantees by the Guidelines would fail this test.

Finally, the Policy Requirement and Guidelines are impermissibly vague because they fail to explain which speech and activities are "inconsistent with an opposition to prostitution" and thus prohibited. The Guidelines compound the vagueness problem by failing to provide adequate guidance on the required separation between grantees and affiliates.

ARGUMENT

I. THE PLAINTIFFS HAVE STANDING

The District Court correctly found that the associational Plaintiffs have standing to challenge the Policy Requirement and Guidelines. Individual Plaintiffs AOSI and Pathfinder (whose standing the Government challenges for the first time in this appeal) have been injured in the same way as the associations' members, and the District Court's analysis is therefore equally applicable.

The Government argues that Plaintiffs lack standing because AOSI, Pathfinder, and the members of GHC and InterAction face only conjectural injuries, rather than an injury in fact. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (standing requires an actual and concrete "injury in fact"); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (to have standing, an association must show that its members would have standing to sue in their own right). The Government further argues that GHC and InterAction lack standing because their claims require individualized determinations. *See Hunt*, 432 U.S. at 343 (associational standing requires that neither the claims asserted nor the relief requested require individualized determinations).

In making these arguments, the Government ignores the common concrete injuries that have already been inflicted or threatened against Plaintiffs and that are the real basis for their suit.

A. Both The Individual Plaintiffs And The Associations' Members Have Suffered An Injury In Fact

AOSI, Pathfinder, and members of GHC and InterAction all face a "threatened or actual injury resulting from the [Government's] putatively illegal action," and have therefore adequately asserted an injury in fact. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (internal quotation marks omitted).[2]

[2] With respect to GHC and InterAction, only one member of each organization need have standing in its own right to meet the requirement for

These organizations face the loss of Leadership Act funds unless they abide by the Policy Requirement and Guidelines. They also risk criminal and civil sanctions if they are found to have misrepresented their compliance. *See infra* Part III. Under these threats of financial, civil, and criminal sanctions, Pathfinder, AOSI, and members of GHC and InterAction have all been compelled to speak the government's message and adopt policies against their will. SPA 156, 168-169; JA 245 ¶ 57, 624-626, 711 ¶ 23, 742 ¶ 24, 846-848 ¶¶ 22, 25. *See International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996) (milk producers had standing to contest compelled disclosure on labels because "the statute at issue require[d] appellants to make an involuntary statement").

These organizations have also all been forced to constrain their privately funded speech and conduct so as to be consistent with the Policy Requirement and Guidelines. For example, before the preliminary injunction, AOSI was "severely constrained" in the program activities it could undertake with its private funds, such as planning and participating in conferences and discussing key policy issues

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associational standing. *See Building & Constr. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006) ("An association bringing suit on behalf of its members must allege that *one or more of its members* has suffered a concrete and particularized injury …." (emphasis added)); *see also Latino Officers Ass'n v. Safir*, 170 F.3d 167 (2d Cir. 1999) (finding that injury to nine of 1,500 members bestowed standing on plaintiff organization). In fact, twenty-eight GHC members and twenty InterAction members have adopted policy statements that they did not wish to make. JA 710 ¶ 20, 844 ¶ 17.

related to the legal status of sex workers. JA 632-633. Likewise, Pathfinder was barred from speaking freely on its website and at U.S. conferences about its HIV prevention activities with sex workers. JA 748-749 ¶¶ 41-42. And multiple members of GHC and InterAction have been barred from speaking freely with their private funds about effective HIV prevention efforts involving prostitutes. *See supra* Facts II.B. These injuries are more than adequate to confer standing. *See Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 392 (1988) (finding an injury in fact when "the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution").

Pathfinder, AOSI, and members of GHC and InterAction have also been directly injured by the vague terms of the Policy Requirement and Guidelines. For example, Pathfinder, which is a member of GHC and InterAction as well as an individual Plaintiff, does not know if the government views its privately-funded HIV prevention program in India, which develops networks of sex workers, as inconsistent with an opposition to prostitution and sex trafficking pursuant to the Guidelines. JA 745 ¶ 31. Because Plaintiffs are affected by the vague terms "'in a personal and individual way,'" they have standing to bring a vagueness challenge. *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003) (quoting *Lujan*, 504 U.S. at 560 n.1).

The Government does not dispute any of these facts. Instead, it argues that no plaintiff can have standing to challenge the Policy Requirement and Guidelines unless it first sets up an affiliate, which Plaintiffs have not attempted to do. This argument fails for two reasons.

First, setting up an affiliate cannot remedy the harms that the organizations themselves have suffered and continue to suffer. The fact that an affiliate might not be bound by the Policy Requirement is unresponsive to Plaintiffs' argument that *they* should not be: (1) compelled to take a pledge opposing prostitution; (2) denied funding based on the Government's disagreement with their views (or lack thereof) on prostitution; (3) silenced in their privately-funded speech; or (4) subject to an unconstitutionally vague statute and regulation. Because Plaintiffs' constitutional injury does not depend on whether or not they have created an affiliate, they need not create one in order to have standing.

Second, the Supreme Court has repeatedly refused to require speakers to exhaust administrative schemes before bringing First Amendment challenges to unconstitutional licensing regimes. In *Watchtower Bible & Tract Society v. Village of Stratton*, for example, the Court struck down, on First Amendment grounds, an ordinance requiring people to obtain a permit before engaging in door-to-door advocacy. 536 U.S. 150 (2002). The Court allowed the claims to proceed although the permits were free and "issued routinely" and no plaintiff had ever

even applied for a permit. *Id*. at 154, 156; *see also, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, (1969) ("The Constitution can hardly be thought to deny to one subjected to the restraints of [a licensing law] the right to attack its constitutionality, because he has not yielded to its demands." (internal quotation marks omitted)); *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958) (rejecting argument that appellant lacked standing to challenge constitutionality of ordinance because she made no effort to secure a permit under it).

