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September 17, 2007

BY HAND
Honorable Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the Second Circuit
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: Alliance for Open Society, Inc. v. USAID, No. 06-4035-cv

Dear Ms. Wolfe:

Pursuant to the Court's order of August 7, 2007, we submit this letter brief to address the impact of guidelines issued by Defendants-Appellants United States Agency for International Development ("USAID") and the United States Department of Health and Human Services ("HHS") on the constitutional and statutory challenges pending before this Court as to the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"). For the reasons set forth below, the guidelines here permit a grantee to establish a separate affiliate to engage in speech disfavored by the Leadership Act and are virtually identical to the regulations previously found constitutional in Brooklyn Legal Services Corp. v. Legal Services Corp., 462 F.3d 219 (2d Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3539 (March 28, 2007) (No. 06-1308), and Velazquez v. Legal Servs. Corp., 164 F.3d 757 (2d Cir. 1999), aff'd, 531 U.S. 533 (2001), and cert. denied, 532 U.S. 903 (2001). Accordingly, the Court should reject Plaintiffs-Appellees' facial challenge to the guidelines and vacate the injunction issued by the district court.

I. BACKGROUND

A. Procedural History

Plaintiffs-Appellees are non-governmental organizations ("NGOs") that receive funding from the United States Government under the Leadership Act, a statute designed to combat HIV/AIDS abroad, particularly in developing countries. At the time Congress enacted the Leadership Act, Congress had been presented with extensive testimony about the links between prostitution, sex trafficking and the transmission of HIV/AIDS. See Brief of Defendants-Appellants, filed Nov. 13, 2006, at 10-13. Congress also had heard evidence that some organizations receiving foreign aid funding from the United States Government had backed the

legalization of prostitution, advocated weaker legal restrictions on sex trafficking, and conducted condom distribution projects with pimps and sex traffickers while taking no steps to assist women and children forced into sexual slavery. S. Hrg. 108-105, 108th Cong., 1st Sess. at 21, 35-36 (Apr. 9, 2003). Given the evidence before it, Congress expressly found that prostitution and sex trafficking are causes of and factors in the spread of HIV/AIDS. Accordingly, Congress concluded that it should be the policy of the United States to eradicate these deadly practices and that their eradication should be a priority in all prevention efforts under the Leadership Act. Consistent with Congress's findings and strategy, the Leadership Act provides, inter alia, that, except for limited exceptions, all funding recipients must have a "policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. § 7631(f) (the "funding condition").

Plaintiffs here challenged the funding condition under the First Amendment. The funding condition was also challenged in DKT International, Inc. V. United States Agency for International Development, 477 F.3d 758 (D.C. Cir. 2007). In a decision issued on February 27, 2007, the D.C. Circuit in DKT found that the funding condition did not violate the First Amendment, noting that the Government in choosing its agents "may use criteria to ensure that its message is conveyed in an efficient and effective fashion." Id. at 762. In reaching its decision, the D.C. Circuit concluded that "[n]othing prevents DKT from itself remaining neutral [on the question of prostitution] and setting up a subsidiary organization that certifies it has a policy opposing prostitution." Id. at 763.

At oral argument in this case on June 1, 2007, the Government informed the Court that defendant agencies HHS and USAID were in the process of preparing guidelines regarding a grantee's ability to establish a separate affiliate under the Leadership Act to engage in speech that would be inconsistent with the funding condition. The Government further informed the Court that these guidelines would be modeled upon the regulations previously found constitutional in Brooklyn Legal Services Corp. and Velazquez v. Legal Servs. Corp.

By letter dated July 23, 2007, the Government sent the Court a copy of the guidelines issued by HHS and USAID, which can be found at 72 Fed. Reg. 41076-77 (2007) and http://www.usaid.gov/news/news/affiliate_guidance_072307.doc, respectively.

B. The Guidelines Issued by HHS and USAID

The guidelines promulgated by HHS and USAID provide that:

> [C]ontractors, grantees and recipients of cooperative agreements ("Recipients") [under the Leadership Act] must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with a policy opposing prostitution and sex trafficking ("restricted activities").

72 Fed. Reg. at 41076.[1] The guidelines state that a Recipient will be found to have objective integrity and independence from such an affiliated organization if:

> (1) The affiliated organization is a legally separate entity;
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> (2) The affiliated organization receives no transfer of Leadership Act funds, and Leadership Act funds do not subsidize restricted activities; and
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> (3) The Recipient is physically and financially separate from the affiliated organization. Mere bookkeeping separation of Leadership Act funds from other funds is not sufficient. [USAID and HHS] will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient physical and financial separation exists. The presence or absence of any one or more factors will not be determinative.

