UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC. and OPEN SOCIETY INSTITUTE,

Plaintiffs,

Civil Action No. 05-cv-8209

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT and ANDREW S. NATSIOS, in his official capacity as Administrator of the United States Agency for International Development,

Defendants

----------x

Lenora M. Lapidus (LL 6592)
Emily J. Martin
Claudia Flores (CF 4932)
Women's Rights Project
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, N.Y. 10004
Telephone: (212) 519-7816
Facsimile: (212) 549-2580

Christine I. Magdo (CM 2336)
COVINGTON & BURLING
1330 Avenue of the Americas
New York, N.Y. 10019
Telephone: (212) 841-1000
Facsimile: (646) 441-9252

Caroline M. Brown (CB 0659)
Karin L. Kizer
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

Counsel for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

FEDERAL STATUTES

INTERNATIONAL AGREEMENTS

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*

Amici are nongovernmental organizations ("NGOs") that provide services or conduct programs, research, or advocacy in the global effort to combat HIV/AIDS and to stop needless deaths through prevention and access to treatment for all affected persons. The individual statements of interest for each *amicus* are listed in Appendix A. *Amici* are united in striving to provide and/or promote the most effective interventions to prevent the spread of HIV/AIDS and provide access to treatment based on accepted best principles and practices of public health. As such, *amici* follow basic principles of public health that accept that both structural and individual behavioral change are core components of sustainable, effective health interventions, and that all public health interventions can be judged according to ethical principles of respect, beneficence, the obligation to do no harm and the principle of justice.

A number of the *amici* currently administer programs or provide health care services to people with HIV/AIDS or at high risk of transmission of the virus, or intend to administer such programs in the future. Some of these programs expressly target sex workers or include sex workers within their general scope. A number of these programs have a proven track record in reducing HIV infection and providing treatment to those with the virus and have led to significant advances in understanding the physical, cultural, and socioeconomic underpinnings of the AIDS epidemic.

Amici's mission in combating HIV/AIDS is seriously threatened by the condition attached to funding provided by the U.S. Agency for International Development ("USAID") for international AIDS programs that NGOs must adopt a "policy explicitly opposing prostitution." *See* 22 U.S.C. § 7631(f). That condition compels public health service providers in the global

fight against AIDS to choose between forgoing U.S. funding or adopting a policy that alienates and marginalizes the high-risk communities with which they work and restricts speech and activities supported by non-USAID funds. For those *amici* who do not accept or receive U.S. funding, their ability to research and advocate on HIV/AIDS in these high-risk communities is also harmed as fewer partnering public health providers are willing to take the risk that their activities will be misconstrued as "support" for "prostitution."

Like the plaintiffs, *amici* believe that the compelled adoption of the USAID policy statement, applied to U.S. organizations, is a violation of the First Amendment. They submit this brief not to repeat the constitutional arguments, but to provide the Court with the public health context in which this restriction on speech occurs and to emphasize its potentially devastating effects on public health.

BACKGROUND

The crisis posed by the HIV/AIDS global epidemic is large, immediate and growing. In 2000, there were an estimated 34 million people living with HIV. In 2002, their ranks increased to 36 million. In 2004, the total had grown to an estimated 39.4 million. The number of people living with HIV in Eastern Europe and Central Asia increased by 40 percent in just two years; in East Asia the increase was almost 50 percent between 2002 and 2004. Last year, an estimated 3.1 million people died of AIDS. At the same time, some 4.9 million people became newly infected with the virus: an average of over 13,000 people a day.[1] The rapid increase in HIV infection worldwide and the tragedy of its human toll demands the

[1] All statistics from Joint United Nations Programme on HIV/AIDS, *AIDS Epidemic Update 2004*, at 2 (Dec. 2004), *available at* http://www.unaids.org/wad2004/report.html.

comprehensive attention of governments and nongovernmental public health service providers around the world.

