BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

September 17, 2007

By Hand

Honorable Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the Second Circuit
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl St.
New York, NY 10007

Re: *Alliance for Open Society International v. USAID*
06-4035-cv

Dear Ms. Wolfe:

Pursuant to the Court's order dated August 7, 2007, counsel submit this letter brief on behalf of Plaintiffs-Appellees Alliance for Open Society International and Pathfinder International (collectively, "Plaintiffs"), for circulation to Judges Straub, Pooler and Barrington Parker, each of whom sat on the oral argument panel on June 1, 2007.

FACTS

At oral argument on June 1, 2007, counsel for Defendants-Appellants U.S. Department of Health and Human Services ("HHS") and U.S. Agency for International Development ("USAID") (collectively, "Defendants" or "government") informed Plaintiffs and this Court that, in light of the D.C. Circuit's opinion in *DKT International, Inc. v. USAID*, 477 F.3d 758 (D.C. Cir. 2007), Defendants planned to issue guidelines implementing 22 U.S.C. § 7631(f) (the "Policy Requirement") that would provide grantees an avenue through which they could speak freely with their private funds.[1] At that time, and in a letter to the Court a week later, the government represented that the forthcoming guidelines would be modeled on those applicable to recipients of federal Legal Services Corporation ("LSC") funding. Ltr. from Sean H. Lane to Hon. Catherine O'Hagan Wolfe (June 8, 2007) at 1.

[1] *DKT*, issued in February 2007, after the parties' pre-argument briefs were filed in the instant appeal, upheld the Policy Requirement's constitutionality on the grounds that, as the government's attorney argued at oral argument in that case, grantees could speak freely with their private funds if they undertook a simple corporate reorganization. 477 F.3d at 763 & n.4.

On July 23, 2007, without soliciting or accepting public comment, Defendants issued their guidelines. The guidelines require agency officials to determine whether grantees – which, pursuant to the Policy Requirement, must adopt policies opposing prostitution – are sufficiently separate from any organization that does not have an anti-prostitution policy and/or espouses views about prostitution with which the government does not agree. 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"); USAID, Acquisition & Assistance Policy Directive 05-04 Amend. 1 ("USAID Guidelines"), pp. 3-4.[2]

The government contends that "there are no legally significant differences between the guidance issued here and the [LSC] program integrity regulation." Ltr. from Sean H. Lane to Hon. Catherine O'Hagan Wolfe (July 26, 2007) at 2. Although there is some superficial similarity between Defendants' guidelines and the LSC regulation,[3] the former depart significantly from the latter both in their content and in the context in which they operate.

First, unlike the LSC regulation, the guidelines require grantees to parrot the government's viewpoint on prostitution as their own. HHS Guidelines, 72 Fed. Reg. at 41,076; USAID Guidelines, p. 3. The LSC regulation, 45 C.F.R. § 1610.8, contains no such organizational policy requirement.

Second, the guidelines mandate much more stringent "physical and financial" separation between the grantee and affiliate than the LSC regulation requires. The guidelines, but not the LSC regulation, require agency officials to consider: i) whether affiliates have 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." *Compare* HHS Guidelines, §§ 3(i)-(iii), (v), 72 Fed. Reg. at 41,077, *and* USAID Guidelines, §§ 3(i)-(iii), (v), *with* 45 C.F.R. § 1610.8(a)(3).[4]

Third, unlike the LSC rules, the guidelines are not the product of formal rulemaking.[5] Accordingly, they contain no assessment of and fail to take into account the burden on federal

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[2] The USAID Guidelines are available at http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04_amendment1.pdf.

[3] For example, under both regimes, in order for an organization to be considered sufficiently separate from a grantee, it must be legally separate, receive no federal funds, and be "physically and financially separate." HHS Guidelines, §§ 3(i)-(iv), 72 Fed. Reg. at 41,076-77; USAID Guidelines, §§ 3(i)-(iv); 45 C.F.R. §§ 1610.8(a)(3)(i)-(iv).

