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October 1, 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 reply to the September 17, 2007 submission of Plaintiffs-Appellees in the above-captioned case (the "Letter") regarding the impact of guidelines issued by Defendants-Appellants USAID and HHS on the constitutional and statutory challenges pending before this Court as to the Leadership Act.[1] As established in our opening letter brief, these guidelines track in all material respects the LSC regulation found to provide a facially adequate alternative channel for expression 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). In their Letter, Plaintiffs challenge the facial sufficiency of the guidelines and claim that the funding condition somehow renders the guidelines fatally defective. Plaintiffs are incorrect on both counts.

ARGUMENT

A. Congress May Condition the Use of Non-Federal Funds Provided It Does Not Foreclose Alternate Channels for the Exercise of First Amendment Rights Through Affiliate Organizations

Congress has broad power to specify the purposes for which funds appropriated out of the Federal Treasury may be spent. See U.S. Const. Art. I, § 9, Cl.7; see South Dakota v. Dole, 483 U.S. 203, 206-07 & n.2 (1987). It is also well settled that Congress may provide that federal

[1] The abbreviations and definitions used in the Government's September 17, 2007 letter are incorporated herein by reference.

funds cannot be used to support particular activities that also are supported by non-federal funds — even if the activities involved would otherwise be protected by the First Amendment when engaged in solely by private parties — so long as the fund recipient is not prevented from creating an affiliate organization to receive and spend non-federal funds to engage in the protected activities. See, e.g., FCC v. League of Women Voters of California, 468 U.S. 364, 400 (1984). Congress also may require that such an affiliate organization be kept "physically and financially separate" from the grantee organization. Rust v. Sullivan, 500 U.S. 173, 180, 187-90 (1991).

In Regan v. Taxation With Representation ("TWR"), 461 U.S. 540 (1983), for instance, the Supreme Court rejected an "unconstitutional conditions" challenge to section 501(c)(3) of the Internal Revenue Code, which forbade tax-exempt organizations from engaging in lobbying. The Court held that the restriction on the ability of a tax-exempt organization to engage in lobbying activity did not place an unconstitutional condition on free speech because the organization could create a separate affiliate to engage in lobbying activity. Id. at 544.

In League of Women Voters, 468 U.S. at 381-89, the Court struck down a statute that prohibited federally subsidized radio stations from broadcasting editorial opinions, in part because a station "is not able to segregate its activities according to the source of funding" and has "no way of limiting the use of its federal funds to all noneditorializing activities . . . ." Id. at 400. The Court recognized, however, that "if Congress were to adopt a revised version of [the statute] that permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations that could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid . . . ." Ibid. Under such a statute, a station "would be free, in the same way that the charitable organization in Taxation With Representation was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities." Ibid.

In Rust, the Supreme Court upheld regulations implementing Title X of the Public Health Service Act, which prohibited the use of federal funds "in programs where abortion is a method of family planning." 500 U.S. at 178. The regulations prohibited Title X projects from, among other things: counseling patients regarding abortion, referring patients to abortion providers, lobbying for legislation to increase the availability of abortion, and using legal action to make abortion available. See id. at 180-81. The regulations also required that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion activities. Under this rule, the federally funded project had to have "objective integrity and independence" from prohibited activities, beyond mere bookkeeping separation. Id. at 180-81.

The Court in Rust held that the regulations did not place an unconstitutional condition on the exercise of First Amendment rights. In particular, the Court stated that "[b]y requiring that a Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in League of Women Voters and [TWR],

not denied it the right to engage in abortion-related activities." Id. at 198. Rather, "Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project to ensure the integrity of the federally funded program." Ibid.

This Court applied these principles in Velazquez, rejecting plaintiffs' facial challenge to the LSC funding restrictions, including their challenge to the LSC program integrity regulation. The Court held that plaintiffs had no basis to question the decision to limit funding for legal services to specific areas and activities, stating that Congress:

> is free to offer a limited menu of legal services under the LSCA. We think it clear, for example, that Congress could fund a legal aid office but limit its practice to specific services such as representing the indigent in landlord-tenant disputes or in consumer fraud cases. The limitations of the 1996 Act are no more suspect simply because they are defined in terms of representations that are prohibited rather than those that are permitted.

164 F.3d at 765.

Taking its lead from Rust, TWR, and League of Women Voters, this Court in Velazquez held 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 766. The Ninth Circuit adopted the same principle in Legal Aid Society of Hawaii v. Legal Services Corp., 145 F.3d 1017, 1026 (9th Cir.), cert. denied, 525 U.S. 1015 (1998), concluding that the LSC statute and regulations do not violate the First Amendment because "[a] recipient of LSC funds may engage in conduct protected by the First Amendment outside the scope of the federally funded program if, as in Rust, the recipient sets up a separate entity that complies with the program integrity regulations."

