UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC. *et al.*,

Plaintiffs,

05 Civ. 8209 (VM) (DF)

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT *et al.*,

Defendants.

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MEMORANDUM IN SUPPORT OF MOTION OF PLAINTIFFS FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT AND MOTION BY GLOBAL HEALTH COUNCIL AND INTERACTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

In today's motions, two preeminent international development and public health organizations – Global Health Council ("GHC") and InterAction – seek to join this case, and obtain a preliminary injunction, on behalf of their members who are dedicated to helping the government accomplish the shared mission of fighting the global HIV/AIDS pandemic. GHC and InterAction seek to protect the ability of their members to receive federal funding for this common purpose without having to surrender their core First Amendment rights to the government as a precondition to the receipt of this funding.

In particular, GHC and InterAction seek to enjoin the federal government from requiring their members to take a pledge "explicitly opposing prostitution" as a condition of receiving federal funds to fight HIV/AIDS (the "Policy Requirement"). This is the very same Policy Requirement that this Court already has enjoined vis-à-vis similarly situated plaintiffs Alliance for Open Society International, Inc. ("AOSI") and Pathfinder International ("Pathfinder") (collectively, "Plaintiffs"), on the grounds that it "cannot survive heightened scrutiny, and also impermissibly discriminates based on viewpoint and compels speech," and therefore "violates the First Amendment." *See AOSI v. USAID*, 430 F. Supp. 2d 222, 276 (S.D.N.Y. 2006).

Rather than remedy these constitutional violations, however, defendants United States Agency for International Development ("USAID") and Department of Health and Human Services ("HHS") (collectively "Defendants") have exacerbated the situation by: (1) refusing to extend to other similarly situated grant recipients the temporary relief won by AOSI and Pathfinder; (2) delaying a ruling on the merits by appealing this Court's preliminary injunction order and then avoiding a decision on their own appeal; (3) declining to seek input from grantees before issuing draconian guidelines that do nothing to cure the Constitutional defects identified by this Court; and (4) seeking to create further delay by announcing the possibility of formal

"notice and comment" rulemaking at some unspecified time in the future. In the face of such conduct, it is imperative that GHC and InterAction be permitted to join this case and to obtain a preliminary injunction on behalf of their members.

At stake is nothing less than the ability of their members to engage in life-saving work throughout the world free of unconstitutional restrictions on their speech and activities. If GHC and InterAction succeed, the immediate effect will be to restore their members' First Amendment rights and to enhance the urgently important fight against HIV/AIDS worldwide. Their members will once again be able to bring to that fight the tools that the public health community deems most effective. In particular, where appropriate, they will be able to work closely with sex worker organizations and to advocate for the protection of sex workers' human rights in order to prevent the spread of HIV/AIDS. If, on the other hand, GHC and InterAction are unable to join this lawsuit, that work will continue to be hampered by an unconstitutional restriction on their members' First Amendment rights.

PROCEDURAL HISTORY

On May 9, 2006, the Court ruled that the federal government may not require independent non-profit organizations to adopt policies "explicitly opposing prostitution" as a condition of receiving federal funds to fight HIV/AIDS internationally. The Court held that the Policy Requirement in 22 U.S.C. § 7631(f) violates the First Amendment as applied to Plaintiffs AOSI and Pathfinder, because it is not narrowly tailored to achieve Congress's goals, discriminates based on viewpoint, and unconstitutionally compels speech.[1] *AOSI v. USAID*, 430

[1] In light of the Court's familiarity with the procedural and factual background of this case, Plaintiffs do not recite the procedural history prior to the Court's ruling of May 9, 2006, and do not repeat relevant facts from their prior filings. Instead, Plaintiffs hereby incorporate the Memorandum of Law in Support of Motion of Plaintiffs AOSI and Open Society Institute for a Preliminary Injunction and the Memorandum of Law in Support of Motion of Plaintiff Pathfinder for a Preliminary Injunction.

F. Supp. 2d 222, 276 (S.D.N.Y. 2006). Accordingly, the Court issued a preliminary injunction enjoining Defendants USAID and HHS from enforcing the Policy Requirement against those Plaintiffs. (Prelim. Inj. Order, June 29, 2006.)

In the wake of the decision, Defendants indicated that they would continue to enforce the Policy Requirement against similarly situated U.S.-based grantees who were not parties to this case. By letter, and at a subsequent conference, Plaintiffs alerted Defendants and the Court that additional parties sought to join this action to obtain protection. (*See* Ltr. from Rebekah Diller to Hon. Victor Marrero, May 25, 2006; Tr. of Ct. Conf. 4:4 to 4:12, June 2, 2006.)

In an effort to avoid unnecessary motion practice, Plaintiffs then provided Defendants with declarations from the proposed new parties – InterAction and GHC – and several of their members, showing that their claims were in every material respect factually and legally identical to those on which the Court had already ruled. Defendants, however, refused to consent to extending the terms of the preliminary injunction and amending the complaint. (Ltr. from Richard Rosberger to Hon. Victor Marrero, Aug. 9, 2006.)

In light of this opposition, and at the Court's suggestion, GHC and InterAction conducted surveys of their members to determine how many were affected, and reported the results to the Court. (*See* Ltr. from Laura Abel to Hon. Victor Marrero, Nov. 13, 2007.) Shortly thereafter, Defendants appealed the preliminary injunction order to the U.S. Court of Appeals for the Second Circuit, and the case was placed on this Court's suspense docket pending the outcome of the appeal. (*See* docket entry 63.)

At oral argument before the Second Circuit on June 1, 2007, Defendants announced their intention to issue guidelines explaining the Policy Requirement that would purportedly provide grantees an avenue through which they could speak freely with their private funds. On July 23,

2007, without soliciting or responding to comments from the public, Defendants issued their Guidelines. On November 8, 2007, the Court of Appeals issued a summary order remanding this case to this Court "to determine in the first instance whether the preliminary injunction should be granted in light of the new guidelines." *AOSI v. USAID*, No. 06-4035-cv (2d Cir. Nov. 8, 2007), at 5. In the same order, the Court of Appeals stated, "[J]urisdiction shall be returned to this Court upon a letter request from any party. Upon such a restoration of jurisdiction, the matter is to be sent to this panel." *Id.* at 6. The Court of Appeals made clear that it was "offer[ing] no opinion on the merits concerning the propriety of the guidelines or the constitutionality of the statutory regime, and [that] the District Court on remand may consider any legal arguments it deems relevant and take any additional evidence that may be appropriate." *Id.* at 5. Finally, the Court of Appeals ordered, "The injunction is to remain in place pending the outcome of the proceedings before the District Court." *Id.* at 5-6.

On November 30, 2007, this Court held a conference, at which Plaintiffs advised the Court of their desire to amend the Complaint to add GHC and InterAction as Plaintiffs, and of the desire of GHC and InterAction to seek preliminary injunctions on behalf of their members. By letter dated December 14, 2007, Defendants advised the Court that they would not consent to either motion, and that the parties had agreed on a briefing schedule. On February 4, 2008, the Court granted Plaintiffs' request for leave to file a 40-page brief in support of both motions.

STATEMENT OF FACTS

This Statement of Facts addresses two new sets of facts not addressed in the preliminary injunction motion of Plaintiffs AOSI and Pathfinder or the Court's May 6, 2006 ruling granting that motion: the July 2007 Guidelines, and the ongoing harm that Defendants' enforcement of the Policy Requirement is causing GHC, InterAction, and their respective members.

A. The Guidelines

The Guidelines require agency officials to determine whether grantees required to adopt policies opposing prostitution are sufficiently separate from any other organization that does not have an anti-prostitution policy and/or espouses any viewpoint about prostitution with which the government does not agree. The Guidelines require the two organizations to be legally separate. They also require the two organizations to maintain physical and financial separation, and warn that whether such separation is sufficient will be judged on a case by case basis, according to five non-exclusive factors, including: 1) separate personnel, management and governance; 2) separate accounts and accounting and timekeeping records; 3) separate facilities, equipment and supplies, and the extent to which the non-grantee engages in restricted activities; 4) signage and other distinguishing factors; and 5) protection of Defendants, the U.S. government and the funded project from public association with the non-grantee organization. *See* USAID, Acquisition & Assistance Policy Directive 05-04 Amend. 1 ("USAID Guidelines") at 3-4, attached as Exhibit B to Decl. of Rebekah Diller dated February 7, 2008 ("Diller Decl."); HHS, Office of Global Health Affairs, Guidance Regarding Section 301(f) of the U.S. Leadership Against HIV/AIDS, Tuberculosis & Malaria Act of 2003, 72 Fed. Reg. 41,076, 41,076 (July 26, 2007) ("HHS Guidelines"), attached as Exhibit C to Diller Decl. (collectively "Guidelines").[2] The Guidelines exceed the scope of the Policy Requirement, which purports to govern only grantees' own speech, insofar as the Guidelines proscribe grantee relationships with entities that are legally separate, over which grantees exercise no control, if such entities engage in speech of which the Defendants disapprove.