This principle applies with even greater force here, where the Government argues not just that Plaintiffs need to seek a license but that they must set up an affiliate and substantially restructure their operations. *See supra* Facts III.B. That many organizations will choose (and have chosen) not to go through this expensive, burdensome, and uncertain process—and instead choose to avoid the prohibited activities altogether—is precisely the type of self-censorship that the Supreme Court has recognized as a basis for a pre-enforcement First Amendment challenge to a statute or regulation. *See American Booksellers Ass'n*, 484 U.S. at 393 (finding standing when newly enacted statute had not yet been enforced because "the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution").

B. The Associations' Claims Do Not Require Individualized Determinations

Associational Plaintiffs InterAction and GHC also have associational standing because their claims do not require individualized determinations.

As demonstrated *supra* Facts II.B, all of the relevant questions of law and fact in this case are common to all of the associations' aggrieved members. These members are all: (1) compelled to voice the same government message on prostitution policy; (2) subjected to the same belief-based test for funding eligibility; (3) silenced from expressing contrary viewpoints, even through privately funded speech and activities; and (4) subjected to the same impermissibly vague terms under the Policy Requirement and Guidelines. Thus, as the District Court recognized, "it is the conduct of Defendants in the form of the Policy Requirement and the Guidelines that will be the primary subject of inquiry." SPA 163.[3]

This case therefore resembles *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, in which the Supreme Court agreed that an association of law schools had standing to assert an as-applied claim that a military recruiting condition on federal funds violated the First Amendment rights of its members.

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[3] Although the Government revised the Guidelines following the District Court's decision, it failed to remedy any of Plaintiffs' constitutional objections and Plaintiffs continue to be burdened by the Guidelines' separation requirement for affiliates. *See infra* Part II.C.

547 U.S. 47, 52 n.2 (2006) ("*FAIR*"). As the District Court had explained, and the Court cited approvingly, the association had standing because its claim was that "the Government [was] applying a statute and its implementing regulations to almost every law school in the nation in a way that violates the law schools' First Amendment rights," not that there was "something unconstitutional about the manner in which the Government [was] applying [the statute and regulations] to a particular institution." 291 F. Supp. 2d 269, 291 (D.N.J. 2003), *rev'd on other grounds*, 390 F.3d 219 (3d Cir. 2004), *rev'd on other grounds*, 547 U.S. 47 (2006). Likewise, Plaintiffs claim that the government is applying the Policy Requirement and Guidelines to their members in a way that violates the members' First Amendment rights. As the Supreme Court recognized, participation of individual members is not required for such claims. 547 U.S. at 52 n.2.

The Government nevertheless argues that InterAction and GHC lack associational standing because, under the Government's theory of the case, the predominant issue is whether the Policy Requirement and Guidelines unduly burden Plaintiffs' ability to set up adequate alternative channels for protected expression, and according to the Government, this issue requires individualized determinations. Gov't Br. 25.

As an initial matter, the Government mischaracterizes the key issues in this case. Because the Policy Requirement constitutes compelled speech and viewpoint

discrimination, it is properly subject to heightened scrutiny. As a result, whether there are "adequate alternative channels" of speech is simply irrelevant because the aggrieved organizations are injured *regardless* of whether they had an opportunity to affiliate with another organization. *See infra* Part II. Because the opportunity to affiliate cannot redress Plaintiffs' injuries, the Court need not make *any* inquiry into the burden from the Guidelines' affiliate test, much less a highly individualized one.

Moreover, with respect to those additional injuries caused by the Guidelines' affiliation requirement, the District Court correctly found that Plaintiffs challenge the common "baseline burden" that the Guidelines' five-factor test imposes on all organizations. As a result, Plaintiffs' claims do not turn on individualized inquiries. SPA 164-165. Indeed, this suit is similar to *Hunt* itself, where the Supreme Court held that an association of apple growers and dealers had standing to pursue a Commerce Clause claim that a North Carolina statute burdened the Washington apple industry. The Court found that the association had standing, despite the fact that the ban imposed different types of harm on the association's members and differing degrees of harm within those types. *Hunt*, 432 U.S. at 343-344.[4] As in *Hunt*, the associations' claims are based on their members' common

[4] The cases upon which the Government relies are inapposite because each involves claims that, by their very nature, require individualized determinations. In *Rent Stabilization Ass'n v. Dinkins*, the court held that an association of

burden from conforming to the Guideline's requirements and do not depend on the individual impact of the Guidelines on any one member.

The District Court also correctly held that the important First Amendment interests at stake in this case provide additional support for associational standing. SPA 166-167. The "individualized determinations" requirement for associational standing is prudential, not constitutional. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc*., 517 U.S. 544, 553 (1996). The Supreme Court has made clear that such a prudential requirement may be relaxed in the First Amendment context, when a statute or regulation is likely to chill protected speech. In *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), for example, the Supreme Court relaxed the prudential limitations against third party standing in the analogous overbreadth context. The Court reasoned that "[e]ven where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity." *Id.* at 956. The same concern is squarely at issue in this

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landlords did not have standing to bring a takings claim on behalf of its members because it required a "factual inquiry for *each* landlord … to determine the landlord's *particular* return based on a host of *individualized* financial data." 5 F.3d 591, 596 (2d Cir. 1993) (emphasis added). *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004), is even less applicable. There, an association of individual landowners brought a variety of tort claims seeking monetary damages—the death knell for associational standing. *Id.* at 714.

case, where many association members have not sued individually because they fear retaliation. JA 710 ¶ 20; JA 844-845 ¶ 17.[5] Moreover, despite the Government's attempt to cabin *Joseph H. Munson Co.*'s reach only to overbreadth claims (Gov't Br. 29-30), *Joseph H. Munson Co.* makes clear that it is the *concerns* raised by a particular First Amendment claim, not the *type* of First Amendment claim, that determine whether the prudential limitations on standing will be lessened.[6]

II. THE POLICY REQUIREMENT AND GUIDELINES VIOLATE THE FIRST AMENDMENT

The Leadership Act's anti-prostitution Policy Requirement violates Plaintiffs' First Amendment rights by compelling speech, discriminating on the basis of viewpoint, and prohibiting speech and activities the government deems contrary to its viewpoint. The Policy Requirement is presumptively impermissible, but even if it were not, the Government cannot show that the mandate to adopt and espouse the government's view as Plaintiffs' own and the viewpoint-based

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[5] *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130 n.37 (D.C. Cir. 1977), which the Government cites for the proposition that a prudential standing prong may not be relaxed by a District Court (Gov't Br. 28-29), is inapplicable to the First Amendment context. That case, which has never been cited by this Circuit, rejected a plaintiff's attempt to relax the zone of interests requirement for standing to bring a claim under a tax statute. 566 F.2d at 143.