In his State of the Union address in January 2003, President Bush recognized the "severe and urgent crisis abroad" posed by the HIV/AIDS pandemic, and proposed the President's Emergency Plan for AIDS Relief (commonly known as "PEPFAR"), asking the Congress to commit $15 billion over five years to "turn the tide against AIDS."[2] Congress responded with the enactment of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("AIDS Leadership Act"), to authorize the appropriations requested by the President. Pub. L. No. 108-25, 117 Stat. 711, codified at 22 U.S.C. § 7601 et seq. The stated purpose of the AIDS Leadership Act is to strengthen U.S. leadership and the effectiveness of its response to HIV/AIDS by establishing a comprehensive five-year global strategy, providing increased resources for multilateral and bilateral efforts to fight the disease, and "encouraging the expansion of private sector efforts and expanding public-private sector partnerships to combat HIV/AIDS." 22 U.S.C. § 7603. The central objective of the AIDS Leadership Act is the amelioration of the HIV/AIDS pandemic, which is reflected by the legislative conviction that "HIV/AIDS is ***first and foremost*** a health problem." 22 U.S.C. § 7601(15) (emphasis added).

The AIDS Leadership Act authorizes the U.S. government to provide financial support for a number of education and prevention activities, including "programs and efforts that are designed or intended to impart knowledge with the exclusive purpose of helping individuals avoid behaviors that place them at risk of HIV infection, including . . . where appropriate, use of condoms." 22 U.S.C. § 2151b-2(d)(1)(A). Congress further agreed to provide "assistance to

---

[2] Pres. George W. Bush, *State of the Union Address* (Jan. 28, 2003), *available at* http://www.whitehouse.gov/news/releases/ 2003/01/20030129-1.html.

establish and implement culturally appropriate HIV/AIDS education and prevention programs that focus on helping individuals avoid infection of HIV/AIDS." 22 U.S.C. § 2151b-2(d)(1)(B). Such programs are to be "implemented through nongovernmental organizations, including faith-based and community-based organizations, particularly those organizations that utilize both professionals and volunteers with appropriate skills, experience, and community presence." 22 U.S.C. § 2151b-2(d)(1)(B). The legislation also authorizes "[b]ulk purchases of available test kits, condoms, and, when proven effective, microbicides that are intended to reduce the risk of HIV/AIDS transmission and for appropriate program support for the introduction and distribution of these commodities, as well as education and training on the use of the technologies." 22 U.S.C. § 2151b-2(d)(3)(B).

SUMMARY OF ARGUMENT

The imperatives of PEPFAR and the AIDS Leadership Act are placed in jeopardy by USAID's requirement that public health organizations and other groups that receive funding under the AIDS Leadership Act ***must*** adopt a written policy "explicitly opposing prostitution and sex trafficking."[3] 22 U.S.C. § 7631(f) ("the pledge requirement"). The pledge requirement runs counter to U.S. and internationally recognized public health practice, and human rights standards protecting the right to health, by forcing organizations to adopt a policy opposing sex work[4] and in doing so stigmatize the very individuals they are trying to help. As such, the pledge requirement is at odds with the federal government's longstanding recognition that such stigmatization harms

---

[3] Because plaintiffs do not challenge the requirement that organizations oppose sex trafficking, *amici* do not address herein that aspect of 22 U.S.C. § 7631(f).

[4] Consistent with the internationally recognized conventions of the public health sector, this brief uses the terms "sex work" and "sex workers" to refer to prostitution and those individuals engaged in prostitution.

people most at risk of HIV/AIDS, and undermines efforts to prevent the spread of HIV/AIDS and to treat its victims. More importantly, the pledge requirement is at odds with public health policy and best practices in the field recognized internationally because it alienates the sex worker communities whose participation and cooperation in the fight against HIV/AIDS is crucial to the success of such efforts. Requiring NGOs that deal primarily with health and social services to take a political stance opposing sex work will negate their ability to approach sex workers with the non-judgmental and non-moralistic attitude that their years of experience have shown to be effective with these communities.

In addition, USAID has also made clear that not only must recipient organizations adopt an organization-wide policy, but that if they accept government funding, they must also refrain from using their own private funding to engage in speech and activities that USAID perceives as being insufficiently opposed to sex work. *See* Letter from Christopher D. Crowley, Mission Director, USAID, to Galina Karmanova, AOSI, (Oct. 7, 2005) (attached as Ex. A to the Declaration of Rebekah Diller in Support of Plaintiffs' Motion for a Temporary Restraining Order, dated Oct. 12, 2005) ("Plaintiffs' TRO Motion"). As implemented by USAID, the pledge requirement restricts the ability of service providers to engage in proven public health interventions even with their private funds. As a result, the pledge requirement undermines, rather than supports, the public health objectives of the AIDS Leadership Act because service providers must either adopt an anti-prostitution policy — thereby restricting their ability to engage in proven public health interventions even with their private funds — or they must forego government funding, which threatens to greatly reduce the reach and effectiveness of their public health efforts.