[2] The USAID and HHS Guidelines are nearly identical. For ease of reference, Plaintiffs will cite herein to the USAID Guidelines.

The Guidelines purport to be modeled on a Legal Services Corporation ("LSC") regulation, 45 C.F.R. § 1610.8, which requires the legal aid programs that LSC funds to remain separate from other organizations that represent certain categories of immigrants, bring class actions, seek attorneys' fee awards, and engage in other forms of legal representation, *see* USAID Guidelines at 3, but they are more stringent and burdensome than the LSC regulation in several respects. Whereas the LSC rule does not require grantees to espouse any message as organizational policy, *see* 45 C.F.R. § 1610.8, the Guidelines require grantees to espouse an anti-prostitution message as their own organizational policy, *see* USAID Guidelines at 2. Whereas the LSC rule requires a degree of "physical and financial" separation between grantees and other organizations, *see* 45 C.F.R. § 1610.8(a)(3), the Guidelines require agency officials to also consider: i) whether the other organization has separate management and governance; and ii) the extent to which "[Defendants], 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," *see* USAID Guidelines at 4. Furthermore, unlike the LSC rules, the Guidelines operate in an international context and fail to take into account the additional burdens on grantees in that context. The Guidelines also do nothing to clarify the considerable vagueness of the Policy Requirement itself. For example, they do not clarify what a grantee's "policy" must say in order to comply with the requirement. Unlike the LSC rules, which require grantees to form an affiliate in order to engage in a number of clearly defined, restricted activities, the Guidelines refer to "restricted activities" but never explain what those activities are, other than to state in circular terms that they are "activities inconsistent with a policy opposing prostitution." *Compare* USAID Guidelines, at 3, with 45 C.F.R. § 1610.2(b) (incorporating by reference statutory list of LSC-restricted activities).

Finally, unlike the LSC regulation, the Guidelines were never subjected to or modified in response to formal notice and comment. *See* 62 Fed.Reg. 27,695-01 (May 21, 1997) (describing LSC notice and comment process). Accordingly, they contain no explanation of why particular types of separation are required, other than that the Guidelines were modeled on the LSC rule..

B. The Harm to InterAction, GHC and Their Members

InterAction and GHC seek to join this action to protect their members who partner with the U.S. government in its worldwide effort to prevent and treat HIV/AIDS. InterAction is the largest alliance of U.S.-based international development and humanitarian non-governmental organizations ("NGOs"). (Decl. of Sam Worthington, President and Chief Executive Officer of InterAction, dated Feb. 4, 2008 ("Worthington Decl.") ¶¶ 4-5.) InterAction members collectively receive annually more than $1 billion from the U.S. government, including Global AIDS Act funding from the Defendants, and more than $7 billion from private sources. (*See id.* ¶¶ 6-8.) Membership in InterAction permits organizations to share best practices learned from their humanitarian work and to collectively express opinions and ideas about U.S. government policy, with individual anonymity, and therefore less fear of retaliation. (*Id.* ¶¶ 9, 31.)

GHC is a private, nonprofit membership alliance consisting of member organizations dedicated to international public health, including many U.S.-based grantees that receive HIV/AIDS funding from Defendants. (Decl. of Nils Daulaire, President and Chief Executive Officer of GHC, dated Feb. 7, 2008 ("Daulaire Decl.") ¶¶ 3, 12.) Organizations join GHC to collectively express concerns about U.S. policy without fear of government reprisal and to advance their interests in promoting international public-health policy and practice. (*See* Daulaire Decl. ¶ 9; Decl. of Pape Gaye, President of IntraHealth International, Inc., dated Jan. 25, 2008 ("Gaye Decl."), ¶ 8.) GHC also furthers its mission by facilitating debate on public health in frequent conferences, forums, briefings and other events. (Daulaire Decl. ¶ 7.)

The Policy Requirement forces the members of GHC and InterAction to serve as a mouthpiece for the government by requiring them to express Defendants' views about prostitution and to suppress any contrary viewpoint or conduct. Twenty-eight GHC members, eighteen of which wish to remain anonymous, have told GHC that they are both subject to the Policy Requirement and desire relief from it. (Daulaire Decl. ¶ 20.) Likewise, twenty InterAction members, fourteen of which wish to remain anonymous, have told InterAction that they are both subject to the Policy Requirement and desire relief from it. (Worthington Decl. ¶ 17.) It is likely that additional members desire relief but are too afraid say so. (Daulaire Decl. ¶ 20; Worthington Decl. ¶ 17.) The Policy Requirement has undercut the private character and independence that is fundamental to the members' functioning and credibility as NGOs. (Daulaire Decl. ¶ 34; Worthington Decl. ¶ 22) As NGOs, the members are careful to take policy positions that derive from their experiences providing services in the field. (Daulaire Decl. ¶ 34; Gaye Decl. ¶ 27; Decl. of Dan Pellegrom, President of Pathfinder, dated Feb. 7, 2008 ("Pellegrom Decl.") ¶ 24.) Many believe that prostitution causes serious health, psychological, and physical risks for women and work to assist women in finding alternatives. At the same time, they believe that by forcing them to explicitly oppose prostitution, the Policy Requirement causes them to stigmatize the very group whose trust they must earn to stop the spread of HIV/AIDS. (Daulaire Decl. ¶ 32; Gaye Decl. ¶ 28; Decl. of Helene Gayle, President and Chief Executive Officer of CARE, dated Feb. 6, 2008 ("Gayle Decl.") ¶ 23; Worthington Decl. ¶ 25.)

The Policy Requirement also undercuts the privately funded speech of GHC and InterAction members. For example, CARE, which is a member of both InterAction and GHC, has been recognized by UNAIDS and the World Health Organization as a best practices leader in preventing HIV/AIDS for its sex worker peer education program in Bangladesh. Yet, the Policy

Requirement has threatened this work, as well as similar work in India, and has forced CARE to refrain from sharing the lessons of its highly effective HIV prevention strategies at conferences and in public communications. (Gayle Decl. ¶¶ 23-24.) Even after this Court issued the injunction, Defendant USAID inquired into CARE's relationship with an organization, funded privately by CARE, which works with Indian sex workers. (Gayle Decl. ¶¶ 21-22.) Similarly, IntraHealth—a member of GHC—is refraining from developing privately funded programs to serve and remove barriers to healthcare for sex workers. (Gaye Decl. ¶ 30.) Additionally, were it not protected by this Court's preliminary injunction, Plaintiff Pathfinder, a member of both GHC and InterAction, would need to censor discussions of the lessons learned from its privately funded HIV prevention programs with sex workers. (*See* Pellegrom Decl. ¶¶ 34, 42-43.)

The guidelines do not mitigate these harms, but rather perpetuate these impermissible burdens on speech and do not provide real alternative channels for protected expression.

1. The Guidelines' Legal Separation Requirement

The Guidelines' legal separation requirement will impose an insuperable barrier for the members of InterAction and GHC seeking to use their private funds to speak through a new organization. In most of the developing countries where the members of InterAction and GHC operate, all NGOs must register with and obtain the approval of the host country prior to operating. (Daulaire Decl. ¶ 46; Worthington Decl. ¶ 33.) In order to establish a new, legally separate NGO, the members will be required to secure a new registration for the new entity and explain to foreign government authorities – often multiple authorities at different levels – why such a structure is necessary. (Decl. of Mark Sidel, dated Feb. 5, 2008 ("Sidel Decl.") ¶ 12; Daulaire Decl. ¶ 42; Worthington Decl. ¶ 47) InterAction and GHC members operate in nearly every country in the developing world. (Daulaire Decl. ¶ 5; Worthington Decl. ¶5) Pathfinder, for example, operates in 27 countries; CARE operates in over 35 countries; IntraHealth operates

in 19 countries. (*See* Pellegrom Decl. ¶ 5; Gayle Decl. ¶ 32; Gaye Decl. ¶3). As is detailed in the accompanying expert declaration of Professor Mark Sidel and documented in numerous U.S. Department of State ("State Department") reports, foreign registration is by no means assured and can be a prohibitively long, cumbersome and exceptionally difficult procedure, involving substantial burdens and costs. (Sidel Decl. ¶ 13.) It may be an even longer and more difficult process where it entails creating a second affiliate of an American charitable organization. (*Id.*) Moreover, the creation of a separate entity to do work that is already being done is likely to create suspicion among foreign authorities, who often have broad and arbitrary discretion over the issuance of permits. (*Id.* ¶ 14.)