Id. at 41076-77. The factors relevant to determination of this third prong of physical and financial separateness include but are not limited to:

> (i) The existence of separate personnel, management, and governance;
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> (ii) The existence of separate accounts, accounting records and timekeeping records;
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> (iii) The degree of separation from facilities, equipment and supplies used by the affiliated organization to conduct restricted activities, and the extent of such restricted activities by the affiliate; and
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> (iv) The extent to which [the agency], the U.S. Government and the project name are protected from public association with the affiliated organization and its restricted activities in materials such as publications, conferences and press or public statements.

Id. at 41077.

II. The USAID and HHS Guidelines are Constitutional

A. The Guidelines Are Nearly Identical to Those Previously Found Constitutional by This Court

The guidelines issued by USAID and HHS track— in all material respects —the guidelines previously found constitutional by this Court in Brooklyn Legal Services and Velazquez and, therefore, are facially valid under the First Amendment.

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[1] As the USAID and HHS guidelines are identical, we will cite only to the HHS guidelines, which are published in the Federal Register.

In both Brooklyn Legal Services and Velazquez, this Court addressed the constitutionality of restrictions on local legal assistance programs that receive federal funding through the Legal Services Corporation ("LSC"). See Brooklyn Legal Services, 462 F.3d at 221-22. Congress had charged LSC with ensuring that federal funds distributed by LSC were not diverted toward activities Congress specifically desired not to subsidize. Id. at 222.[2] The organizations receiving LSC funding often receive funding from other sources, including state and local governments and private sources. Id. Like the funding condition challenged here by AOSI, the LSC restrictions apply to all activities of a grantee, not just those that were federally funded. Id. at 222. To provide an alternative avenue for speech for such non-federal funds, LSC promulgated a program integrity regulation, which permits an LSC funding recipient to affiliate with an organization that engaged in otherwise disfavored activities. Id. at 222-23.

Under the LSC program integrity regulation, a recipient of LSC funding is permitted to affiliate with another organization if the funding recipient maintained "'objective integrity and independence from [the] organization that engage[d] in restricted activities.'" Id. at 223 (quoting 45 C.F.R. § 1610.8(a); compare 72 Fed. Reg. 41076-77 (Leadership Act guidelines requiring "objective integrity and independence" from any affiliated organization that engages in activities inconsistent with the Leadership Act prohibition against prostitution and sex trafficking).

The LSC regulation provides a three-part test for objective integrity and independence of the recipient and affiliate. The three-part LSC test requires that: (1) the other organization is a legally separate entity; (2) the other organization does not receive any LSC funds, and LSC funds do not subsidize any prohibited activities; and (3) the recipient is physically and financially separate from the other organization. 45 C.F.R. § 1610.8(a). The Leadership Act guidelines have the same test. See 72 Fed. Reg. 41076-77 (three-part test requires that the affiliated organization is a legally separate entity, does not receive any Leadership Act funds or use Leadership Act funds to subsidize restricted activities, and that the Recipient is "physically and financially separate" from the affiliated organization).

Like the Leadership Act guidelines, the LSC regulation provides that mere bookkeeping separation was insufficient but instead that physical and financial separation "will be determined on a case-by-case basis and will be based on the totality of the facts." 45 C.F.R. § 1610.8(a); compare 72 Fed. Reg. 41076-77 (guidelines providing that separation is not a matter of "mere bookkeeping" but determined on a "case-by-case basis" on the "totality of the facts").

Also like the Leadership Act guidelines, the LSC regulation supplies factors for determining separateness while explicitly cautioning that the "presence or absence of any one or more factors will not be determinative." 45 C.F.R. § 1610.8(a); compare 72 Fed. Reg.41076. The LSC regulations set forth four factors: (i) the existence of separate personnel; (ii) the

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[2] The LSC restrictions included prohibitions on participating in class action lawsuits, in-person solicitation of clients, and seeking certain types of attorney's fees. Id.

existence of separate accounting and timekeeping records; (iii) the degree of separation from facilities in which restricted activities occur, and the extent of such resticted activities; and (iv) the presence of signs and other forms of identification that distinguish the recipient from the organization. 45 C.F.R. § 1610.8(a)(3); compare 72 Fed. Reg. 41077 (four factors in guidelines include existence of separate personnel, management and governance, separate accounting and timekeeping records, degree of separation from facilities where restricted activities occur and presence of signs and other forms of identification which could distinguish between Recipient and affiliated organization).