ARGUMENT

I. The U.S. Government May Not Condition Funding So As To Restrict A Recipient's Private Speech Unless It Demonstrates That Such Restrictions Are Narrowly Tailored To Serve A Substantial Government Interest.

It is axiomatic that government restrictions based on viewpoint are subject to strict scrutiny. "A regulation of speech that is motivated by nothing more than a desire to curtail expression on a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech . . . .'" *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383-84 (1984) (citation omitted). In imposing viewpoint-based restrictions as a condition of funding, the government's actions are subject to heightened scrutiny and it must demonstrate that such restrictions are narrowly tailored to further a substantial government interest. *See id.* at 380.

The funding condition is particularly problematic here because it extends to the plaintiffs' use of private funds. Restrictions on how federal funds recipients use private funding to engage in constitutionally protected speech are unconstitutional when, as here, they leave no alternative avenue for a recipient to engage in privately funded speech. *See generally League of Women Voters*, 468 U.S. 364 (1984). At the very least, such restrictions are subject to heightened scrutiny, which a flat ban will almost always fail. *See id.*

As demonstrated below, and in addition to the reasons set forth in plaintiffs' pleadings, the pledge requirement and its resulting restraint on private speech fail heightened scrutiny. The pledge requirement undermines rather than reinforces the government's goal — expressed in the AIDS Leadership Act and elsewhere — of reducing the stigmatization of those affected by HIV/AIDS. Likewise, the pledge requirement and its restraints on the use of private funds to engage in speech are at odds with well-established "best practices" for the prevention and treatment of HIV/AIDS, as well as international human rights standards on the rights to

health and free expression. As such, the pledge requirement is not narrowly tailored to advance the public health objectives that the AIDS Leadership Act was designed to promote.

II. Compelling Organizations To Adopt The Anti-Prostitution Pledge Conflicts With The U.S. Government's Long-Standing Opposition To Stigmatization Related To HIV/AIDS.

USAID's current policy of compelling domestic and foreign NGOs to take a position opposing prostitution and to refrain from using private funding to engage in constitutionally protected activities as a condition of their receiving federal funds marks a radical and unjustified shift in U.S. policy towards AIDS prevention. "U.S. funded HIV/AIDS initiatives . . . have employed sex workers to promote adoption of safer-sex behavior among their peers and have engaged in policy discussion and law reform as part of efforts to create 'enabling environments' to protect health among communities of sex workers." Penelope Saunders, *Prohibiting Sex Work Projects, Restricting Women's Rights: The International Impact of the 2003 U.S. Global AIDS Act*, 7 HEALTH AND HUMAN RIGHTS: AN INTERNATIONAL JOURNAL 179, 184 (2004). Indeed, the pledge requirement is at odds with the U.S. government's long-standing acknowledgment that stigmatizing groups vulnerable to HIV/AIDS undermines treatment and prevention efforts.

As a result of its experience with the outbreak of HIV/AIDS in the United States in the 1980s, the U.S. Government has long-recognized that stigmatizing individuals living with HIV/AIDS and the members of vulnerable groups most at risk for HIV/AIDS actively harms efforts to prevent and treat the disease. For those already infected by HIV/AIDS, such stigmatization discourages them from acknowledging their condition and seeking treatment out of fear of being shunned by their community and in some cases verbally or physically abused. Likewise, members of vulnerable groups who fear stigmatization will shun HIV/AIDS information — and even medical treatment — or fail to take precautions to prevent the spread of

the disease because they fear the additional stigma of being associated with those already infected by HIV/AIDS.