For example, in India and Bangladesh, where Pathfinder and CARE run privately funded HIV prevention programs targeting sex workers, the process for registering and establishing a new entity typically takes months or years and requires clearances from multiple government agencies, including intelligence authorities. (Sidel Decl. ¶ 29.) Past practice indicates that there is no guarantee that a new, separate entity will even be allowed to operate in either country. (*Id.* ¶¶ 30, 38.). To take another example, in Mozambique, where Pathfinder runs privately funded HIV prevention programs with sex workers, the State Department reports that registration and establishment of an NGO takes months, during which the authorities examine, among other things, the NGO's activities and its proposed board. (Sidel Decl. ¶ 49.)

The challenge of registration is compounded by myriad host country rules concerning the tax treatment of foreign offices and branches of American charitable organizations. In certain cases, national governments may even question whether the tax-exempt status of an existing grantee organization should be re-classified or revoked. (*See* Sidel Decl. ¶ 18.) Members will also face difficulties raising funds due to the legal separation requirement. If the newly formed

affiliate is the recipient of funds from the Defendants, U.S. law, regulations and practice provide that it may not be eligible to receive those funds until it has "demonstrated a capacity to undertake effective development activities." 22 U.S.C. § 2151u(a); *see also* 22 C.F.R. § 203.3(f)(4) (requiring entity to have been incorporated for at least 18 months in order to register as a private voluntary organization eligible for certain USAID funding); Pellegrom Decl. ¶¶ 54-55; Exhibit E to Diller Decl. at 13 (noting that past performance is criterion for awards from Global AIDS Act implementing agencies). On the other hand, if the newly formed organization is to be privately funded, it will encounter similar problems attracting funding from the private sector due to the absence of a proven record of past performance and experience. (*See* Gaye Decl. ¶ 34; Pellegrom Decl. ¶ 52; Sidel Decl. ¶ 22; Worthington Decl. ¶ 35.)

2. The Guidelines' Separate Management and Governance Requirement

The Guidelines' requirement of separate management and governance prevents InterAction and GHC members from using their private funds to speak through an affiliate. Non-profit organizations are generally governed and controlled by their board of directors. (*See* Worthington Decl. ¶ 33). This principle is embodied InterAction's Private Voluntary Organization Standards, with which all InterAction members must certify compliance every two years. Those standards provide that a member's board must act as the organization's governing body, accepting responsibility for oversight of all aspects of the organization. If an affiliate's board, as well as its management, must be separate from the grantee organization, the grantee will not have control such that it can speak through the affiliate. (*See id.*)

3. The Guidelines' Separate Personnel Requirement

The Guidelines' separate personnel requirement is particularly onerous in the international context, because many countries may refuse to issue visas or work permits for additional American and other foreign personnel. (*See* Pellegrom Decl. ¶ 77; Sidel Decl. ¶¶ 14-

15.) Governments frequently limit the number of visas and work permits to foreign NGOs, impose substantial waiting times or approval procedures, and require that entities to whom such foreign individuals will be assigned to be fully registered and approved. (Sidel Decl. ¶¶ 14-15.)

In many countries, an NGO must hire a local attorney and show that it could not find any local residents qualified for the post. (Worthington Decl. ¶ 36; Daulaire Decl. ¶¶ 46-47.) Often, applications are denied. For example, Pathfinder was unable to obtain an Indian work permit for a Bangladeshi employee with needed HIV expertise last year, and has been trying for five months without success to obtain a Tanzanian visa for another employee. (Pellegrom Decl. ¶ 77.)

4. The Guidelines' Separate Accounts Requirement

The requirement of separate bank accounts will also cause enormous obstacles in the international aid context. (*See* Sidel Decl. ¶ 17.) In many countries, an entity must be registered with the government before it can open a bank account. Governments may limit the number of bank accounts or even prohibit multiple accounts per organization, per donor, or per project. (*Id.*) India, for example, exercises close control over NGO bank accounts through its Foreign Contribution (Regulation) Act, which limits foreign NGOs to maintaining only one bank account. (*See* Foreign Contribution (Regulation) Act, § 6 (India), annexed to Sidel Decl. as Exhibit C.) It recently took nearly a year for Pathfinder to obtain permission to have a local Indian employee added as a signatory to an existing account. (Pellegrom Decl. ¶ 90.)

The establishment of new and separate affiliates would also almost certainly cause havoc and long delays in the receipt of funds from abroad. India's Foreign Contribution (Regulation) Act also strictly regulates which Indian nonprofits and charitable affiliates can receive and use foreign charitable donations. (Sidel Decl. ¶ 35.) The U.S. State Department has noted thousands of instances in which Indian authorities have used this act to prohibit organizations from seeking

and receiving charitable funds. (Sidel Decl. ¶ 37.) Mozambique and Bangladesh are among the countries imposing similar barriers to the transfer of funds. (Sidel Decl. ¶¶ 38-41, 49-51.)

5. The Guidelines' Separate Facilities, Equipment, and Supplies Requirement

The Guidelines' requirement of separate offices and equipment is also extremely onerous. U.S. NGOs often must engage in the highly cumbersome and time-consuming process of importing necessary vehicles and office equipment into the countries in which they operate. (*See* Sidel Decl. ¶ 16.) In India, for example, it can be very difficult to obtain government authorization for duty-free import of vehicles and office equipment, and may be particularly difficult to obtain those permissions for two affiliates of the same foreign organization. Securing appropriate office space, telephone and Internet access and other necessary services for an additional office location is likely to take months or longer. (*Id.* at ¶ 32.)

Moreover, the added administrative expenses inherent in running two affiliated entities with separate staff, offices, and equipment, would hamper the ability of the members of GHC and InterAction to raise funds from Defendants and private donors. NGOs are increasingly judged, ranked and rated by independent judging and certification organizations, in response to concerns about effectiveness and efficiency in the American charitable sector. Dividing the work that these organizations do in their U.S. headquarters, and in dozens of countries abroad, into new and separate affiliates, each with significantly increased administrative costs, would likely result in a downgrading of rankings and ratings because of the higher ratio of administrative to program costs resulting from the Guidelines. In turn, less favorable rankings or ratings can hurt the ability of organizations to raise funds from the private sector and the government. (Sidel Decl. ¶ 25; Pellegrom Decl. ¶¶ 66-67, 69-71.)

ARGUMENT

I. PLAINTIFFS SHOULD BE GRANTED LEAVE TO AMEND THE COMPLAINT TO ADD GHC AND INTERACTION AS PLAINTIFFS.

Plaintiffs should be granted leave, in the interests of justice, to file a Second Amended Complaint in order to add GHC and InterAction as additional plaintiffs. Amendment is in the interests of justice because InterAction's and GHC's members are subject to severe penalties based on their exercise of First Amendment freedoms and because they merely seek the same relief already provided to others. Rule 15(a)(2) provides that a party may amend its complaint a second time with the court's leave, and that the court "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Similarly, Rule 21 allows plaintiffs to be added "at any time, on just terms . . . ." Fed. R. Civ. P. 21. In determining whether a party may be added under Rule 21, courts are "guided by 'the same standard of liberality afforded to motions to amend pleadings under Rule 15.'" *Infosint S.A. v. H. Lundbeck A/S*, No. 06 Civ. 2869 (LAK)(RLE), 2007 WL 2489650, at *2 (S.D.N.Y. Sept. 4, 2007) (internal citation omitted). Where, as here, there has been no undue delay, bad faith or undue prejudice, and where amendment would not be futile, amendment should be permitted. *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002).