[4] The guidelines also require separate accounts, equipment and supplies, which are not called for by the LSC regulation. *Compare* HHS Guidelines, §§ 3(ii), (iii), 72 Fed. Reg. at 41,077, *and* USAID Guidelines, §§ 3(ii), (iii), *with* 45 C.F.R. §§ 1610.8(a)(3)(ii), (iii).

[5] HHS has indicated that it will undertake notice and comment rulemaking at an undetermined future time. Ltr. from Sean Lane to Hon. Catherine O'Hagan Wolfe (Aug. 6, 2007).

grantees and the international context in which the rules will be applied. Although their stated purpose is 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," no effort is made to explain why disclaimers and other forms of public disclosure would not adequately inform the public. HHS Guidelines, 72 Fed. Reg. at 41,076; USAID Guidelines, p. 3. Indeed, the guidelines contain no explanation of why particular types of separation are required between the grantee and any affiliate, other than that the guidelines were modeled on those considered by this Court in *Velazquez v. LSC*, 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), *petition for cert. filed*, 75 U.S.L.W. 3539 (U.S. Mar. 28, 2007) (No. 06-1308).

Fourth, the guidelines do nothing to clarify the considerable vagueness of the Policy Requirement itself. *See* Pls.' Br. of Dec. 14, 2006, at 12-13. 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 here 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* HHS Guidelines, 72 Fed. Reg. at 41,076, *and* USAID Guidelines p. 3, *with* 45 C.F.R. § 1610.2(b) (incorporating by reference statutory list of LSC-restricted activities such as class action representation and lobbying). Indeed, the guidelines add a new level of vagueness. For example, although officials must assess whether the government is "protected from public association with [a grantee's] affiliated organization and its restricted activities," the guidelines provide no criteria for making this determination. *See* HHS Guidelines, §§ 3(v), 72 Fed. Reg. at 41,077, *and* USAID Guidelines, §§ 3(v).

SUMMARY OF ARGUMENT

Instead of choosing a workable model that would enable federal grantees operating throughout the world, often in countries hostile to non-governmental organizations, to participate in the effort against HIV/AIDS without sacrificing their First Amendment rights, Defendants have issued rules significantly more onerous than those at issue in *Brooklyn Legal Services*, 462 F.3d 219, and those suggested by the D.C. Circuit in *DKT International, Inc.*, 477 F.3d 758.

Far from curing the First Amendment violations found by the District Court, the guidelines continue to require grantees to adopt organizational policies opposing prostitution, while massively burdening privately funded speech on the issue. The preliminary injunction should be upheld because the guidelines perpetuate the Policy Requirement's constitutional and statutory infirmities in at least four ways:

1) The Policy Requirement – as implemented by the guidelines – continues to violate the compelled speech doctrine by forcing independent non-profit organizations to affirmatively parrot the government's viewpoint on prostitution in order to be eligible for federal grants.

2) The Policy Requirement – as implemented by the guidelines – continues to violate the unconstitutional conditions doctrine by failing to provide an adequate alternative channel for grantees to say or do anything that the government believes is inconsistent with the government's viewpoint about prostitution. Moreover, the government exacts this price without any justification for the harshness of the means chosen or any explanation of why less burdensome alternatives would not suffice.

3) The Policy Requirement 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.

4) Finally, the guidelines empower USAID and HHS officials to analyze not just the speech and beliefs of grantees, but also those of every organization with which grantees might be remotely affiliated. Thus, through the guidelines Defendants gain even greater leverage than before to suppress certain viewpoints. Defendants cannot point to support in the statute for such an expansive and strained reading of Congress's command.

ARGUMENT

I. Even With the Guidelines, the Policy Requirement Continues to Compel Speech and Is Thus *Per Se* Unconstitutional.

In both *Rumsfeld v. Forum for Academic and International Rights* and *Rust v. Sullivan*, the Supreme Court made clear that the government may not use its funding power to compel speech by private individuals or entities. *Rumsfeld v. Forum for Academic & Int'l Rights, Inc.*, 547 U.S. 47, 59-62 (2006); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). *See also* Pls.' Br. of Dec. 14, 2006, at 27-30. Defendants' new guidelines do nothing to change the fact that the Policy Requirement violates this clear prohibition by requiring grantees to adopt a policy opposing prostitution that parrots the government's current viewpoint.