The premier federal agencies leading the U.S. efforts at home and abroad to prevent the spread of HIV/AIDS and to treat those infected with the disease have repeatedly recognized that isolating groups most vulnerable to HIV/AIDS, such as sex workers, undermines prevention and treatment efforts for these very reasons. The U.S. Government's Centers for Disease Control and Prevention ("CDC"), which has a long history working to combat HIV/AIDS in the United States and overseas, has warned that stigmatization of vulnerable groups "profoundly affect[s] prevention effort[s]" worldwide because of its "pernicious effects" through which stigmatized people are threatened with shunning and physical harm, and therefore avoid seeking HIV/AIDS testing, information and other related services. Centers for Disease Control and Prevention, *Stigma and Discrimination: World AIDS Day 2002* (Press Release Dec. 1, 2002).[5] The CDC has explained that the stigma associated with HIV/AIDS goes beyond the fears people have about the disease itself: "AIDS stigma reflects societal biases about race/ethnicity, socioeconomic status, sexual orientation, age, gender, and drug use. HIV infection evokes and magnifies these biases." Centers for Disease Control and Prevention, *Testimony of Dr. Eugene McCray, Director, CDC's Global AIDS Program Before the Senate Committee on Foreign Relations, Subcommittee on African Affairs* (Feb. 14, 2002).[6]

The CDC recognizes that "[at] home and abroad, HIV continues to stalk our most *vulnerable populations*, people who are marginalized because of race or ethnicity, socioeconomic status, sexual orientation, age or gender. For HIV/AIDS prevention to succeed,

---

[5] *Available at* http://www.cdc.gov/hiv/wad.htm.

[6] *Available at* http://www.cdc.gov/washington/testimony/ha021402.htm.

the *special needs* and life contexts of those populations must be sensitively addressed, by *culturally competent* programs and staff." Centers for Disease Control and Prevention, Divisions of HIV/AIDS Prevention, *HIV Prevention Strategic Plan Through 2005* 24 (January 2001) (emphasis in original).[7] Consistent with this position, the CDC's manuals to train health care providers who work with those living with HIV/AIDS include sections on ways to address and reduce stigmatization of vulnerable groups. For example, the CDC's materials for training health care workers overseas to reduce the transmission of HIV/AIDS from mothers to their children emphasize the reasons that stigma associated with HIV/AIDS needs to be confronted:

> Stigma is disruptive and harmful at every stage of the HIV/AIDS continuum, from prevention and testing to treatment and support. For example, people who fear discrimination and stigmatization are less likely to seek HIV testing while persons who have been diagnosed may be afraid to seek necessary care.

Centers for Disease Control and Prevention, *Training Module 5 for Reducing Mother-To-Child-Transmission of HIV/AIDS* (undated).[8]

USAID, which provides substantial funding for HIV/AIDS prevention and treatment overseas, likewise has consistently recognized that "[s]tigma and discrimination push people in high-risk groups (*e.g.,* sex workers, injecting drug users) underground, making them [more] difficult to reach through prevention programs and thus creating more opportunities for HIV/AIDS to spread to the general population." U.S. Agency for International Development, *Leading the Way: USAID Responds to HIV/AIDS – 1997-2000* 11 (Sept. 2001).[9] For at least the

---

[7] *Available at* http://www.cdc.gov/hiv/pubs/prev-strat-plan.pdf.

[8] *Available at* http://www.cdc.gov/nchstp/od/gap/pmtct/Trainer%20Manual/Adobe/Module_5TM.pft.

[9] *Available at* http://www.synergyaids.com/documents/3013_USAID_HIV_AIDSreport2.pdf. *See also* U.S. Agency for International Development, *Cambodia HIV/AIDS Strategic Plan:*
(continued...)

past several years, USAID has recognized that "[o]vercoming the stigma attached to HIV/AIDS and the resulting discrimination" is "essential to combating the epidemic." U.S. Agency for International Development, *USAID's Expanded Response to HIV/AIDS* 16 (June 2002).[10] The USAID Administrator, Andrew Natsios, recently listed "stigma reduction" as one of the key elements of a successful strategy to fight HIV/AIDS. U.S. Agency for International Development, *Remarks by Andrew S. Natsios, Administrator, HIV Prevention Symposium, Academy for Educational Development* (Jan. 14, 2004).[11] To further these objectives, USAID funds a variety of studies researching ways to reduce and eliminate stigmatization of and discrimination against groups associated with the spread of HIV/AIDS.[12] The Agency monitors the impact that stigma has on prevention and treatment, including "association of the disease with marginal groups, such as homosexuals, drug injectors, and sex workers . . . ."[13] USAID also funds private groups to prepare training manuals for health care workers focused exclusively on the elimination of stigma resulting from the "negative attitudes toward the behavior of a group,

---

2002-2005, at 51 (Mar. 2004), *available at* http://www.usaid.gov/kh/health/documents/USAID_Cambodia_HIV_strategy_2002_2005.pdf ("[S]tigma forces those most vulnerable to HIV infection underground, thereby strengthening the chain of transmission between those individuals and groups and the rest of the community.").