A. There Has Been No Undue Delay, Bad Faith, or Undue Prejudice.

Plaintiffs have not unduly delayed seeking to amend the Complaint, or exhibited any bad faith or dilatory motive. As this Court has held, "Defendants can hardly be heard to complain of undue delay or prejudice [when] the case has not even proceeded to discovery." *Spanierman Gallery, PSP v. Love*, 320 F. Supp. 2d 108, 113 (S.D.N.Y. 2004) (Marrero, J.). *See also Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993) (same). Plaintiffs raised the issue of additional parties less than one month after the Court's Decision granting as-applied relief to Plaintiffs AOSI and Pathfinder. *See* discussion *supra* at 3. Because the legal claims in the

Second Amended Complaint are the same as those in the Amended Complaint, adding GHC and InterAction as Plaintiffs causes no prejudice. *See Presser v. Key Food Stores Coop.*, 218 F.R.D. 53, 56 (E.D.N.Y. 2003) (finding no prejudice because amended complaint added plaintiffs but did not add a new cause of action). To the extent that Plaintiffs must address any new factual issues in the Second Amended Complaint, those additions are necessitated by Defendants' issuance of the Guidelines after this case had been briefed and argued at the Court of Appeals. Furthermore, Defendants can hardly be heard to complain of undue delay where, as here, they themselves delayed the case by appealing this Court's order and then mooting their own appeal by issuing new guidelines after the parties had filed their appellate briefs and argued the case before the Second Circuit.

B. Amending the Complaint Would Not Be Futile, Because GHC and InterAction Have Associational Standing on Behalf of Their Members.

Amending the Amended Complaint to add GHC and InterAction as parties would not be futile because GHC and InterAction satisfy all three prongs of the associational standing test: 1) their members would otherwise have standing to sue in their own right, 2) the interests at stake in this litigation are germane to each organization's purpose, and 3) neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit, and there are important First Amendment interests at stake. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

1. GHC and InterAction Each Has at Least One Member With Standing to Sue in Its Own Right.

GHC and InterAction satisfy the first prong of the associational standing test, because each has at least one member with standing to sue on its own behalf. *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); *Southside Fair Hous. Comm. v. City of New York*, 928 F.2d 1336, 1342 (2d Cir. 1991) (associational standing exists where the organizations' "members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action" (internal quotation marks and citation omitted) (emphasis added)). An association need not seek relief on behalf of every one of its members; it may act to protect the interests of a subset of its members. *See New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1349 (2d Cir. 1989) (holding that plaintiff organization, open to all women, had standing to seek injunction on behalf of members "seek[ing] to avail themselves of health care and family planning services"); *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).

Here, GHC and InterAction more than satisfy the first prong because they have multiple members who meet the three standing requirements. An individual has standing if: (1) it suffers an actual and concrete "injury in fact," (2) the injury is traceable to the defendants' challenged actions, and (3) it is likely that a decision in favor of the individual will redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). GHC has 28 U.S.-based members who have said in a survey that they are subject to the Policy Requirement and would like relief from it; InterAction has 20 such members. (Daulaire Decl. ¶ 20; Worthington Decl. ¶ 17.) For example, CARE, which is a member of both InterAction and GHC, adopted a policy solely because of the Policy Requirement and therefore is compelled to speak the government's message and is prevented from speaking about its programs with sex worker organizations in India and Bangladesh because of the Policy Requirement. Plaintiff Pathfinder, also a member of GHC and InterAction, and whose standing in this case the government has never challenged, had

to adopt a policy against its will and, but for the preliminary injunction, could be barred from speaking freely on its website and at U.S. conferences about its HIV prevention activities with sex workers. (Pellegrom Decl. ¶¶ 32, 39.) GHC member IntraHealth wishes to remain silent on the social and political aspects of sex work (and therefore does not wish to speak the government's viewpoint), has refrained from using its private funds for programs directed toward sex workers, and has curtailed its speech at conferences in the U.S. and abroad concerning HIV/AIDS-prevention among sex workers. (*See* Gaye Decl. ¶¶ 30-31; *see also* Daulaire Decl. ¶ 35 (describing concerns of GHC member EngenderHealth about alienating partners in its HIV/AIDS prevention outreach).) Since GHC and InterAction each has at least one member that could sue on its own behalf, they satisfy the first requirement of associational standing.

2. The Purposes of GHC and InterAction Are Germane to the Interests at Stake in This Litigation.

GHC and InterAction satisfy the second prong of the associational standing test because their purposes are directly germane to the interests at stake. "[T]he requirement of germaneness is undemanding; mere pertinence between litigation subject and organizational purpose is sufficient." *Building & Constr. Trades Council*, 448 F.3d at 148 (internal quotation marks omitted). The overriding interest at stake is the ability of domestic Global AIDS Act grantees to retain their independence and use their private funding to engage in HIV prevention activities and speak freely about the issues surrounding HIV/AIDS. GHC and InterAction both exist in order to promote open debate on issues of public policy and to share among their members best practices in public health and humanitarian work. (*See* Daulaire Decl. ¶¶ 5, 7; Worthington Decl. ¶¶ 6, 31.) Thus, the purposes of GHC and InterAction are germane to the interests at stake in this litigation.

3. The Claims Can Be Adjudicated and the Requested Relief Awarded Without the Participation of Individual Members.

The claims of GHC and InterAction can be adjudicated and a preliminary injunction granted without the participation of individual members. This third prong of the associational standing test is prudential and is satisfied unless the individual participation of *each* injured member is indispensable to resolving the claims. *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 282 (1986). Individual participation is not required for the claims GHC and InterAction seek to assert on behalf of their members -- that the Policy Requirement violates the First Amendment and is impermissibly vague. *See* Second Am. Compl. ¶¶ 116-18, Diller Decl., Ex. A; *see also infra* Argument, § II.A.

Determination of each of these claims depends on the government's application of the law, but not on the facts concerning any individual grantee. *All* of the aggrieved members of GHC and InterAction are being compelled to espouse the government's message and adopt a government-mandated viewpoint. *All* are subject to a ban on the use of private funding to engage in constitutionally protected speech unless they establish a legally, financially and physically separate entity, with separate employees, over whom they exercise no control. That restriction is not narrowly tailored to fit Congress's intent as to any of them, because, without adequate government justification, the restriction: 1) exempts four entities receiving Leadership Act funds; 2) imposes a blanket ban on the use of private funds by preventing recipients from exercising control over an affiliate's privately funded speech; and 3) imposes massive burdens common to all grantees (such as the difficulty of registering a new legal entity overseas, obtaining visas for staff, obtaining foreign government permission to open separate new bank accounts, and others). *See infra* Argument, § II.A.

This case thus resembles *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, in which the Supreme Court agreed with lower courts that had held that an association of law schools had standing to assert its as-applied claim that a military recruiting condition on federal funds violated the First Amendment rights of its members. 547 U.S. 47, 52 n.2 (2006). As the district court had explained, 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." *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 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*, 544 U.S. 1017 (2006). *See also Nat'l Ass'n of Coll. Bookstores, Inc. v. Cambridge Univ. Press*, 990 F. Supp. 245, 249-50 (S.D.N.Y. 1997) (individual participation unnecessary where claims could "be proven largely by reference to" defendants' actions). Just as associational standing was proper there, it is also proper here.

Like the claims asserted, the declaratory and injunctive relief sought does not require individual participation by GHC and InterAction members. *See, e.g., United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996); *New York State Nat'l Org. for Women*, 886 F.2d at 1349; *NYC C.L.A.S.H., Inc.*, 315 F. Supp. 2d 461, 469-70 (S.D.N.Y. 2004 (Marrero, J.). *See also Nitke v. Gonzales*, 413 F. Supp. 2d 262, 272 (S.D.N.Y. 2005) (holding that no individual participation was necessary because the free speech claims asserted addressed "the breadth of [the statute] with respect to all speech it reaches and the relief sought appli[ed] equally to all affected [members]"). A declaration that the Policy

Requirement violates the First Amendment and a preliminary injunction against its application to GHC and InterAction members would not require individualized determinations. For these reasons, GHC and InterAction satisfy the third prong of the associational standing test.

Even if individual participation were necessary, GHC and InterAction would still have associational standing because of the important First Amendment interests at stake. As with all prudential standing requirements, the limitations of the third associational standing prong are relaxed in the context of the First Amendment. *See NYC C.L.A.S.H, Inc.,*, 315 F. Supp. 2d at 468. The First Amendment concerns are particularly pressing here because the affected members of GHC and InterAction, all of whom rely on government funding, risk government retaliation and loss of critical funding if they are unable to participate through their member organizations and instead are forced to participate individually. This case thus implicates the First Amendment's protection of the rights of government grantees to assert their speech rights free of retaliation by the government. *See Housing Works, Inc. v. Turner*, 179 F. Supp.2d 177, 194-99 (S.D.N.Y. 2001) (Marrero, J.), *aff'd*, 56 F. App'x. 530 (2d Cir. 2003). It also implicates the First Amendment's protection of the ability of individuals to assert their rights collectively, particularly when they would face government retaliation if they asserted their rights individually. *See NAACP v. Alabama*, 357 U.S. 449, 460, 462-63 (1958).