[6] Notably, the Court first elucidates the principle behind relaxing third party prudential standing requirements for First Amendment claims generally, *before* beginning its specific overbreadth analysis. *Joseph H. Munson Co.*, 467 U.S. at 956-957.

restriction on who may participate in the international AIDS program are narrowly tailored to serve a substantial government interest. Furthermore, the Guidelines do not remedy these constitutional violations, and instead impose on grantees and their affiliates further separation requirements and burdens that are themselves unconstitutional.

A. The District Court Correctly Applied Heightened Scrutiny

The Policy Requirement calls for a "Government-mandated pledge or motto," *FAIR*, 547 U.S. at 62, conditions funding based on the recipient's viewpoint, prohibits activities and speech that the government deems inconsistent with its viewpoint, and effectively silences dissenting views outside the government program. Such an assault on the First Amendment is subject to at least the heightened scrutiny applied by the District Court.

1. The Supreme Court applies the highest scrutiny to government restrictions that compel speech and discriminate on the basis of viewpoint

The Supreme Court has long reviewed with the closest scrutiny government regulations that compel private speech. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court found no justification to compel schoolchildren to salute the flag in order to receive a public school education. Recognizing the "fixed star in our constitutional constellation … that no official … 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," *id.* at 642, *Barnette* suggested that for the government to compel speech by private individuals, it must have an even greater justification than when it prohibits speech, *see id.* at 633 ("[I]nvoluntary affirmation could be commanded only on even more immediate and urgent grounds than silence.").

Since then, the Supreme Court has repeatedly struck down attempts to compel participants in government programs to espouse government-mandated viewpoints as a condition of participation. *See, e.g.*, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) (striking down mandatory assessments against public employees to subsidize union's political activities); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977) (striking down political contributions, in the form of mandatory union fees, as condition of public employment); *Wooley v. Maynard*, 430 U.S. 705, 715-717 (1977) (striking down display of "Live Free or Die" on license plates, as condition of being licensed to drive); *Speiser v. Randall*, 357 U.S. 513 (1958) (striking down requirement that veterans declare that they did not advocate the forcible overthrow of government, as condition of tax exemption).

Viewpoint-based restrictions on speech are similarly subject to the highest scrutiny and are presumptively invalid. *See Baird v. State Bar of Ariz.*, 401 U.S. 1, 7 (1971) ("[A] State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."). At the

core of the First Amendment is the ability to hold positions that differ from those of the government, and even to criticize the government. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964). Viewpoint-based restrictions "raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace," and thus "[t]he First Amendment presumptively places this sort of discrimination beyond the power of the government." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

The Policy Requirement and Guidelines impose precisely the sort of forbidden ideological litmus test for participation in a federal program that is barred by the compelled speech and viewpoint-discrimination lines of cases. The Policy Requirement compels private NGOs to voice, as their own, a government-mandated viewpoint on prostitution, as a condition of participating in the Leadership Act program. The new Guidelines compound the problem by forcing NGOs to state that they endorse the government's viewpoint for a specific reason: "because of the psychological and physical risks" posed by prostitution. SPA 191, 203; 45 C.F.R. § 89.1(b).

And the Policy Requirement and Guidelines go further yet. In addition to adopting the required position, Plaintiffs must also ensure that none of their privately-funded speech is "inconsistent with a policy opposing prostitution," a prohibition that is unconstitutionally vague and has never been defined but, at

minimum, appears to bar speech advocating against criminalizing prostitution and prostitutes. SPA 16-17; *see also* SPA 48; JA 389.[7]

The First Amendment harm caused by the Policy Requirement and Guidelines is exacerbated by the fact that the speech at issue—concerning the proper treatment of prostitution—is the subject of considerable debate within the U.S. and abroad, with institutions such as the WHO and the U.N. calling for reducing or removing criminal penalties against prostitutes. SPA 123. The Supreme Court has long recognized that "[e]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (internal quotation marks omitted); *see also Velazquez v. Legal Services Corp.*, 164 F.3d 757, 771 (2d Cir. 1999) ("*Velazquez I*"), *aff'd on other grounds*, 531 U.S. 533 (2001) ("*Velazquez II*"). Yet the Policy Requirement effectively forces the adoption of the government's viewpoint, screens grantees based on their beliefs, and simultaneously prohibits dissenting viewpoints—or even silence—regarding a controversial topic. Heightened scrutiny must be applied to this severe, biased intrusion onto free speech.

[7] Even if Plaintiffs set up an affiliate, they would need to continue to funnel a substantial amount of private funding to the organization receiving federal funding. *See supra* p.9.

2. Heightened scrutiny applies equally where a restriction that compels speech and discriminates based on viewpoint is a funding condition

Heightened scrutiny of compelled speech and viewpoint discrimination applies with equal force even when a person has no inherent right to participate in the government program at issue. "[T]he 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." *United States v. American Library Ass'n*, 539 U.S. 194, 210 (2003) (plurality) (citation omitted); *see also National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) ("[E]ven in the provision of subsidies, the Government may not aim at the suppression of dangerous ideas …." (internal quotation marks omitted)); *Speiser*, 357 U.S. at 518 ("To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.").