[10] *Available at* http://www.usaid.gov/our_work/global_health/aids/Publications/docs/expandedresponse.pdf

[11] *Available at* http://www.usaid.gov/press/speeches/2004/sp040114.html.

[12] *See, e.g.,* U.S. Agency for International Development, *Leading the Way: USAID Responds to HIV/AIDS – 1997-2000*, at 35 (Sept. 2001), *available at* http://www.synergyaids.com/documents/3013_USAID_HIV_AIDSreport2.pdf; U.S. Agency for International Development, *Working Report Measuring HIV Stigma: Results of a Field Test in Tanzania* (June 2005), *available at* http://www.synergyaids.com/resources.asp?id=5976.

[13] *See, e.g.,* U.S. Agency for International Development, *Expanded Response Guide to Core Indicators for Monitoring and Reporting on HIV/AIDS Programs* 69 (Jan. 2003), *available at* http://www.usaid.gov/our_work/global_health/aids/TechAreas/monitoreval/expandresponse.pdf.

such as homosexuals or prostitutes."[14] EngenderHealth, *Reducing Stigma and Discrimination Related to HIV and AIDS – Training for Health Care Workers* 28 (2004).

More recently, the federal government's spokesperson for its policies to combat the spread of HIV/AIDS globally, Ambassador Randall Tobias, Coordinator for the newly established Office of the Global AIDS Coordinator ("OGAC") has repeatedly emphasized the importance of combating the stigmatization of vulnerable groups and the need to eliminate it. For example, Ambassador Tobias recently recognized that "[t]he need for public leadership in fighting stigma is tremendous." U.S. Department of State, *Working Together as Partners in the Global HIV/AIDS Fight*, Remarks at the Nat'l Ass'n of People With AIDS Staying Alive 2005: Positive Living Summit, Los Angeles, CA (Aug. 21, 2005).[15] He has also stated that groups fighting HIV/AIDS must focus on the goal of reducing stigma associated with AIDS and not argue about how best to achieve that task:

> [The] denial, stigma, and complacency that fuel HIV/AIDS – these too are real enemies. It is morally imperative that we direct our energies at these enemies, not at one another. We may not agree on every tactic employed by every donor and we may have passionate opinions about how things can be done better, but we must work with each other to find the best solutions, while knowing that every person in this fight simply wants to save lives. That is a noble calling, and should be appreciated and respected.

U.S. Department of State, *Global Fight Against HIV/AIDS: What Do We Need To Do Differently? Remarks to IMPACT Arena, Bangkok, Thailand* (July 14, 2004).[16] Indeed, in its first report to Congress, OGAC expressly acknowledges the harm caused by stigmatization of vulnerable groups and has said reducing stigma is one of the major components of reducing the

---

[14] *Available at* http://engenderhealth.org/res/offc/hiv/stigma/pdf/stigma_trainer.pdf.

[15] *Available at* http://www.state.gov/s/gac/rl/rm/51304.htm.

[16] *Available at* http://www.state.gov/s/gac/rl/rm/2004/34366.htm.

global spread of HIV/AIDS. U.S. Department of State, Office of the Global AIDS Coordinator, *Engendering Bold Leadership – The President's Emergency Plan for AIDS Relief: First Annual Report to Congress* 33 (Mar. 4, 2005).[17]