Already, Plaintiff Open Society Institute's participation has subjected it to criticism by a senior member of the powerful House Committee on Oversight and Government Reform, who pointed out that OSI "received at least $30 million between 1998 and 2003 from the federal government." *See* 152 Cong. Rec. E1917-01 (Sept. 28, 2006) (Statement of Rep. Souder). Likewise, CARE has been subject to investigation by USAID and has been accused by a member of Congress of violating the Policy Requirement based on its privately funded activities in India.

(Gayle Decl. ¶¶ 20-22.) Mindful of this criticism, and fearful of jeopardizing their own funding, a substantial number of the other members of GHC and InterAction who want relief from the Policy Requirement determined not to bring suit individually for fear of government retaliation. (*See* Daulaire Decl. ¶¶ 9, 35; Worthington Decl. ¶¶ 9, 17.) Because proceeding through GHC and InterAction is the only way many members of those organizations can receive relief, this is precisely the sort of case in which organizational standing should be allowed. *See NAACP*, 357 U.S. at 458-61.

In addition, the interests of judicial efficiency weigh in favor of permitting associational participation here. If GHC and InterAction are not allowed to join then each of their members will be forced to join individually, a factor weighing heavily in favor of allowing associational standing. *See Brock*, 477 U.S. at 290 ("The only practical judicial policy when people pool ... their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.") (citations omitted).

Defendants have nonetheless argued that GHC and InterAction fail to satisfy the third prong of the associational standing test, citing *Harris v. McRae*, 448 U.S. 297, 320 (1980), in which the Supreme Court held that an association could not assert a Free Exercise claim on behalf of its members. *See* Ltr. From Richard E. Rosberger to Hon. Victor Marrero, Aug. 9, 2006. Defendants' reliance on *Harris* is misplaced, because the standing requirements for Free Exercise claims are particularly stringent, requiring plaintiffs to allege "'the coercive effect of the enactment as it operates against him in the practice of his religion.'" *Harris*, 448 U.S. at 321 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963)). Thus, an individual advancing a Free Exercise claim must make a showing concerning his particular religious beliefs and how the challenged law prevents him from practicing religion in furtherance of those beliefs.

See McGowan v. State of Md., 366 U.S. 420, 429 (1961) (rejecting department store employees' standing to challenge Sunday closing laws when record was silent on their religious beliefs and the effect of challenged laws on those beliefs). In contrast, other provisions of the First Amendment do not require such individualized showings regarding their beliefs. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (holding that vagueness challenge will prevail if speech regulation does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"); *Speiser v. Randall*, 357 U.S. 513 (1958) (ruling on taxpayers' challenge to a requirement that they sign a loyalty oath to obtain a tax exemption, without requiring taxpayers to demonstrate that they held beliefs that would be violated by the oath). *See also Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 71-72 (2d Cir. 2001) (contrasting the stringent, individualized standing requirements of the Free Exercise Clause with the Establishment Clause's looser standing requirements). Not only do GHC and InterAction not assert a Free Exercise claim, but the speech claim they do assert merits *looser*, not tighter, standing analysis. *See* discussion *supra* at 20-21. Because the claims advanced and relief requested do not require the participation of individual members and because of the important First Amendment interests at stake, associational standing is appropriate here.

II. THE COURT SHOULD GRANT GHC AND INTERACTION A PRELIMINARY INJUNCTION.

A preliminary injunction should be granted if plaintiffs demonstrate a likelihood of success on the merits and a threat of irreparable harm. *AOSI*, 430 F. Supp. 2d at 239. *See also Time Warner Cable of N.Y.C., a Div. of Time Warner Entm't Co., L.P. v. Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997). GHC and InterAction meet both requirements.

A. GHC and InterAction Are Likely to Succeed on the Merits.

This Court has held that the Policy Requirement violates the First Amendment rights of AOSI and Pathfinder for three reasons: the restriction is not narrowly tailored to achieve Congress's goals, discriminates based on viewpoint, and compels speech. *AOSI*, 430 F. Supp. 2d at 276.[3] Like AOSI and Pathfinder, the members of GHC and InterAction include U.S.-based recipients of Global AIDS Act funding that have been forced to restrict their privately funded speech and activities, adhere to the government's point of view on a contested social issue, and espouse the government's message as their own. (*See, e.g.*, Daulaire Decl. ¶¶ 27, 31-32; Worthington Decl. ¶¶ 22, 25, 28.) Instead of curing these First Amendment violations, the Guidelines perpetuate the Policy Requirement's constitutional infirmities in all three ways and remains unconstitutionally vague because the Guidelines provide no clarity regarding which privately funded activities and speech may be performed or spoken only through an affiliate.

1. The Policy Requirement Still Is Not Narrowly Tailored

The Policy Requirement, as implemented by the Guidelines, remains unconstitutional because it still cannot survive heightened scrutiny. As the Court has held, when government seeks to impose a viewpoint-based restriction that imposes burdens on the privately funded speech of grantees, it must show that the restriction is "narrowly tailored to fit Congress's intent." *AOSI*, 430 F. Supp. 2d at 267 (citation omitted). The Defendants have not shown -- and indeed cannot show -- that the Policy Requirement, as implemented by the Guidelines, passes this test.

The issuance of the Guidelines does not relieve the government of its obligation to justify the massive burdens that the Policy Requirement continues to impose on the privately funded

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[3] GHC and InterAction incorporate herein the arguments made in support of the motions of Plaintiffs AOSI and Pathfinder for a preliminary injunction.

speech of the members of GHC and InterAction. In concluding that the narrow tailoring test applies to the Policy Requirement, the Court relied on *Rust v. Sullivan*, which evaluated a viewpoint-based speech restriction requiring grantees to physically and financially separate federally funded from privately funded activities. *AOSI*, 430 F. Supp. 2d at 267-68 (citing *Rust v. Sullivan*, 500 U.S. 173, 195 n.4 (1991)). Thus, the Guidelines' introduction of requirements that mandate extreme separation between recipients and other organizations does not lessen the operative standard of review.[4] Indeed, the Guidelines should arguably be subjected to even greater scrutiny because the Policy Requirement compels speech while the restriction in *Rust* did not.

This heightened scrutiny requirement is further supported by other cases in which the Supreme Court required funding conditions that impose *substantial* burdens on privately funded speech to be justified by a sufficient government interest. In *FCC v. League of Women Voters*, the Supreme Court invalidated a statute that barred television stations receiving federal public broadcasting funding from using private funds to editorialize, because the government had failed to demonstrate a need for "barr[ing a station] from using even wholly private funds to finance its editorial activity." 468 U.S. 364, 400 (1984). Although the Court noted that a non-burdensome requirement of establishing a separate entity "which could then use the station's facilities to

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[4] Although the *Rust* Court upheld a requirement that government-funded family planning clinics desiring to engage in privately funded speech concerning abortion do so in a physically separate location, it did so only because the Court: 1) presumed, in the context of the facial challenge before it, that the burden imposed by the restriction was minimal, 500 U.S. at 196-200; and 2) found that the government had demonstrated a need for the restriction, *id.* at 188 (discussing government reports that "the distinction between the recipients' title X and other activities may not be easily recognized"). Here, in contrast, the burdens are far from minimal and the government's need is unclear. Furthermore the government's encroachment on the First Amendment is far greater heare than it was in *Rust* because the Policy Requirement also compels grantees to affirmatively speak the government's message while refraining from contrary speech or conduct. Moreover, as explained below, the Guidelines require far more separation than the *Rust* statute did. *See* discussion *infra* at 27.

editorialize with nonfederal funds" would not violate the First Amendment, *id.*, it is clear from the Court's reasoning that a regulation requiring a separate transmitter in a separate physical space staffed by separate personnel under separate management and board control would have imposed an unconstitutional burden on privately funded speech. In *United States v. American Library Association*, the Court rejected a facial challenge to a statute that conditioned federal funding of public libraries on a requirement that Internet filters be installed in all library computers, including those that were non-federally funded. The Court treated as dispositive the minimal burden the statute imposed – a simple request by an adult patron was sufficient to disable the filters.[5] 539 U.S. 194, 208-09 (2003) (plurality op.); *id.* at 214 (Kennedy, J., concurring) ("If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case."); *id.* at 220 (Breyer, J., concurring) (rejecting facial challenge because of the "comparatively small burden" imposed). However, the crucial concurrences make clear that a plaintiff would be entitled to an as-applied First Amendment exemption on a showing of substantial burden, if the government's interests were insufficient to justify the burden. *Id.* at 215 (Kennedy, J., concurring); *id.* at 217, 219-20 (Breyer, J., concurring). The Policy Requirement and Guidelines require an even higher level of scrutiny because they discriminate based on viewpoint and compel speech.