This Court revisited the LSC regulation in Brooklyn Legal Servs. Corp., 462 F.3d at 228-36. In upholding the facial validity of the LSC regulation, the Court reiterated the adequate alternative test in Velazquez and, on that basis, instructed that the district court on remand was to consider whether the burdens associated with the LSC regulation would "in effect preclude the plaintiffs from establishing an affiliate." Id. at 233.

B. The Guidelines Provide an Alternative Avenue for Speech Disfavored by the Leadership Act and, Therefore, Are Facially Constitutional Under the First Amendment

In their Letter, Plaintiffs claim that the guidelines share only a "superficial similarity" to the LSC regulation previously found constitutional. A comparison of the language of the guidelines with the LSC regulation, however, reveals otherwise.

The guidelines track, in most places word-for-word, the three-pronged approach of the LSC regulations by requiring that the affiliated organization be a legally separate entity, that the affiliated organization receive no transfer of Leadership Act funds, and that the affiliated organization be physically and financially separate from the recipient of Leadership Act fund. See Government's Letter Brief, dated Sept. 17, 2007 at 3-4. Similarly, both the LSC regulation and the guidelines provide that physical and financial separation is evaluated "on a case-by-case basis and based on the totality of the facts." Id. Both the LSC regulation and the guidelines also provide that the presence or absence of any one or more of the listed factors on physical and financial separation will not be determinative, id.; indeed, the factors do not purport to be the exclusive list of considerations for evaluating physical and financial separation. Id. Furthermore, the vast majority of the factors to be considered as to physical and financial separation are identical in both the LSC regulation and the guidelines. Id.

Notwithstanding the overwhelming similarity between the guidelines and the LSC regulation, Plaintiffs focus on two differences in the factors enumerated under physical and financial separation. Letter at 2, 8. Given that these factors are merely a non-exclusive list of items to consider in a case-by-case assessment, however, these two differences are clearly insufficient to establish that the guidelines are facially invalid in all applications. See 45 C.F.R. § 1610.8(3) (LSC regulation factors relevant to separation include but are not limited to listed factors); 72 Fed. Reg. 41076-77 (identical language for Leadership Act guidelines); see Rust v. Sullivan, 500 U.S. at 183 (successful facial challenge must establish that no set of circumstances exists under which statute would be valid).

In any event, the two differences in the formulations of separation in the guidelines and the LSC regulation are relatively minor. In the Government's initial letter brief, we addressed Plaintiff's argument about the first difference, and why this language regarding separate management and governance falls far short of establishing a facial claim. See Government's Letter Brief, at 6-7. The second difference cited in Plaintiffs's Letter similarly fails to establish a facial claim. The language in question provides for evaluating the public association between the two entities in publications and press conferences. This language is different from the corresponding section of the LSC regulation, which examines the presence of signs or other forms of identification distinguishing a funding recipient from its affiliate. This change in emphasis reflects the Government's interest in ensuring that Recipients of Leadership Act funds are not seen as endorsing prostitution, thereby linking the United States to that view in the international arena. See Reply Brief for Defendants-Appellants, dated Jan. 16, 2007, at 20-25. The new language is narrowly tailored to meet Congress's goal by focusing on whether the two entities might be associated in the mind of the public based on their public statements. Thus, while the guidelines provide an alternative avenue for speech by permitting the establishment of an affiliate, the guidelines appropriately ensure that this affiliation does not "threaten the integrity of the Government's programs and its message opposing prostitution and sex trafficking . . . . "

72 Fed. Reg. at 41076.[2]

Plaintiffs erroneously assume that the two differences in the guidelines from the LSC regulation will always weigh against an applicant for Leadership Act funding and thus result in an additional burden. In fact, there may be circumstances where a funding Recipient benefits from consideration of the new factors objected to by these Plaintiffs. For example, a funding Recipient might benefit from consideration of separate "management and governance" where that Recipient already has separate board members and officers from its affiliated organization but the two entities share other relevant connections including but not limited to accounts, accounting records and timekeeping records. The same holds true for the revised factor which now includes language regarding public association between the two entities but omits the language from the LSC regulation language regarding the presence of signs or other forms of identification that distinguish a funding recipient from the affiliate. Compare 72 Fed. Reg. 41077 with 45 C.F.R. § 1610.8(a)(3). For example, a Recipient creating a new affiliate might have no concerns about public association with the new entity in press conferences and publications. Thus, whether this change in formulation will result in a benefit or burden to an individual funding Recipient may depend entirely upon the individual circumstances of that Recipient. In sum, it is erroneous to assume that the two differences objected to by Plaintiffs would result in an additional burden to every other potential funding Recipient. See Brooklyn Legal Services, 462 F.3d at 228 (facial challenges must show that each time that a statute is enforced, "it will necessarily yield an unconstitutional result").