As these statements demonstrate, the U.S. Government has recognized that stigmatization of vulnerable groups, including sex workers, must be avoided if efforts to treat them and prevent the spread of HIV/AIDS are to be successful. In contrast, the pledge requirement as administered by USAID ignores this important policy lesson and contradicts current U.S. efforts aimed at fighting stigma when it thwarts public health objectives. By compelling NGOs that work with sex workers to take a position opposing prostitution, the pledge requirement will force these groups to stigmatize the very individuals that they intend to help. The AIDS Leadership Act offers no evidence or explanation as to why, given the U.S. Government's long-standing recognition that stigma hinders efforts to stem the spread of HIV/AIDS and its efforts to stop stigmatization of vulnerable groups, forcing organizations to adopt this stigmatizing policy will have a different result now. In fact, the AIDS Leadership Act recognizes that efforts to "reduce the stigma associated with HIV/AIDS" are essential to combating the HIV/AIDS pandemic. 22 U.S.C. § 7601(21)(C). As such, the pledge requirement does not advance the public health objectives of the AIDS Leadership Act, but instead undermines those very aims.

---

[17] *Available at* http://www.state.gov/documents/organization/43885.pdf.

III. Compelling Organizations To Adopt A Pledge That Stigmatizes Sex Workers And That Limits Privately Funded Speech and Activities Runs Contrary To Public Health Policy And Best Practices In The Field.

The AIDS Leadership Act's pledge requirement and the resulting restraints on the use of private funding to engage in constitutionally protected speech — speech that recipients believe is the best way to fight HIV/AIDS — runs contrary to public health policy and best practices in the field by threatening to alienate the sex worker communities whose participation and cooperation in the fight against HIV/AIDS is crucial to the success of such efforts. Compelling NGOs to adopt a policy statement opposing prostitution impedes their ability to reach out to sex workers, to teach them skills that would make it possible for them to leave prostitution, to promote safer sex practices among sex workers and their clients, to provide medical treatment and care for HIV-positive sex workers and their families, and to engage in further research into effective practices for preventing the spread of HIV. Gaining the trust and cooperation of sex workers in order to enter into an active collaboration is a crucial component of the anti-HIV/AIDS programs that are implemented around the world by *amici*. Forcing NGOs, which deal primarily with health and social issues, to take a political stance opposing prostitution will negate their ability to approach sex workers with the non-judgmental and non-moralistic attitude that their years of experience have shown to be effective with these communities. As many case studies and "best practices" guidelines[18] demonstrate, the active and

---

[18] "Best practices" are published by health organizations such as the World Health Organization and UNAIDS and heavily relied on by public health professionals. Best practices can range from specific training techniques to entire programs. The basis for best practices ranges from very strong evidence in the form of randomized controlled trials to less rigorous evidence-based studies, when these are the only measure available. *See* Declaration of Chris Beyrer, dated Sept. 21, 2005, ¶¶ 21-22 (submitted with the Plaintiffs' TRO Motion).

voluntary participation of sex workers themselves is crucial to the success of HIV-prevention and treatment programs.

Sex workers tend to be a marginalized segment of the population — often poor, disenfranchised, and subject to abuse. "In nearly all settings, female sex workers are a stigmatized group of people. . . . [M]ost mainstream societies have relegated them to the margins, abused them, exploited them[,] and restricted their rights as citizens." UNAIDS Case Study, *Female Sex Worker HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India and Bangladesh* 9 (Nov. 2000).[19] The stigma and illegality frequently associated with prostitution make sex workers a particularly difficult population to reach in HIV/AIDS intervention efforts.

Despite the difficulty of establishing contact and collaboration with sex workers, organizations have persevered, because sex workers are crucial actors in efforts to prevent the spread of HIV. "Early in the [AIDS] epidemic, sex workers were recognized as a key group to involve in HIV-prevention work. . . . However, sex workers have been difficult to fully involve in HIV prevention, since the illegality of prostitution in many countries means that women and men who exchange sex for money may not always be visible or accessible. Sex work is also highly stigmatized in many societies and, in early reports about AIDS, the mass media often presented sex workers unhelpfully as 'conduits of infection' rather than as individuals who might be especially vulnerable and/or who have a key role to play in HIV prevention." UNAIDS Best Practice Collection Key Material, *Innovative Approaches to HIV Prevention: Selected Case Studies* 38 (Oct. 2000) (citations omitted). UNAIDS further advises that in developing,

---

[19] All UNAIDS documents cited are *available at* http://www.unaids.org.

implementing, monitoring and evaluating HIV/AIDS prevention and care programs, "it is important to consider . . . the active involvement of sex workers themselves in all phases of project development, implementation and evaluation." UNAIDS Technical Update, *Sex Work and HIV/AIDS* 3 (June 2002).