In issuing a preliminary injunction to protect Plaintiffs AOSI and Pathfinder, this Court held that the Policy Requirement failed to survive heightened scrutiny for three reasons: 1) "the Government's claim that its goals will be jeopardized if the Policy Requirement is not enforced

[5] In the absence of a majority opinion in *American Library Association*, Justice Kennedy's concurring opinion is controlling because it was decided on the narrowest grounds. *See Marks v. U.S.*, 430 U.S. 188, 193 (1977).

as the Government interprets it is undercut by the Act's exclusion provisions exempting certain recipients of funds under the Act;" 2) the Policy Requirement "amounts to a blanket ban on certain constitutionally protected speech;" and 3) less restrictive means exist to satisfy the government's interest. *AOSI*, 430 F. Supp. 2d at 269-71. Even with the issuance of the Guidelines, the Policy Requirement still fails for these same three reasons.

a. The Policy Requirement Still Excludes Certain Funding Recipients.

When this Court last examined the Policy Requirement, in May 2006, it noted that the following recipients of Global AIDS Act funds were exempted from the requirement: the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and all United Nations Agencies. *AOSI*, 430 F. Supp. 2d at 269. The Court noted that "[t]he Government has not advanced any explanation as to why a restriction on Plaintiffs' speech is necessary to protect Congress's goals in promoting uniformity of message while these high profile organizations can engage in clearly dissenting speech." *Id.* Thus, the Court ruled, the Government's asserted interests were undermined and could not support the Policy Requirement. *Id.* Even as modified by the Guidelines, the Policy Requirement continues to exempt those same organizations and continues to fail heightened scrutiny.

b. The Policy Requirement Still Imposes a Blanket Ban on Speech by Funding Recipients.

In granting a preliminary injunction to Plaintiffs AOSI and Pathfinder, this Court characterized the Policy Requirement as a "blanket ban" and held that, "[a]s such, Defendants' application of the provision is not 'narrowly tailored.'" *AOSI*, 430 F. Supp. 2d at 270. Unfortunately, despite the issuance of the Guidelines, the Policy Requirement still imposes a blanket ban on the speech of funding recipients. The Guidelines do not allow recipients to advance their privately financed speech, free and clear of the Policy Requirement, through any

affiliate organization that they control through overlapping boards and management. *See* discussion *supra* at 11. Thus, funding recipients continue to be unable to spend their private funds to engage in their own speech of which the government disapproves.[6] As the Court has held, such blanket bans on speech cannot be narrowly tailored. 430 F. Supp. 2d at 270.

In this regard, the Guidelines stand in stark contrast to the only affiliate regimes to have survived constitutional scrutiny at the Supreme Court.[7] In *Regan v. Taxation With Representation of Washington*, the Court's ruling that Congress could prohibit lobbying by 501(c)(3) groups that Congress exempts from federal taxation was contingent on the fact that Congress allowed the groups to pursue their First Amendment rights by lobbying through closely affiliated 501(c)(4) groups with which they shared personnel, management and boards. 461 U.S. 540, 544-46 (1983). The separation regulations at issue in *Rust* likewise did not mandate separate legal entities, management, or governance. 500 U.S. at 180-81.

The Guidelines also stand in stark contrast to the LSC separation regulation, which is the subject of ongoing litigation over whether it is adequately tailored. Indeed, after a district court judge criticized an early version of that regulation for failing to allow LSC-funded entities to

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[6] Although the Guidelines state that separate governance is one of a number of non-exclusive factors and not an absolute requirement, the government retains full authority to declare recipients in violation of the Policy Requirement based on purported insufficient separation from another organization, with respect to each of the five enumerated factors. Thus, the Guidelines require funding recipients to adhere to each factor to the maximum extent, or risk running afoul of the Policy Requirement and paying the consequences. *See* discussion *infra* at 28-30.

[7] The Guidelines are also substantially more burdensome than the regime contemplated by the Court of Appeals for the D.C. Circuit in *DKT International, Inc. v. USAID*, 477 F.3d 758 (D.C. Cir. 2007). The D.C. Circuit panel upheld the constitutionality of the Policy Requirement only because it presumed that the statute did not "'effectively prohibit the recipient from engaging in the protected conduct outside the scope of the federally funded program.'" *Id.* at 763 (quoting *Rust*, 500 U.S. at 197). The panel found that the statute left open channels for protected speech and conduct because grantees could set up subsidiary organizations unburdened by the pledge. *Id.* at 763 n.4. While a "subsidiary organization" structure would, as contemplated by the D.C. Circuit, allow a recipient to exercise control over its subsidiary's speech, Defendants' Guidelines do not tolerate such a structure.

control their privately funded affiliates, LSC amended that regulation to "allow control at the Board level, [so] recipients will have an avenue through which to engage in restricted activities." 62 Fed. Reg. 27,695, 27,697 (May 21, 1997).

Because the Guidelines continue to impose the Policy Requirement's blanket ban on the speech of recipients, the Policy Requirement remains unconstitutional.

c. The Policy Requirement Continues to Massively Burden Plaintiffs' Privately Funded Speech Without Adequate Justification.

In granting a preliminary injunction to Plaintiffs AOSI and Pathfinder, this Court held that, even apart from the exclusion of several funding recipients and the blanket nature of the Policy Requirement, the requirement was unconstitutional because there exist "other less restrictive methods of protecting the Government interests, which undermine the argument that the Act is narrowly tailored." 430 F. Supp. 2d at 270. This continues to be true.

i. The Guidelines' Vagueness Requires Grantees to Maintain an Extreme Level of Separation.

Although the Guidelines require that recipients be "physically and financially separate from the affiliated organizations," neither the Policy Requirement nor the Guidelines state the specific activities that are permitted and prohibited, nor how a recipient can ensure that it is physically and financially separate enough from prohibited activities. Rather, they list five factors relating to separation, warning that the Defendants "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." USAID Guidelines at 4. The Guidelines also warn that Defendants may take other, as yet undisclosed, factors into account. USAID Guidelines at 4 ("Factors relevant to this determination shall include but will not be limited to . . . ."). Given the enormous financial and even criminal

penalties that may flow from a violation of the Policy Requirement and Guidelines,[8] the members of GHC and InterAction, and all other funding recipients, must maintain great separation between their activities and the activities of any other organization that engages in activities that might be barred by the Policy Requirement. Pellegrom Decl. ¶ 47. *See also Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (where First Amendment freedoms are involved, a vague law necessarily requires overcompliance, as it forces citizens to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked") (*quoting Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

The vagueness of the Policy Requirement and Guidelines is exacerbated by the particular vagueness of the individual factors the Defendants will consider in deciding whether recipients are "physically and financially separate," many of which use inherently vague terms such as "the extent to which" and "the degree of." USAID Guidelines at 4. Recipients have no way of knowing how much of any of these factors is too much. As a result, they must comply with the broadest interpretation of each to avoid potential penalties. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991) (holding that statute allowing attorney to describe at press conference the "general nature of the defense without elaboration" was problematic because

[8] Under the federal criminal fraud and false statements statute, a knowing and willful misrepresentation to a federal agency in a certification in connection with a contract may be punished by up to five years imprisonment. 18 U.S.C. § 1001. *See, e.g., U.S. v. Gatewood*, 173 F.3d 983, 987 (6th Cir. 1999) (if contractor made false certification in invoice submitted to U.S. Navy he would be subject to criminal penalties under 18 U.S.C. § 1001). Under the federal false claims statute, grantees could also be subject to civil penalties for misrepresentations of compliance. 31 U.S.C. § 3729. Even without the operation of these statutes, the penalties for violating the certification are quite harsh: USAID may unilaterally terminate the contract, terminate the award, seek a refund of money already disbursed, and permanently disqualify the grantee from receiving future funding. *See* 22 C.F.R. §§ 208.800, 226.62(a)(3), 226.73.