Thus, many of the canonical Supreme Court cases striking down compelled speech and viewpoint discriminatory restrictions were issued in the context of access to government benefits. *Speiser*, for example, involved access to tax exemptions, and *Barnette* involved access to free public education. *See supra* Part II.A.1. And in *Velazquez I*, a panel of this Circuit invalidated as viewpoint discriminatory a congressionally imposed requirement that civil legal aid programs abstain from challenging welfare reform laws in order to obtain Legal Services

Corporation funding. 164 F.3d at 772 (noting that law at issue was "viewpoint discrimination subject to strict First Amendment Scrutiny," as it "muzzle[d] grant recipients from expressing any and all forbidden arguments");[8] *see also FAIR*, 547 U.S. at 62, 65 (upholding government funding condition mandating that universities permit military recruiters on campus because universities and students were not required to endorse any "Government-mandated pledge or motto," and schools and students remained free to speak their own minds and voice their disagreement); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (upholding funding restriction because it did not "require[] a doctor to represent as his own any opinion that he does not in fact hold" and left "[t]he doctor … free to make clear that advice regarding abortion is simply beyond the scope of the program").

Even in government-funding cases that do not involve compelled speech or viewpoint discrimination, the Supreme Court has applied heightened scrutiny, which requires the government to show that the speech restrictions are "narrowly tailored to further a substantial governmental interest." *FCC v. League of Women Voters of California*, 468 U.S. 364, 380 (1984). In *League of Women Voters*, the Supreme Court applied the narrow tailoring test to invalidate a statute that barred

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[8] The Government is wrong that this portion of the opinion no longer constitutes good law. The *BLS* panel relied on *Velazquez I* for this very proposition. 462 F.3d at 230. And although the Supreme Court's decision in *Velazquez II* is worded differently, it too invalidated the welfare reform restriction on viewpoint discrimination grounds. 531 U.S. at 548-549.

television stations receiving federal public broadcasting funding from using private funds to editorialize. *Id.* at 380. Contrary to the Government's contention (*see* Gov't Br. 47), the Court expressly rejected a lesser level of scrutiny for the funding context. *See League of Women Voters*, 468 U.S. at 401 n.27 ("[I]n neither of those cases did the Court even consider that the restrictions could be justified simply because these employees were receiving Government funds, nor did it find that a lesser degree of judicial scrutiny was required simply because Government funds were involved.").

By contrast, the Government fails to identify a single case where the court applied anything less than heightened scrutiny when a funding condition entailed compelled speech or viewpoint discrimination. For example, in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), cited by the Government for the proposition that rational basis review should apply (Gov't Br. 43, 47), the restriction was a viewpoint *neutral* blanket prohibition on lobbying by 501(c)(3) organizations and the Court found "no indication that the statute was intended to suppress any ideas," 461 U.S. at 548.

In *BLS*, 462 F.3d at 224, upon which the Government places heavy emphasis, the challenged restrictions on class action litigation, seeking attorneys' fees, and soliciting clients involved no compelled speech and had previously been found to be viewpoint neutral. *See Velazquez I*, 164 F.3d at 770-772. Moreover,

the panel in *BLS* reiterated the need for "closer attention" when faced with "speech on the 'highest rung' of First Amendment values." *BLS*, 462 F.3d at 230;[9] *see also Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1099-1100 n.3 (2009) (emphasizing that speech restriction at issue did not involve "viewpoint discrimination").

3. The Government's reliance on protection of a government message does not justify a lesser standard of scrutiny

The prohibition against viewpoint discrimination and compelled speech applies with just as much force when the government purports to protect a message that it wishes to convey, contrary to the Government's suggestion that only a more deferential "adequate alternative" standard should apply. Gov't Br. 32. It is true that in certain circumstances, the government may choose to fund one message but not another. *See Rust*, 500 U.S. at 193. But, as the *Rust* Court took pains to explain, this principle is limited to the *speech* that the government funds, not to the selection of *entities* that may receive funds. *Id.* at 196. Thus, while the challenged restrictions in *Rust* limited abortion-related speech within a

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[9] The Government also cites (Gov't Br. 43, 47) this Court's *Planned Parenthood Federation of America, Inc. v. Agency for International Development*, 915 F.2d 59 (2d Cir. 1990), but that case did not involve compelled speech or viewpoint discrimination, and the restriction there applied to foreign NGOs—a distinction that even the government recognized as critical in an early OLC memo. *See* JA 143 n.10; *see also supra* p.10.

government-funded *program*, they did not require *the grantee* to hold a particular position regarding abortion. *Id.*

Likewise, in *Rosenberger v. Rector & Visitors of University of Virginia*, the Court *struck down* a university's refusal to fund religious student newspapers as viewpoint discriminatory. 515 U.S. 819, 837 (1995). The Government ignores this holding and points instead to that case's dicta that the government "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.* at 833 (citing *Rust*, 500 U.S. at 196-200). But this statement was merely the *Rosenberger* Court's shorthand description of *Rust*, which made clear that those "steps" could not demand a particular viewpoint of grantees or require the funding recipient "to represent as his own any opinion that he does not in fact hold." 500 U.S. at 200; *see also Latino Officers Ass'n, N.Y., Inc. v. City of N.Y.*, 196 F.3d 458, 468 (2d Cir. 1999) (rejecting *Rosenberger* dicta as basis for supplanting the speech rights of government employees). Furthermore, even in *Rust*, the scope of the "government message" extended only to speech made within the four corners of the government-funded program or project—not to all speech by the grantee—because "Title X expressly distinguishes between a Title X *grantee* and a Title X *project*." 500 U.S. at 196 (emphasis in original).

In a radical re-reading of well-established Supreme Court precedent, the Government also argues more broadly that the Policy Requirement escapes First

Amendment scrutiny because it falls under the Spending Clause. *See* Gov't Br. 37-38. The Government relies on *South Dakota v. Dole*, 483 U.S. 203 (1987), in which the Supreme Court applied a germaneness test to uphold a federal requirement that states must raise the drinking age in order to obtain federal transportation grants. *Id.* at 207-208. The case is inapposite because it did not involve any restriction on individual rights, much less a restriction on speech. The Court in fact specifically stated that Spending Clause conditions could be struck down if they violated "other constitutional provisions." *Id.* Indeed, like all Article I powers, the Spending Clause is necessarily subject to the Bill of Rights and other later in time constitutional amendments. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996) ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction [by the Eleventh Amendment]."). Moreover, the germaneness standard in *Dole* is based on the unique relationship between states and the federal government, 483 U.S. at 210, and the Supreme Court has never relied on it to justify funding-based restrictions that impinge on fundamental rights.[10] *See, e.g.*, *FAIR*, 547 U.S. at 60-67; *Velazquez II*, 531 U.S. at 540-549; *Rust*, 500 U.S. at 192-200.