Plaintiffs' disingenuously cite the decision in DKT International, Inc. v. United States Agency for International Development, 477 F.3d 758 (D.C. Cir. 2007), and the D.C. Circuit's colloquy with Government counsel during argument in that case. Relying on these two facts, Plaintiffs claim that the guidelines in this case are more burdensome than the corporation arrangement contemplated by the Court and Government counsel in DKT. Plaintiffs are flatly incorrect. The Court in DKT specifically held that a subsidiary to the funding recipient "would qualify for government funds as long as the two organizations' activities were kept sufficiently separate." Id. at 763. Moreover, Government counsel's discussion of these issues during the DKT oral argument was entirely consistent with these guidelines enacted subsequently by USAID and HHS. More specifically, Government counsel informed the DKT Court that the relevant question was whether the two entities are actually separate, that there could be

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[2] Plaintiffs are inconsistent in their criticism of the guidelines. On the one hand, they criticize the Government for varying from the exact language of the LSC regulation, Letter at 2, 8, while, on the other hand, they complain that the guidelines are reflexively modeled after the LSC regulation, see id. at 3, 5, 17. In fact, the two changes to the guidelines discussed above are specifically tailored to address the Leadership Act and NGOs who receive funding to act in the international arena, where the United States speaks not only through its words but through its associations. See Brief of Defendants-Appellants, dated Nov. 13, 2006, at 28-33; Reply Brief of Defendants-Appellants, dated Jan.16, 2007, at 18-25.

circumstances in which the Government could impute the conduct of a related affiliate to another entity depending on the relationship of the subsidiary and main organization, and that it was appropriate for the Government to assess the question of separation on a case-by-case basis.[3] Indeed, when asked at argument, Government counsel cited the Rust and Velazquez cases as examples of circumstances involving the possible imputing of behavior from one organization to another.

Plaintiffs maintain that the guidelines are facially invalid because NGOs face unduly burdensome registration requirements in the international arena. Letter at 10-12. As a threshold matter, Plaintiffs do not argue that all NGOs are unable to create an affiliate as contemplated by the guidelines. Brooklyn Legal Services, 462 F.3d at 233 (adequate alternative test asks whether plaintiffs are precluded from establishing an affiliate); see Legal Aid Society of Hawaii, 165 F.3d at 1027 (upholding LSC regulation even though restrictions make it more difficult to engage in restricted activities); TWR, 461 U.S. at 550. On a more specific level, Plaintiffs' citation to the registration regimes in a handful of countries does not establish that all Recipients of Leadership Act funding would be subject to these registration requirements. Brooklyn Legal Services, 462 F.3d at 232 (noting that allegations regarding burden of restriction were rejected in part because "the record before us did not establish them as a matter of fact since there was 'little evidence to support . . . predictions regarding how seriously the [regulations] will affect grantees generally.'") (quoting Velazquez, 164 F.3d at 767). Indeed, Plaintiffs appear to concede that these registration requirements do not even apply in all the countries in which Plaintiffs operate. See, e.g., id. at 11 ("In many of the countries in which Plaintiffs operate, NGOs face substantial obstacles . . .).[4] Finally, Plaintiffs' argument proves too much. By arguing that NGOs face obstacles in establishing new entities and opening new offices, Plaintiffs seek to preclude any requirement that a funding Recipient establish an affiliate or subsidiary of any kind, regardless of

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[3] The Government's representations in this letter regarding the content of the oral argument in the DKT case are based on nearly verbatim notes of that proceeding. To the extent that this Court would find a transcript or recording of the DKT oral argument to be helpful, the Government would be happy to order one and provide it to the Court.

[4] The information provided by Plaintiffs on registration requirements highlights the defects of a facial challenge to the guidelines under all circumstances. For example, the information provided as to the burden of registration is exceedingly general. Id. at 11 (referring to "substantial" financial burdens and delays). Moreover, it is unclear what burden, if any, would face NGOs with existing subsidiaries or affiliates where their current relationship would satisfy the guidelines; this inquiry that might vary from country to country and thus from Recipient to Recipient. Finally, the potential denial of registration identified by Plaintiffs is presumably a risk that faces not only new NGOs but also existing ones, thus making it unclear how to quantify the burden of establishing an affiliate in each individual circumstances.

the level of separation between the two.[5]

C. Plaintiffs' Remaining Arguments Regarding the Funding Condition Are Unavailing

The remaining arguments raised by Plaintiffs' Letter all relate to their underlying challenge to the funding condition and have been previously briefed in detail by the parties.[6] Rather than revisit those arguments, we will briefly address the relationship between this Court's analysis of the funding condition and the guidelines.