That approach is consistent with international human rights standards, which recognize the fundamental right of all individuals, including sex workers, to "seek, receive, and impart information" about HIV/AIDS without discrimination.[20] Protecting the fundamental speech rights of organizations working with sex workers also is essential to ensuring sex workers' access to health information.

Recognizing and promoting the human rights of sex workers is also viewed as a public health "best practice" in the fight against HIV/AIDS. This "human rights approach recognizes that rights are universal and reinforces the value of full participation of all members of society." World Health Organization, *The World Health Report: Changing History* 47 (2004).[21] Promoting the human rights of these stigmatized and marginalized individuals makes them more effective participants in the prevention and treatment of HIV and AIDS. "In addition to reducing HIV and STI infections and providing care services, sex work programmes need to address the issue of decreasing sex workers' vulnerability. To do so, programmes must address the conditions surrounding sex work and function as agents of social change. This requires a broad and long-term perspective, which is why sex work programmes should incorporate a

---

[20] The International Covenant on Civil and Political Rights (ICCPR), art. 19, Dec. 19, 1966, 999 U.N.T.S. 171, (recognizing that "[e]veryone shall have the right to freedom of expression," including the right to "seek, receive and impart information of all kinds) *available at* http://www.ohchr.org/english/law/ccpr.htm. The United States ratified the ICCPR in 1992.

[21] *Available at* http://www.who.int/whr/2004/en/.

community-development approach to HIV into their basic framework. 'Empowering' sex workers at the individual, community and societal level is a vital component of addressing their vulnerability." UNAIDS Technical Update, *Sex Work and HIV/AIDS* at 14. Specifically, the stigma faced by sex workers is seen by U.S. policymakers, among others, as an important impediment to reaching sex workers with information, condoms and other HIV/AIDS-related services.

Human rights organizations have documented how stigma and discrimination expose marginalized persons and those who work with them to violence and other forms of abuse. These human rights violations facilitate the spread of the virus by interfering with education and outreach, and driving those most vulnerable to infection away from HIV prevention and treatment efforts. In many countries, sex workers are routinely subjected to violations of their fundamental rights by the police, both at the time of their arrest and while in detention.[22] Peer educators providing HIV/AIDS outreach to these women frequently suffer many of the same abuses. Police have beaten peer educators, claimed without basis that outreach work promotes prostitution, and brought trumped-up criminal charges against outreach workers.[23] The mere possession of condoms — a key tool in the work of HIV/AIDS peer educators — is often enough to trigger police harassment, and thus to deter outreach that could

---

[22] *See, e.g.*, Human Rights Watch, *Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India*, (July 2002), *available at* http://www.hrw.org/reports/2002/india2/; Human Rights Watch, *Ravaging the Vulnerable: Abuses Against Persons at High Risk of HIV in Bangladesh*, (Aug. 2003), *available at* http://www.hrw.org/reports/2003/bangladesh0803/; Human Rights Watch, *Unprotected: Sex, Condoms, and the Human Right to Health in the Philippines* 32-34 (May 2004), *available at* http://hrw.org/reports/2004/philippines0504/.

[23] *Id.*

help prevent the spread of HIV/AIDS.[24] In Kazakhstan and Bangladesh, for example, sex workers have reported verbal and physical abuse by police, including gang rape, and beating with fists, feet and batons. When sex workers face abuse from governmental authorities, they have no one to defend them and when they face abuse from private actors, sex workers report being told that as sex workers they have no right to lodge complaints.[25]

Moreover, as a result of adopting such a position, the relationship of cooperation and trust many NGOs have worked hard to cultivate with sex workers will be damaged. This relationship has made NGOs much more likely to assist in discovering and preventing sexual exploitation and violence directed at sex workers. For example, in Bishkek, Kyrgyzstan, since 2003 the NGO "Tais Plus" has had a project responding to violence for people in sex work. Tais Plus, and similar HIV/AIDS projects in the region, have described their work as an essential first point of contact for marginalized sex workers experiencing violence from police and private actors, as neither traditional rights organizations or the governments in Central Asia have responded to the violence against sex workers. *See* Central and Eastern European Harm Reduction Network (CEEHRN), *Sex work, HIV/AIDS and Human Rights in Central Europe* 66 (Vilnius: Lithuania: July 2005).