[10] The Government further cites *Grove City College v. Bell*, 465 U.S. 555, 575 (1984), *superseded by statute on other grounds*; *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582, 596 (1983) (plurality); and *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), to suggest broad latitude for the government to impose various funding conditions, for "[t]hose who do not wish to

Likewise, the Government's reliance on case law from the government employment context weakens, rather than strengthens, its argument. Gov't Br. 34, 54. In the government employment context, ex ante restrictions on speech by government employees, in contrast to ex post restrictions, are subject to a higher level of scrutiny and require stronger government justifications because they "chill[] potential speech before it happens." *See United States v. National Treasury Emps. Union*, 513 U.S. 454, 468 (1995) ("*NTEU*"). To justify such ex ante restrictions, the government must show a "necessary impact on the actual operation of the Government" from the restricted speech that outweighs the interests of plaintiffs and other similar NGOs. *See id.* at 468. The Government has made no showing that the Policy Requirement's ex ante restrictions meet this heightened scrutiny.

Moreover, in analogizing this case to the employee speech context, the Government ignores the critical distinction the Supreme Court has made between "government employees, whose close relationship with the government requires a balancing of important free speech and governmental interests," and "recipients of small government subsidies, who are much less dependent on the government but

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comply with the conditions may avoid them by declining the funds." Gov't Br. 37. But like *Dole*, none of these cases involved requirements of compelled speech or viewpoint discrimination, and both *Guardians Ass'n*, 463 U.S. at 585-586, and *Pennhurst*, 451 U.S. at 17, involved disputes between the federal government and states, rather than individual rights.

more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing." *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996). Thus, contrary to the Government's suggestion, the Supreme Court has never applied the balancing test from *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny to the government funding context, even with respect to ex post speech restrictions. *See id.* at 568.

B. The Policy Requirement And Guidelines Cannot Survive Heightened Scrutiny Because They Are Not Narrowly Tailored To Further A Substantial Government Interest

1. The Policy Requirement is not narrowly tailored to further the government's asserted interests

The Government has not offered—and cannot provide—a valid justification for the enormous burdens imposed on Plaintiffs' speech. Under heightened scrutiny, the government must show that a First Amendment free speech restriction is narrowly tailored to serve a substantial government interest. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994). The restriction need not be the least restrictive means, but it must "promote[] a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (internal quotation marks omitted). The burden of justifying restrictions on speech and establishing a substantial government interest falls on the government. In contexts as varied as broadcasting, commercial speech, and government employee speech, the Supreme Court has made clear that the government must present "more than anecdote and

supposition" to sustain a speech restriction. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822-823 (2000) (broadcast); *see also Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999) (commercial speech); *NTEU*, 513 U.S. at 475 (ex ante restrictions on government employee speech). The Government has failed to make any such showing here.

In this case, the Government has failed to show how the Policy Requirement's compelled speech and viewpoint discrimination are necessary to promote effectively its interest in combating prostitution in the HIV/AIDS program, where Congress made no findings supporting the need for the Policy Requirement.

Although the Government suggests that a number of congressional purposes for the Leadership Act relate to prostitution (*see* Gov't Br. 6-9), only two bear on the Policy Requirement itself: a desire (1) "to ensure the efficacy and integrity of [government-funded HIV/AIDS] programs and require them to prioritize the reduction of behavioral risks"; and (2) "to prevent dilution of the government's anti-prostitution, anti-sex-trafficking message." *Id.* at 8-9. Neither support the Policy Requirement's heavy burden on speech.

As for the first purpose, that objective is accomplished by the Leadership Act restriction on the use of government funding, 22 U.S.C. § 7631(e), which Plaintiffs abide by and do not challenge. Section 7631(e) prohibits grantees from

using government funds in a manner inconsistent with the government's message, *i.e.*, by "promot[ing] or advocate[ing] the legalization or practice of prostitution or sex trafficking." *Id.* § 7631(e). That prohibition is sufficient to "ensure the efficacy and integrity of [government-funded HIV/AIDS] programs." Gov't Br. 8-9. There is, therefore, no justification for an additional government-mandated statement of opposition to prostitution.

As for the second purported purpose, the Governments points to nothing in the legislative record suggesting that Congress was concerned that grantees' privately funded speech—or silence—would somehow dilute the message of a government-funded program. In an attempt to address that fatal problem, the Government in its brief completely recasts the Leadership Act's global HIV/AIDS prevention program—under which Plaintiffs provide services as varied as home based care for people living with HIV/AIDS and support for orphans and vulnerable children, *see supra* p.8—as an anti-prostitution public messaging campaign. Govt's Br. 2, 6-8. That attempt must fail because many of the activities funded by the Leadership Act—which range from tuberculosis and malaria prevention to developing microbicides—have nothing to do with prostitution. *See* 22 U.S.C. § 7603; *see also supra* p.8. The Government "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." *Velazquez II*, 531 U.S. at 547.

Nor does the fact that Plaintiffs operate abroad make a difference, for the Government has not established that, simply by accepting government funding for a particular program, grantees somehow lose their private status and function only "as the United States' representatives." *See* Gov't Br. 34. To the contrary, Plaintiffs and their members here are private NGOs that interact with the public as representatives of independent organizations, not as representatives of the U.S. government. Indeed, it is precisely because the government benefits from certain work being performed by private entities with an appearance of independence that it operates through grants to NGOs rather than through its own executive agencies and officials. *See, e.g.*, 22 U.S.C. § 2151u(a) (emphasizing importance of partnering with NGOs that retain "their private and independent nature"). As the D.C. Circuit has explained, "[i]n a grant program the federal government gets the advantage of services rendered by someone who is doing his own thing, his own autonomous thing. It is not the same as a government operation in disguise." *Forsham v. Califano*, 587 F.2d 1128, 1138 (D.C. Cir. 1978), *aff'd*, 445 U.S. 169 (1980). For this reason, the government goes to great lengths to ensure that Plaintiffs clearly communicate that they do *not* speak for or on behalf of the government, even when they are engaged in government-funded work. *See, e.g.*,

22 C.F.R. § 226.91(c)(1) (requiring organizations with USAID cooperative agreements to place disclaimers on government-funded public communications, unless first approved by USAID).