"general" and "elaboration" "are both classic terms of degree" that do not provide sufficient guidance for determining whether conduct is unlawful).

ii. The Extreme Separation Required by the Policy Requirement and Guidelines Imposes Massive Burdens on the Members of InterAction and GHC.

As discussed above, the ban on shared management and governance imposes a blanket ban on the ability of Global AIDS Act grantees to use their private funds to speak through any other organization. *See* discussion *supra* at 26-28. However, even if the Guidelines theoretically permitted grantees to speak through another entity, they would impose severe, and sometimes insurmountable, burdens on their ability to do so. *See generally* discussion *supra* at 9-13. For example, visa, work permit, and registration requirements, as well as limits on foreign entities opening bank accounts and on the transfer of foreign funds, would cause the members of GHC and InterAction to face long delays in their ability to open and staff a new entity. In some countries, they would be simply unable to obtain the necessary permissions. Moreover, in the course of attempting to obtain the necessary permissions for a new entity, the existing members will face intense scrutiny and the possible loss of their own tax-exempt status in some countries. *Id.*

Compliance with the Guidelines would also require the members to bear the substantial cost of running two physically separate sets of offices, with separate staff, offices and equipment. Compounding the financial burden is the fact that this added cost will increase the members' overheads, which in turn will undercut their ability to compete for the funds they need to carry out their missions. *See* discussion *supra* at 13. The members' fundraising competitiveness will be further undermined by the new entity's lack of any track record. *See* discussion *supra* at 13.

For all of these reasons, it is not viable for recipients to create and operate affiliates in keeping with the Guidelines.

iii. The Extreme Separation Required by the Policy Requirement and Guidelines Is Not Sufficiently Justified by the Government's Interests.

Defendants have not offered—and cannot provide—valid justifications sufficient to support these enormous burdens on Plaintiffs' speech. Defendants do claim that the Guidelines are intended to "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, thereby avoiding the risk of confusing the Government's message." USAID Guidelines at 3. Yet, as the Court observed regarding the Policy Requirement itself, "the Government has failed to demonstrate why the restriction on government funds is not itself adequate to prevent public confusion over its message, or why permitting grantees to refrain entirely from taking a position on prostitution would undermine the Government's message." *AOSI*, 430 F. Supp. 2d at 270.

Nor is there any evidence that the specific types of separation required by the Guidelines are necessary to avoid confusion of the government's message. Indeed, in a related context, Defendants specifically rejected similar separation measures as unnecessary to guard against government endorsement of a grantee's message. During the notice and comment process for regulations governing faith-based grantees, 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. USAID, Participation by Religious Organizations in USAID Programs, 69 Fed. Reg. 61,716-01, 61,718, 61,719, 61,721 (Oct. 20, 2004). *See also Lee v. Weisman*, 505 U.S. 577, 609 (1992) (Blackmun, J., concurring) (government may neither sponsor nor endorse religion). USAID rejected these

concerns, stating 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." 69 Fed. Reg. at 61,718. *See also* HHS, Participation in HHS Programs by Religious Organization, 69 Fed. Reg. 42,586, 42,588 (July 16, 2004) (asserting that aid from HHS to inherently religious organizations that engage in religious activities in the same space as their federally funded activities would not impermissibly advance religious purposes).

Thus, Defendants themselves believe that the very same forms of legal, employee and physical separation that they are forcing on Global AIDS Act grantees are not necessary to prevent governmental endorsement of a grantee's privately funded speech in the faith-based context. Defendants' adoption of the burdensome Guidelines, even after the Senate Appropriations Committee and the chairmen of two House of Representatives committees requested them to rely on the faith-based model as a far less burdensome way to achieve Congressional goals, implies that a constitutionally impermissible desire to burden and ultimately suppress disfavored speech is the real motive here.[9]

d. Defendants' Reliance on *Brooklyn Legal Services* and *Velazquez* Is Misplaced.

Instead of offering justifications for the harshness of the Guidelines, Defendants merely claim they were modeled on a regulation upheld as facially constitutional in *Velazquez v. LSC*,

[9] *See* S. Rep. No. 110-128, at 33 (2007) (Senate Appropriations Committee "will view unfavorably any requirements that impose more costly and burdensome restrictions than those that apply to faith-based grantees."); Ltr. from Rep. Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, to Hon. Alberto Gonzales, Attorney General (June 29, 2007), *available at* http://oversight.house.gov/documents/20070629123546.pdf; Ltr. from Reps. Henry A. Waxman and Tom Lantos to Hon. Michael O. Leavitt, Secretary, HHS (July 20, 2007), *available at* http://oversight.house.gov/documents/20070720162655.pdf; Ltr. from Reps. Henry A. Waxman and Tom Lantos to Hon. Henrietta H. Fore, Acting Administrator, USAID (July 20, 2007), *available at* http://oversight.house.gov/documents/20070720162731.pdf.

164 F.3d 757 (2d Cir. 1999), *aff'd on other grounds*, 531 U.S. 533 (2001), and *Brooklyn Legal Services Corp. B v. LSC*, 462 F.3d 219 (2d Cir. 2006).[10] USAID Guidelines at 3.

However, Defendants can draw no comfort from these cases for two reasons. First, those cases hold that viewpoint-discriminatory restrictions on privately funded speech by government funding recipients (precisely the type of restriction at issue here) are unconstitutional. In *Velazquez*, the Supreme Court and Second Circuit invalidated a viewpoint-based restriction that prohibited LSC grantees from using both federal and private funds to challenge welfare laws. *LSC v. Velazquez*, 531 U.S. 533, 542-49 (2001); *Velazquez v. LSC*, 164 F.3d 757, 769-72 (2d Cir. 1999). The courts invalidated the restriction even though the regulatory scheme at issue there offered the affiliate option upon which Defendants claim they have modeled the Guidelines. *See Velazquez*, 164 F.3d at 761-72 (describing affiliate option established by LSC in 45 C.F.R. § 1610.8); USAID Guidelines at 3 (stating that guidance "is modeled on" the LSC affiliate option). If the Supreme Court would not tolerate a grant program barring criticism of government policy, it stands to reason that it would not tolerate the more onerous program here, which not only bars criticism of a government-mandated position, but actually compels grantees to convey that position as their own.

Second, those cases also hold that grantee-affiliate separation requirements are unconstitutional if 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." *Brooklyn Legal Servs.*, 462 F.3d at 232 (citing *Velazquez*, 164 F.3d at 767). As Plaintiffs describe above, in the context of U.S. organizations operating in many different countries around the world – as the members of GHC and

[10] Significantly, as applied challenges to that regulation continue.

InterAction do – the Guidelines certainly impose such extraordinary burdens, which cannot be justified by the Government's unsupported claims of needs. *See* discussion *supra* at 30-31.

2. The Policy Requirement Continues to Discriminate Based on Viewpoint and Is Thus Unconstitutional.

As the Court has held, the Policy Requirement violates the constitutional prohibition against viewpoint discrimination. *AOSI*, 430 F. Supp. 2d at 271-74. The Guidelines do not even purport to remedy the constitutional infirmity, because an organization's eligibility for government funding remains contingent on its point of view about prostitution. Even when subsidies are at issue, the Supreme Court has ruled, government may not choose funding recipients based on their beliefs. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1988). In *Rust*, in which the Supreme Court ruled that a government-subsidized family planning program could be restricted to exclude abortion-related speech, the Court took pains to note that the restrictions did not require the grantee to adopt a particular point of view. *Rust*, 500 U.S. at 196. Yet here the government continues to require the grantee to oppose prostitution and continues to impose the government's view that criminal penalties against prostitutes are the only way to deal with this social ill, even though many InterAction and GHC members would prefer to remain neutral on the question, particularly given the variety of legal approaches to prostitution in the countries in which they operate around the world. (Worthington Decl. ¶ 26; Daulaire Decl. ¶¶ 28, 33.)

The possibility of a relationship with an affiliate or other organization does not undo the constitutional harm. As is described *supra* at 33, in *Legal Services Corp. v. Velazquez*, the Supreme Court and Second Circuit invalidated a viewpoint-based restriction even though the regulatory scheme at issue there offered the affiliate option upon which Defendants claim they have modeled the Guidelines.