In Velazquez, this Court rejected plaintiffs' facial challenge to the LSC regulation, including plaintiffs' claim that the LSC program integrity regulation unreasonably burdened a grantee's use of non-federal funds. 164 F.3d at 766. The Court explained that, "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." Id. As the Velazquez plaintiffs failed to provide any basis for concluding that the LSC regulation could not be applied "in at least some cases without unduly interfering with [a recipient's] First Amendment rights," this Court held that plaintiff could not sustain a facial challenge. Id. at 767. The Supreme Court declined to review this Court's conclusion that the LSC regulation was facially valid for First Amendment purposes. Legal Servs. Corp. v. Velazquez, 532 U.S. 903 (2001) (denying certiorari).

Several years later, this Court revisited the constitutionality of the LSC regulation, this time reversing the district court's holding that the regulation was unconstitutional as-applied. Brooklyn Legal Servs. Corp., 462 F.3d at 228-36. As an initial matter, this Court noted that:

> [T]he federal government's interest in these cases cannot be subject to the least- or less-restrictive-means mode of analysis—which, like the undue burden test itself, is more appropriate for assessing the government's direct regulation of a fundamental right—when the government creates a federal spending program.

Id. at 229 (citing United States v. Am. Library Ass'n, 539 U.S. 194, 211-12 (2003); South Dakota v. Dole, 483 U.S. 203, 207 (1987)). Thus, "while the First Amendment has application in the subsidy context, the government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech at stake." Id. at 230.

Noting that its prior rejection of the facial challenge to the LSC regulation had provided the framework for evaluating legal challenges in unconstitutional conditions cases, this Court reiterated that:

> Taking [the Supreme Court's decisions in TWR, League of Women Voters and Rust] together, we infer that, in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression.

Id. at 231 (quoting Velazquez, 164 F.3d at 766). In articulating the adequate alternative channel test, the Court provided further guidance on the "undue burden" language of its prior opinion:

> [In Velazquez,] we articulated that restrictions that unduly burden the ability of an organization to set up adequate alternative channels for protecting expression such that they are in effect precluded from doing so should be subject to invalidation.

Id. at 232 (citing Velazquez, 164 F.3d at 766). Thus, this Court remanded the case to the district court for factual findings "under the adequate alternative test articulated in [Velazquez] and [to] consider whether the associated burdens in effect preclude the plaintiffs from establishing an affiliate." Id. at 233.

B. Plaintiffs' Objections to the Leadership Act Guidelines Are Meritless

Notwithstanding the similarity between the Leadership Act guidelines and the LSC regulation, Plaintiffs argue that the guidelines are facially unconstitutional for three reasons, See Letter of Rebekah Diller to Honorable Catherine O'Hagan Wolfe, dated July 24, 2007, at 2-4 ("Diller Letter"). None of Plaintiffs' arguments, however, is meritorious.

First, reiterating arguments previously rejected by this Court in Brooklyn Legal Services, Plaintiffs seek to invalidate the guidelines because they differ from the regulations for faith-based grantees. Id. at 2 & n.1 (citing both the First Amendment and the Establishment Clause). In Brooklyn Legal Services, plaintiffs claimed that the LSC regulation violated the Establishment Clause because the level of separation required under the LSC regulation was higher than the separation required by the government's so-called faith based initiative. Brooklyn Legal Services, 462 F.3d at 233. Concluding that the premise of plaintiffs' argument was "flawed," the Court observed that any religious organization that wished to receive funding was required to comply with the same guidelines as a secular entity receiving funding. Id. at 233. That observation is equally true for the Leadership Act guidelines in this appeal. Moreover, the Court in Brooklyn Legal Services specifically rejected the idea that the Government was constitutionally compelled to adopt in other contexts the separation standards used in faith-based regulations. It unequivocally stated:

> [W]e cannot adopt a view that Congress' decision to accommodate a religious organization in the distribution of its funds must by mandate of the Establishment Clause level the field for all other restrictions the government may place on totally unrelated programs.

Id. at 234 (also noting Supreme Court's recent rejection of similar Establishment Clause claim in Cutter v. Wilkerson, 544 U.S. 709, 724 (2005)).

Second, Plaintiffs contend that the burdens on speech under these guidelines are greater than those imposed by the LSC regulation in Brooklyn Legal Services. See Diller Letter at 2-3.