The Government suggests that any deviation from the prescribed position by a grantee outside the federal program will cast doubt on the anti-prostitution message. Yet the Government does not even argue that the private speech of Plaintiffs could be confused with official government speech, and the evidence suggests the opposite. USAID itself acknowledges that "[b]eneficiaries of U.S. aid receive billions of dollars in foreign assistance every year in the form of grants and cooperative agreements, often with little to no awareness that the assistance is provided by the American people through USAID." 70 Fed. Reg. 50,183, 50,184 (Aug. 26, 2005). Furthermore, USAID's remedy for the lack of awareness—requiring that "all programs, projects, activities, public communications, and commodities … partially or fully funded by a USAID grant … be marked appropriately overseas with the USAID [logo]," 22 C.F.R. § 226.91(a)—presumably allows recipients to recognize which of a grantee's activities are publicly funded (because they bear the mark of the U.S. Government, *e.g.*, in the form of the USAID logo) and which are privately funded (because they carry no U.S. Government mark, message, or logo).

Furthermore, any assertions of harm that would result from the absence of the Policy Requirement are suspect because of the complete lack of evidence that the government suffered any harm during the two periods when it has not enforced the Policy Requirement: (1) the period from 2004 to 2005 when it refrained from enforcing the Requirement because OLC had opined that enforcement would be unconstitutional, and (2) the past four years, since the first preliminary injunction was issued.

The Policy Requirement's exemption of four entities—the Global Fund to Fight AIDS, Tuberculosis and Malaria; the WHO; all U.N. agencies; and the International AIDS Vaccine Initiative ("IAVI"), *see* 22 U.S.C. § 7631(f)—further underscores the fact that any purported government interests are not compromised by a grantee's lack of an anti-prostitution policy. *See NTEU*, 513 U.S. at 476 (honoraria ban's exemptions "diminish the credibility of the Government's rationale" for broad ban (internal quotation marks omitted)). Indeed, two of the exempted agencies—the WHO and at least one U.N. agency—have taken a public position at odds with the Policy Requirement, declaring that the reduction or removal of criminal penalties for prostitution is a "best practice[]" for the prevention of HIV/AIDS. SPA 123. Yet the Government offers no evidence that

such contrary speech by a grantee caused any harm to the government, much less that it garbled or distorted the government's message or policy.[11]

Thus, there is no legitimate concern that the government's anti-prostitution message will be somehow diluted or "garbled" by private NGOs that lack a policy on prostitution. To the extent there is any risk of diluting or garbling the government's message, the answer is to clarify the message expressed by the particular government-funded program. The answer is *not* to impose unconstitutional restrictions on *all* speech by a grantee.

2. The Guidelines' separation requirement does not cure the compelled speech and viewpoint discrimination violations

Although the Government places great emphasis on the separation requirement under the Guidelines, the requirement is in no way tailored to achieve

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[11] The Government's attempt to distinguish the exempt international entities on the ground that imposing the Policy Requirement on them would require multilateral negotiations (Gov't Br. 57-59), is undermined by the Government's prior imposition of funding conditions on these same organizations without entering multilateral negotiations. *See Population Inst. v. McPherson*, 797 F.2d 1062, 1064 (D.C. Cir. 1986) (discussing withholding of $10 million earmarked for U.N. Fund for Population Activities); *see also* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. D tit. II, 118 Stat. 3, 146 (barring same international organizations exempted under Leadership Act from receiving HIV/AIDS funds if they "support[] or participate[] in the management of a program of coercive abortion or involuntary sterilization").

The Government's attempt to distinguish IAVI on the ground that it is a research organization is equally unpersuasive, because many of the Plaintiffs' members engage in research too, JA 704-705 ¶¶ 5-7, and because IAVI, a non-profit organization, also engages in advocacy on HIV/AIDS issues, *see* JA 407-410.

the Leadership Act's purposes and does nothing to cure the compelled speech and viewpoint discrimination violations at issue in this case.

Even if Plaintiffs were able to set up separate affiliates as contemplated by the Guidelines, Plaintiffs themselves would still be compelled to adopt and espouse the government's viewpoint on prostitution (and banned from saying or doing anything to the contrary), even with regard to Plaintiffs' privately-financed speech and activities. JA 847 ¶ 23; JA 890 ¶ 38. Contrary to the Government's suggestion, the Supreme Court and this Court have never held that such an "alternative channel" of communication is a cure-all for any First Amendment restriction in a funding condition. *See* Gov't Br. 42. Under heightened scrutiny, the fact that other, separate, and essentially independent organizations might be free to exercise their First Amendment rights cannot cure the constitutional infirmity inherent in forcing a private non-profit organization affirmatively to speak the government's viewpoint (and refrain from doing or saying anything to the contrary) as the price of participating in a government program. *Cf. Rust*, 500 U.S. at 200.

Indeed, in *Citizens United v. FEC*, the Supreme Court recently concluded that allowing an affiliate to speak cannot remedy a restriction on an organization's First Amendment rights, thus striking down "a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak." *See*

130 S. Ct. 876, 897 (2010). "A PAC is a separate association from the corporation," the Court recognized, "[s]o the PAC exemption … does not allow corporations to speak." *Id.*

Moreover, the Government does not even attempt to argue that the new Guidelines' specific separation requirements are in any way tailored to achieving the purposes of the Leadership Act. On the contrary, the Government concedes that they adopted the new Guidelines solely because they supposedly resemble the separation requirements imposed by the Legal Services Corporation, which this Court has thus far declined to invalidate. Gov't Br. 10, 48-49. But as this Court made clear in *Velazquez I*, the government cannot simply model the Guidelines on others previously upheld as constitutional in a completely different context (where there was no compelled speech or viewpoint discrimination, and where the burdens on speech were far less onerous), in order to avoid judicial scrutiny in this case. *See* 164 F.3d at 766.