As a threshold matter, Plaintiffs' arguments regarding the merits of the funding condition shed little light on the discrete topic for the supplemental briefing requested by the Court, namely the impact of the guidelines on the pending appeal. The question posed by the guidelines is whether they provide, as a facial matter, an adequate alternative channel for speech that otherwise renders the speaker ineligible for funding under the Leadership Act. While Plaintiffs contend that the guidelines cannot survive because there are no legitimate Government interests at stake, Letter at 7-8, Plaintiffs' argument distorts this Court's holding in Brooklyn Legal Services. There, this Court rejected a balancing of a plaintiffs' interest as against the Government interest, and instead found the Government's interests relevant to relief only where such interests "are so attenuated from the benefit condition as to amount to a pretextual device for suppressing dangerous ideas or driving viewpoints from the marketplace . . . ." Brooklyn Legal Services, 462 F.3d at 230.

The Government's interests here are clearly not a pretext but rather are directed toward "ensuring the fulfillment of Congress' spending priorities." Id. It is undisputed that Congress found that sex trafficking and prostitution to be "causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. § 7601(23); see Reply Brief of Defendants-Appellants, Dated Jan. 16, 2007, at 18-24 (discussing legislative history on links between prostitution, sex

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[5] While Plaintiffs spend considerable time arguing that the guidelines are unconstitutional because they differ from the regulations for faith-based grantees, Letter at 9-10, the Government addressed that argument in its prior submission. See Government Letter Brief, at 6 (explaining that the identical argument was explicitly rejected in Velasquez); see Cutter v. Wilkerson, 544 U.S. 709 (2005) (recognizing that Congress could accommodate the wearing of religious apparel while in military uniform without lifting all military dress requirements to allow all other forms of expression).

[6] For example, Plaintiffs continue to argue that the funding condition is unconstitutional, see Letter at 4-5, that it is impermissibly vague, id. at 14-15, and that the Government's interpretation of the statute is erroneous, id. at 15-16. These arguments are addressed at length in the Brief of Defendants-Appellants, filed November 13, 2006, and the Reply Brief of Defendants-Appellants, filed January 16, 2007.

trafficking and transmission of HIV/AIDS). Accordingly, Congress made the eradication of prostitution and sex trafficking a priority in "all prevention efforts" under the Leadership Act when combating the international HIV/AIDS crisis. 22 U.S.C. § 7611(a)(4). While Plaintiffs clearly disagree with the judgment of Congress on this issue, such reasoned policy judgments of Congress are entitled to deference. See Marshall v. United States, 414 U.S. 417, 426-27 (1974) (rejecting equal protection challenge to statute mandating incarceration, as opposed to treatment, for drug addicts with two or more felony convictions, based on Congress's finding that such individuals were less likely to be rehabilitated, while acknowledging that "there is no generally accepted medical view as to the efficacy of . . . therapeutic methods of treating addicts and [that] the prospect for the[ir] successful rehabilitation . . . thus remains shrouded in uncertainty"); see also Jones v. United States, 463 U.S. 354, 363-66 (1983) (rejecting due process challenge to scheme providing for indefinite civil commitment of certain insanity acquitees; Congress could reasonably find that a verdict of not guilty by reason of insanity showed that such individuals were dangerous and mentally ill, despite the "'tentativeness of professional judgment'" in psychiatry on this issue); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31-34 (1976) (rejecting due process challenge to statute barring denial of coal miners' claims for disability benefits where sole evidence of disease is negative x-ray; Congress reasonably found that "X-ray testing that fails to disclose [the miner's disease] cannot be depended upon as a trustworthy indicator of the absence of the disease," despite existence of contrary evidence before Congress).[7]

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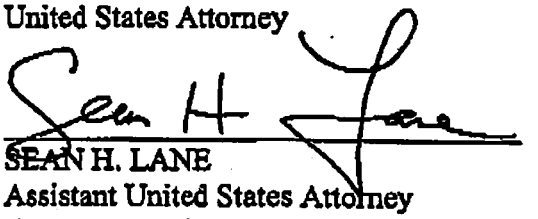
[7] Finally, Plaintiffs complain the guidelines are not the product of formal rulemaking. See Letter at 2-3, 16-17. As the Court is aware, however, the Government issued the guidelines on an expedited basis given the pendency of this appeal and the Court's understandable interest in the content of the guidelines. Indeed, as the Government explicitly informed the Court, HHS is pursing notice-and-comment rulemaking as to these guidelines but this time-consuming process most likely will not be complete before the Court's consideration of this appeal.

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,

MICHAEL J. GARCIA
United States Attorney

By: 

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