More specifically, Plaintiffs claim that the guidelines here "require not just separate personnel and facilities but also separate 'management and governance.'" Id. at 2-3 (emphasis added). Plaintiffs are, however, incorrect. As the plain language of the guidelines make clear, the four factors enumerated under the third prong are not absolute requirements, but rather a list of non-exclusive factors that bear on a case-by-case assessment of overall separateness. See 72 Fed. Reg. 41076(3). Indeed, the Leadership Act guidelines—like the LSC regulation—explicitly provide that the presence or absence of any one of these four factors is "not determinative." Id.; see 45 C.F.R. § 1610.8(3). Rather, the additional language is a minor change designed merely to clarify the range of factors to consider when evaluating the separateness between affiliated entities. This calculus includes, among other considerations, the degree to which the low-level employees, mid-level managers, and high-level corporate officials of the respective entities are the same or different. Thus, the additional language spells out a concept that already is implicit in the more generic concept of separate "personnel" contained in the words of the LSC regulation.[3]

Moreover, the existence of separate corporate management and governance in some cases may be germane to the Government's interest in avoiding the garbling or confusion of its message under the Leadership Act. An obvious example of where such a concern might arise would, hypothetically, include an instance where a well-known public figure is the head of both the funding recipient and the affiliate, and the individual's association with both entities is well-publicized. Indeed, the prelude to the guidelines clearly articulates this concern:

> It is critical . . . that the U.S. Government's message opposing prostitution and sex trafficking is not confused by conflicting positions of [funding recipients].
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> . . . .
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> By ensuring adequate separation between the recipient and affiliate organizations, these criteria guard against a public perception that the affiliate's views on prostitution and sex trafficking may be attributed to the recipient organization and thus to the government.

72 Fed. Reg. 41076. In any event, Plaintiffs are wrong to suggest that this additional language somehow prevents a funding recipient from affiliating with another organization. Letter at 3. Such an argument wrongly assumes that one corporate entity cannot act or speak through another affiliated entity unless they share the exact same managers or boards; in fact, the ultimate control

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[3] Plaintiffs also claim that the burden on grantees is greater because the funding condition requires a funding Recipient "to take a pledge in support of the government's message." Letter at 2. Such a claim is unrelated to the guidelines issued by HHS and USAID. Nonetheless, as explained in the previous briefs filed by the Government, the funding condition clearly protects and advances the Government's interests by ensuring that funding recipients do not act in ways to undermine the Government's goal of eradicating prostitution and sex trafficking. See, e.g., Reply Brief of Defendants-Appellants, filed Jan. 16, 2007, at 18-27.

of a corporation runs through its shareholders. See W.A. Sheaffer Pen Co. v. Lucas, 41 F.2d 117 (D.C. Cir.1930) ("the ultimate control of a corporation is in the majority ... stockholders"); W. Fletcher, Cyclopedia of Corporations § 1097; see also Rogers v. Hill, 289 U.S. 589 (1933) (corporate directors and management are "agents" of shareholders and authorized to act only in the shareholders' best interests).

Third and finally, Plaintiffs claim— in conclusory fashion—that the burdens of separation are "harsher" in the international arena than in the domestic legal aid context. Letter at 3. Plaintiffs further urge that the three sources cited in its letter as to registration requirements for NGOs are sufficient to sustain a facial challenge to the guidelines. See Letter of Rebekah Diller to Honorable Catherine O'Hagan Wolfe, dated July 30, 2007, at 2. Notwithstanding its position, however, Plaintiffs' own description of these burdens is very general; indeed, it is not even clear precisely how such registration requirements would apply in this case, much less to all grantees. Compare Letter at 3 (noting that many countries require NGOs to register, with two of the three cited sources relating to Sub-Saharan Africa and Uganda) with Joint Appendix at 18, 27, 71 (Plaintiff AOSI's primary office is in New York with a branch office in Kazakstan and its HIV/AIDS work takes place in Central Asia). Such generalizations regarding the possible difficulties that might face NGOs in registering in particular countries might, at most, be relevant to some future as-applied challenge but simply cannot support a facial challenge here. Rust v. Sullivan, 500 U.S. 173, 183 (petitioner in a facial challenge faces the "heavy burden" of establishing "that no set of circumstances exists under which the [challenged statute] would be valid"); Brooklyn Legal Services, 462 F.3d at 228 ("Facial challenges . . . permit a single injured party to assert the claims of all future litigants by making a showing that each time that a statute is enforced, it will necessarily yield an unconstitutional result") (quoting Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 293-94 92d Cir. 2006) (Walker, C.J., concurring).

I have enclosed three copies of this letter and enclosures for distribution to the panel members who heard oral argument in this case on June 1, 2007: Hon. Chester J. Straub, Hon. Rosemary S. Pooler and Hon. Barrington D. Parker. We thank you for your attention to this matter.

Respectfully,

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