The Government's attempt to link the new Guidelines to any specific government interests is also fatally undermined by the government's own rejection of similar separation measures in a closely analogous context. During the notice and comment process for regulations governing grants to faith-based organizations, commenters urged USAID to require legal and physical separation between federally-funded activities and privately-funded religious speech in order to

comply with the Establishment Clause bar on endorsing religious speech.[12] 69 Fed. Reg. 61,716, 61,719-61,721 (Oct. 20, 2004). USAID rejected the separation idea on the ground that there was no risk of confusion between church and state. In particular, it noted that by permitting religious grantees to engage in religious activities through the same corporate entity, and using the same employees and physical space in which they engage in federally-funded activities, the government "does not endorse religion in general or any particular religious view." *Id.* at 61,718; *see also* 69 Fed. Reg. 42,586, 42,588 (July 16, 2004) (discussing same conclusions reached by HHS). Yet the Government asks the Court here to believe, based entirely on speculation, that in the absence of onerous separation requirements (requiring grantees to engage in the forbidden speech only through other organizations), the risk of confusion between government-funded speech and privately-funded speech is just too great. Whereas the government found that only a modest degree of separation between *programs* was sufficient to avoid confusion in the faith-based context, it now contends that separation between *organizations* is necessary to avoid confusion in the context of fighting HIV/AIDS. The government's adoption of the burdensome new Guidelines—even after the Senate Appropriations Committee requested that it rely on the faith-based model to

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[12] *See, e.g., Rosenberger*, 515 U.S. at 841-842; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993).

achieve congressional goals[13]—strongly supports the view that the new Guidelines are not narrowly tailored to further any substantial government interest in combating HIV/AIDS abroad.

C. In The Alternative, The Policy Requirement And Guidelines Do Not Survive The Adequate Alternative Channel Test

Even if an adequate alternative channel alone would remedy the constitutional violation here—and it would not, as discussed above—the Policy Requirement and Guidelines would still fail because they "impose[] extraordinary burdens that impede grantees from exercising their First Amendment rights, create[] prohibitive costs of compliance, and demand[] an unjustifiable degree of separation of affiliates." *BLS*, 462 F.3d at 232 (citing *Velazquez II*, 164 F.3d at 767).

As discussed above, the Guidelines continue to impose extraordinary burdens on Plaintiffs' speech rights by forcing them to adopt and espouse a government message and hew to a government-mandated ideological position, burdens not present in *BLS*. Moreover, as the post-*BLS Citizens United* decision makes clear, the mere requirement of speaking through an affiliated organization impedes a grantee from exercising its First Amendment rights. In addition, the

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[13] *See* S. Rep. No. 110-128, at 33 (2007) ("The Committee … urges the administration to impose the least possible burdens so as to avoid requirements that waste resources that could otherwise be used to save lives. The Committee notes that the administration has adopted similar regulations in its faith-based initiative, which should be used as the model in this instance.").

record is replete with uncontested evidence about the prohibitive costs of complying with the Guidelines in an international context not at issue in *BLS*, obstacles common to all the affected association members. *See generally supra* Facts III.B. Finally, as is demonstrated *supra* Part II.B, the mandated degree of separation is wholly unjustified.

The Government nevertheless relies on a D.C. Circuit opinion (predating the Guidelines) for the proposition that the First Amendment problems can be solved through the creation of a separate "affiliate." Gov't Br. 57 (citing *DKT Int'l, Inc. v. USAID*, 477 F.3d 758, 763 (D.C. Cir. 2007)). According to the D.C. Circuit, "[n]othing prevents [the recipient] from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution." *DKT*, 477 F.3d at 763. Because "the subsidiary would qualify for government funds as long as the two organizations' activities were kept sufficiently separate," the D.C. Circuit found, "[t]he parent organization need not adopt the policy." *Id.*; *see also* Gov't Br. 57. But this merely shifts the constitutional problems from one organization to another. So-called subsidiaries possess precisely the same First Amendment rights as parent organizations, and it would be just as unconstitutional to impose the Policy Requirement and attendant restrictions on the new subsidiary as it was to impose them on the original parent organization. Moreover, the new subsidiary would be required by USAID to have its own private funding, so once

again the Policy Requirement would unconstitutionally compel and restrict privately funded speech. *See supra* p.9.

The Government contends that the Guidelines pass constitutional muster because they no longer require separate legal incorporation and separate personnel (although they are still factors) and do not consider separate management and governance. *See* Gov't Br. 49-50. But this is beside the point. The new Guidelines do nothing to remedy the core constitutional defects in the form of compelled speech, viewpoint discrimination, and sweeping restrictions that are not narrowly tailored to meet any substantial government interest. Moreover, the new Guidelines do not remedy the significant burdens of establishing affiliates in many foreign countries, the substantial costs of maintaining formal affiliates for no purpose other than to satisfy the government's Policy Requirement, and the practical difficulty of obtaining the necessary public and private funding for a subsidiary.

III. THE POLICY REQUIREMENT AND GUIDELINES ARE IMPERMISSIBLY VAGUE

As an alternative ground, the preliminary injunction should be upheld because the Policy Requirement and new Guidelines are impermissibly vague.[14]

[14] Although the District Court did not reach Plaintiffs' vagueness claim (SPA 179), this Court may address it as an alternative basis for the preliminary injunction. *See University Club v. City of N.Y.*, 842 F.2d 37, 39 (2d Cir. 1988).

Under the Due Process Clause of the Fifth Amendment, laws are unconstitutionally vague if they fail to provide "the person of ordinary intelligence a reasonable opportunity to know what is prohibited," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), or if they fail to "provide explicit standards for those who apply them," *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007) (internal quotation marks omitted); *see also Hill v. Colorado*, 530 U.S. 703, 732 (2000).

When a law infringes on the First Amendment, the vagueness doctrine "demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *see also Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006) ("[V]agueness in the law is particularly troubling when First Amendment rights are involved.").