Moreover, it is impossible to confine the government's viewpoint discrimination to the federally funded speech of the members of GHC and InterAction, because members must (and do) possess private funds as a condition of receiving federal grants. Congress affirmatively requires NGOs to obtain non-government funds in order to participate in foreign assistance programs. *See* 22 U.S.C. § 2151u(a) (finding that the financial resources of NGOs "should be *supplemented* by the contribution of public funds for the purpose of undertaking development activities") (emphasis added); *see also* 22 C.F.R. § 203.2(p)(2) (requiring U.S.-based NGOs to "solicit[ ] and receive[ ] cash contributions from the U.S. general public" in order to be eligible to receive USAID funding); Pellegrom Decl. ¶ 28; Worthington Decl. ¶ 24 Indeed, USAID requires that fully 20 percent of the support for a private and voluntary organization's work come from non-US government sources. (*See* Pellegrom Decl. ¶ 28.) Thus, as implemented by the Guidelines, the Policy Requirement continues to impermissibly discriminate based on viewpoint, even in the use of private funds. Accordingly, the Policy Requirement continues to violate the First Amendment. *See AOSI*, 430 F. Supp. 2d at 271-74.

3. The Policy Requirement Continues to Compel Speech and Is Thus Unconstitutional.

As the Court has held, the Policy Requirement violates the clear constitutional prohibition against requiring grantees to adopt a policy "espousing the government's preferred message." *AOSI*, 430 F. Supp. 2d at 274. In both *Rumsfeld v. Forum for Academic and International Rights* and *Rust*, the Supreme Court made clear that the government may not use its funding power to compel private individuals or entities to espouse a government-mandated message. *Rumsfeld v. Forum for Academic & Int'l Rights, Inc.*, 547 U.S. 47, 59-62 (2006); *Rust*, 500 U.S. 173 at 200. The Guidelines do not even purport to remedy the compelled speech violation and, as a result, the Policy Requirement remains unconstitutional.

The Guidelines' contemplation of relationships between grantee organizations and other organizations does not change the analysis. Even if the members of GHC and InterAction were able to comply with the requirements in the Guidelines, they would still be *compelled* to adopt anti-prostitution policies, applicable to their own privately financed speech. (Daulaire Decl. ¶ 27; Worthington Decl. ¶ 23; Gaye Decl. ¶ 27; Gayle Decl. ¶ 38.) The fact that other, separate, organizations might be free to express opposition to the government's position cannot cure the constitutional infirmity inherent in forcing an independent nonprofit organization to affirmatively speak the government's viewpoint as the price of participating in a government program. *See Rust,* 500 U.S. at 200 (upholding restrictions on speech by recipient of federal funding, but only because funding recipient is not required "to represent as his own any opinion that he does not in fact hold" and because funding recipient remains free to make clear that the forbidden speech "is simply beyond the scope of the program"). *See also O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996) (city could not require tow truck operator to support mayor's re-election in order to receive city business).

Moreover, given the various requirements for receiving funds from Defendants, the compelled speech requirement inevitably will reach their privately financed speech. *See supra* at 35. Thus, both the Policy Requirement and the Guidelines force grantees to speak the government's message not merely with the government's money but also with the grantees' own private money, a portion of which invariably partially funds the grantee entities.

Since the Guidelines continue to compel independent organizations to parrot the government's message in order to receive government funds, the Policy Requirement continues to be unconstitutional.

4. The Guidelines Are Impermissibly Vague.

The Guidelines' failure to provide clear guidance to agency officials and organizations that seek funding provides an independent ground on which to grant the preliminary injunction motion filed by GHC and InterAction.[11] An enactment either regulating speech or carrying potential criminal sanctions must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (striking down a permit requirement that delegated "overly broad licensing discretion to a government official"). The Policy Requirement, as implemented by the Guidelines, fails this test in three ways.

First, like the Policy Requirement itself, the Guidelines fail to inform grantees about what type of organizational policy will be viewed as sufficiently "opposed to" prostitution. Second, the Guidelines fail to inform grantees about which activities are "restricted" and must be performed through a separate organization. Indeed, the Guidelines' sole definition of "restricted activities" is entirely circular: the restrictive activities are those "activities inconsistent with a policy opposing prostitution." USAID Guidelines at 3. This vagueness places the members of GHC and InterAction in an untenable position. 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 "restricted" such that they would have to be run out of a separate affiliate. *See* Pellegrom Decl. ¶ 18; Gayle Decl. ¶¶ 18-23.

[11] In granting Plaintiffs AOSI and Pathfinder a preliminary injunction, the Court did not reach Plaintiffs' vagueness claim. *AOSI*, 430 F. Supp. 2d at 276. However, the impermissible vagueness of the Policy Requirement – as implemented by the Guidelines – provides an alternative ground for extending the injunction to the members of InterAction and GHC.

Third, the Guidelines introduce a wholly amorphous concept into the regulatory scheme. Although the Guidelines require that a grantee be "physically and financially separate" from a group engaging in restricted activities, the Guidelines do not specify what grantees must do in order to maintain such separation and instead reserve the right to make case-by-case assessments based on five non-exclusive factors. *See* discussion *supra* at 28-30. As a result, grantees must comply with all of the five factors to the maximum extent. *See id.*

Bestowing such unbridled discretion on agency officials violates the First Amendment's requirement that restrictions on speech "'contain narrow, objective and definite standards'" so that they do not become a means for suppressing a particular viewpoint. *Transp. Alternatives, Inc. v. City of N.Y.*, 340 F.3d 72, 78 (2d Cir. 2003) (quoting *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992)). In *Transportation Alternatives*, the court struck down a regulatory scheme in which a parks commission reserved the right to base permit fees on both a list of ten factors, and, as here, any other factors it deemed relevant. *Id.* Also like the Guidelines, the rule did not assign any weight to any particular factor. *Id.* Defendants' Guidelines are even worse because they grant agency officials unbridled discretion on three fronts: (i) in applying the list of physical and financial separation factors, (ii) in deciding whether to take any other, as yet undisclosed, factors into account, and (iii) in determining whether an organization's speech is "contrary to the government's message," *see* USAID Guidelines at 2.

Fourth, the Guidelines' vagueness is exacerbated by the vagueness of the individual factors the Defendants will consider in deciding whether grantees and other entities are "physically and financially separate," many of which use terms such as "the extent to which" and "the degree of." *See* discussion *supra* at 29-30.

Because the Guidelines fail to define the restricted speech and activities and introduce yet more undefined concepts into the regulatory scheme, the Policy Requirement remains unconstitutionally vague.

B. The Members of GHC and InterAction Will Be Irreparably Harmed Absent an Injunction.

In granting a preliminary injunction to AOSI and Pathfinder, the Court found they had demonstrated irreparable injury "[b]ecause the Policy Requirement, as interpreted by the Agencies, prohibits certain expressive activities and compels the Plaintiffs to speak in contravention of the First Amendment . . . ." *AOSI*, 430 F. Supp.2d at 278. Despite Defendants' Guidelines, the members of GHC and InterAction suffer precisely the same irreparable harm.

Absent injunctive relief, the members of GHC and InterAction remain forced to adopt and voice the government's viewpoint, notwithstanding their objections and their missions to prevent and reduce HIV/AIDS. *See* discussion *supra* at 8. Absent an injunction, the members remain unable to speak in the U.S. regarding their privately funded work to fight HIV/AIDS. *See* discussion *supra* at 8-9. For example, CARE, a member of both organizations, remains unable to share with others the lessons on preventing HIV/AIDS that it has learned through its work with sex workers in India and Bangladesh. *See* discussion *supra* at 9. And absent an injunction, the members remain unable to use their private funds to engage in work that might be barred by the Policy Requirement, because the Guidelines bar them from controlling any entity that engages in such work, and because the Guidelines impose such extensive burdens. *See* discussion *supra* at 9-13, 30-31.

In addition to the harm the Policy Requirement causes the members, and the life or death consequences for individuals with HIV/AIDS, InterAction and GHC suffer direct harm to their ability to serve as forums for the exchange of best practices and lessons learned in the fight

against HIV/AIDS. As a result of the Policy Requirement, GHC members have had to curtail their discussions on sex workers and HIV/AIDS policy in GHC's electronic and print publications. (Daulaire Decl. ¶¶ 25-26.) The Policy Requirement also prevents InterAction members from freely discussing best practices at InterAction's meetings and conferences. (Worthington Decl. ¶ 31.)

In light of these direct injuries to the First Amendment rights of GHC and Interaction and their respective members, a preliminary injunction.is warranted.

CONCLUSION

For the reasons stated herein, this Court should grant Plaintiffs' motion to file a Second Amended Complaint, and the motion of GHC and InterAction for a preliminary injunction.

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