Countries have increasingly recognized the importance of a human rights approach in contributing to the success of HIV/AIDS programs. At the 1994 World AIDS Summit in Paris, forty-two governments including the United States declared "the enhanced

---

[24] *Id.*

[25] *See, e.g.*, Human Rights Watch, *Fanning the Flames: How Human Rights Abuses Are Fueling the AIDS Epidemic in Kazakhstan* (June 2003), *available at* http://hrw.org/reports/2003/kazak0603/; Human Rights Watch, *Ravaging the Vulnerable: Abuses Against Persons at High Risk of HIV in Bangladesh* (Aug. 2003) *available at* http://www.hrw.org/reports/2003/bangladesh0803/.

involvement of people living with or affected by HIV/AIDS was critical to ethical and effective national responses to the epidemic. This principle of greater involvement is fundamental to the fairness of any policies and programmes concerning HIV/AIDS." World Health Organization, *The World Health Report: Changing History* 47 (2004).[26] In 1998, the Office of the United Nations High Commissioner for Human Rights and UNAIDS "jointly developed international guidelines on HIV/AIDS and human rights, a tool that applies to human rights law and norms to the specific context of HIV/AIDS and identifies what states can and should do in the light of their human rights obligations. Commitment to these principles was reinforced in the Declaration of Commitment on HIV/AIDS, adopted at the United Nations General Assembly Special Session on HIV/AIDS in 2001." *Id.*

Brazil has explicitly recognized the key role that sex workers play in that country's successful anti-AIDS initiative. According to Brazil's national AIDS commissioner, physician Pedro Chequer: "We view sex workers as essential partners in our HIV prevention efforts. We partner with . . . NGOs composed of and led by sex workers to formulate and implement our HIV prevention program. These NGOs have been tremendously effective in getting Brazilians to give up dangerous sexual behavior, such as having sex with strangers without condoms." Declaration of Pedro Chequer, dated Aug. 24, 2005, ¶ 6.[27] In explaining why the country decided to turn down $40 million in U.S. assistance against AIDS rather than sign a statement condemning prostitution, "we believed we could not conduct effective outreach

---

[26] *Available at* http://www.who.int/whr/2004/en/report04_en.pdf.

[27] The Declaration of Pedro Chequer, dated Aug. 24, 2005, was submitted with the Plaintiffs' TRO Motion.

to and programs with sex workers if our NGO partners were forced to state their explicit opposition to prostitution, as USAID was requiring." *Id.* at ¶ 8.

Even when HIV/AIDS education and care are made available to sex workers, they may not take advantage of them, often citing as a deterrent the "unwelcoming or judgmental attitudes on the part of staff." UNAIDS Technical Update, *Sex Work and HIV/AIDS* at 8. One of the projects lauded by UNAIDS as a successful model of Asia's best efforts at preventing HIV infection among female sex workers is instructive. *See* UNAIDS Case Study, *Female Sex Worker HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India and Bangladesh* (Nov. 2000). Named the Transex Project (because it initially focused on transport and sex workers in Papua New Guinea), this three-year initiative was globally funded by the Australian government, and specific activities were additionally funded by USAID, the World Health Organization, the United Nations Populations Fund, and UNAIDS. The observations and lessons that emerged from this project were telling. The difficulty of engaging sex workers in the initiative was noted: "Rapport building with sex workers proved to be a long and delicate process. . . . " *Id.* at 26. One of the challenges was to train the project's staff to bring a non-judgmental attitude to their interactions with sex workers. "Staff training was intensified to try to overcome all expression of the moralistic stance and poor gender-related attitudes sometimes exhibited by the male staff." *Id.* Sex workers whom the initiative was designed to educate and help were alienated from the project by their initial belief that the project's mission was to condemn or abolish prostitution. "Project personnel repeatedly reassured concerned groups that they were not going to moralize about prostitution or rehabilitate sex workers, but that they would work with other NGOs to provide skills training for sex workers who wished to give up their trade or simply supplement their income. Such non-moralistic attitudes are not widespread