The Policy Requirement and Guidelines are unconstitutionally vague in two distinct ways: They fail to provide guidance as to the kinds of speech and activities that the Government considers sufficiently "opposed to" prostitution; and they fail to provide guidance on the degree of separation that a grantee must have from an affiliate in order to meet the Guidelines' separation requirement.

A. The Policy Requirement And Guidelines Do Not Specify What Speech And Activities Are Prohibited

The Policy Requirement and Guidelines prohibit grantees from using their private funds in a manner that is "inconsistent" with a policy opposing prostitution,

and require grantees to maintain independence from any affiliated organization that engages in "activities inconsistent with the Recipient's opposition to the practices of prostitution and sex trafficking … ('restricted activities')." *See supra* Facts II.A, III.A; SPA 188, 203. For five years, Plaintiffs have sought guidance from the Government as to what speech and activities would be considered "inconsistent" with an opposition to prostitution—yet the Government has consistently refused to define what it means by "restricted activities" or to explain what speech and activities are prohibited.

In the commentary to the revised HHS Guidelines, for example, the government noted that "multiple comments" had objected to the lack of definition for "restricted activities" and that "[s]everal comments" had sought approval of specific hypotheticals. SPA 202. The government rejected these requests for guidance. And while the government stated that it would provide "broad information on types of activities that illustrate what would be covered" (SPA 202), it never has. In contrast, the Legal Services Corporation program integrity regulation, on which the Guidelines are ostensibly based, provides detailed information about the activities in which grantees are prohibited from engaging. *See* 45 C.F.R. § 1610.2(b) (incorporating by reference statutory and regulatory definitions of prohibited activities).

The result is that Plaintiffs lack a reasonable opportunity to know what is prohibited under the Policy Requirement and Guidelines, *see Grayned*, 408 U.S. at 108, and face enforcement "only at the whim" of authorities who enjoy unfettered and standardless discretion, *see Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Pathfinder and CARE, for example, still do not know if the government views their privately funded HIV prevention programs in India, which develop networks of sex workers, as "inconsistent" with the Guidelines, requiring them to be run out of a separate affiliate. *See* JA 745-746 ¶¶ 31-33; JA 880-882 ¶¶ 17-23. Because "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms," this lack of guidance cannot meet the requirements of the Constitution. *United States v. Robel*, 389 U.S. 258, 265 (1967) (internal quotation marks omitted).

This ambiguity is particularly problematic because significant civil liability and criminal penalties can arise from a violation of the Policy Requirement or Guidelines.[15] As a result, but for the preliminary injunction, Plaintiffs would be forced to refrain from a wide range of speech and activities in order to avoid

[15] Knowing and willful misrepresentation of a federal contract certification is punishable by up to five years imprisonment. 18 U.S.C. § 1001; *see, e.g.*, *United States v. Gatewood*, 173 F.3d 983, 987 (6th Cir. 1999). Grantees are also subject to civil penalties. 31 U.S.C. § 3729. Additionally, USAID may punish violations of the certification by terminating the contract, terminating the award, seeking a refund of money already disbursed, and permanently disqualifying the grantee. *See* 22 C.F.R. §§ 208.800, 226.62(a)(3), 226.73.

coming close to the ambit of the regulations—the hallmark of an unconstitutionally vague law. *See Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (where First Amendment freedoms are involved, vague law forces citizens to "'steer far wider of the unlawful zone'" than if the boundaries of the forbidden areas were clearly marked" (citation omitted)).[16]

B. The Policy Requirement And Guidelines Never Provide Guidance On The Required Separation Between Grantees And Affiliates

The Guidelines also suffer from another kind of vagueness: They require that every recipient have "objective integrity and independence" from affiliated organizations that speak or act contrary to the Policy Requirement (SPA 188, 203), but fail to specify the required degree of separation.

Under the Guidelines, the degree of separation required is determined "case-by-case … based on the totality of the facts." SPA 189, 204. Although there is a list of five non-exclusive factors, no particular weight is assigned to any factor and no rules govern how they shall be applied. *Id.* To add to the confusion, the

[16] Although the government claims that it will work with recipients before taking enforcement action (SPA 202-203), organizations will still be forced to wait for government approval before taking any action that could potentially fall under the scope of the regulations, chilling their protected speech and activities in the meantime and likely discouraging them from speaking altogether. *See Board of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 575-576 (1987) (finding an airport speech ban was unconstitutionally overbroad and rejecting a possible limiting construction of the resolution because "it is difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable").

Guidelines state that no single factor is "determinative" and that there are other, unidentified factors. *Id*. Moreover, some factors are inherently ambiguous because they incorporate hopelessly vague terms such as "[t]he extent to which" and "[t]he degree of." *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048-1049 (1991) (invalidating regulation as "void for vagueness" because it used "classic terms of degree" that do not provide sufficient guidance for determining whether conduct is unlawful).

As a result, the Guidelines force Plaintiffs to guess how much separation is required, and the government has unbridled discretion to determine whether a grantee and affiliate are sufficiently separate. This open-ended test is made worse by the failure to clarify what constitutes a "restricted activity" and an "affiliated organization."

This Court struck down a remarkably similar speech regulation in *Transportation Alternatives, Inc. v. City of New York*, 340 F.3d 72 (2d Cir. 2003). There, a licensing scheme was held unconstitutional on the ground that the regulation identified ten factors, assigned "no weight to any of the factors," and allowed government officials to consider other, unidentified factors. *Id*. at 78. The Court concluded that this statutory scheme gave the government "absolute, unregulated discretion." *Id*. Similarly, here, the Guidelines provide no meaningful standards for agency officials.

For these reasons, this Court should conclude that the Policy Requirement and Guidelines are unconstitutionally vague.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Court affirm the preliminary injunctions issued by the District Court.

Respectfully submitted,

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September 8, 2010

CERTIFICATE OF COMPLIANCE

This brief contains 13,265 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and consequently complies with Fed. R. App. P. 32(a)(7)(B).

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September 8, 2010

CERTIFICATE OF SERVICE

I certify that on this 8th day of September, 2010, I caused a pdf version and two paper copies of the foregoing Brief for Plaintiffs-Appellees to be sent via electronic mail and overnight delivery service to:

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