Even if Plaintiffs were able to reorganize to operate under the guidelines, all entities receiving federal funds would continue to be required to pledge allegiance to the government's viewpoint on prostitution, whether or not they agree with it. The fact that separate affiliates might be free to express opposition to the government's position cannot avoid the constitutional infirmity inherent in forcing an independent non-profit entity to affirmatively speak the government's viewpoint as the price of participating in a government program. The "compelled speech" is particularly abhorrent in this case because Congress provides grants to non-governmental organizations ("NGOs") precisely because they are independent, and requires them to obtain non-government funds. *See* 22 U.S.C. § 2151u(a) (finding that it is in the interest of the United States that NGOs "expand their overseas development efforts without compromising their private and independent nature" and 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); Pls.' Br. of Dec. 14, 2006, at 51-52. Thus, both the Policy Requirement and the implementing guidelines force grantees to speak the government's viewpoint not merely with the government's money but also with the grantees' own private money, a portion of which will invariably partially fund the grantee entity.

The government's only defense is that the guidelines here resemble those that were upheld by this Court in *Brooklyn Legal Services*. *See* Ltr. from Sean H. Lane to Hon. Catherine O'Hagan Wolfe (July 26, 2007) at 2. But that case is inapposite here because it did not involve compelled speech and did not require grantees to adopt the government's viewpoint. Thus, the *Brooklyn Legal Services* panel could distinguish the regulation before it from a hypothetical regulation "'authoriz[ing] grants funding support for, but barring criticism of, governmental policy,'" which this Court said "'the Supreme Court would not tolerate.'" *See Brooklyn Legal Servs.*, 462 F.3d at 230 (quoting *Velazquez*, 164 F. 3d at 771). If the Supreme Court would not tolerate a grant program funding support for, but barring criticism of, government policy, it stands to reason, *a fortiori*, that it would not tolerate the more onerous program here, which not only bars criticism of government policy, but actually compels grantees' entire organizations to speak the government's message.

Since the new guidelines continue to compel independent NGOs to parrot the government's viewpoint in order to receive government funds, the Policy Requirement continues to be unconstitutional.

II. Even With the Guidelines, the Policy Requirement Substantially Burdens Plaintiffs' First Amendment Rights Without Adequate Justification.

A. Government Must Justify the Imposition of Any Significant Burden on Privately Funded Speech.

When government seeks to impose substantial burdens on the privately funded speech of funding recipients, it must justify those burdens by a legitimate government interest. This is the clear teaching of the Supreme Court and of this Court in cases concerning the speech rights of both recipients of government grants and government employees. Defendants fail to meet this burden.

The Supreme Court has repeatedly drawn a line between funding conditions that impose *substantial* burdens on privately funded speech and those that impose *insubstantial* burdens. The former must 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 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.

The Court affirmed this ruling in *Rust v. Sullivan*, where it quoted with approval its earlier language that the editorializing ban at issue in *FCC v. League of Women Voters* would be constitutional if Congress allowed the stations to editorialize through an affiliate using shared facilities. 500 U.S. at 197. Although the *Rust* Court upheld a requirement that government-funded family planning clinics desiring to engage in privately funded speech concerning abortion do so through a physically separate office, 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, *id.* at 196-200; 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"); and 3) found that the regulation was "narrowly tailored" to the government's interests. *Id.* at 195 n.4, 198 (stating that the separation requirements "ensure the integrity of the federally funded program").[6]

The Court hewed to the same line most recently in *United States v. American Library Association*, rejecting 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.[7] 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 clear message of *American Library Association* and its predecessors is reinforced by the cases concerning restrictions on the speech in which government employees engage on their own time. *See Board of County Commissioners v. Umbehr*, 518 U.S. 668, 680 (1996) (stating that grantee speech and employee speech cases "span a spectrum"). Under those cases, on which Defendants rely in their briefs, *see* Defs.' Br. of Nov. 13, 2006, at 38-45, the government must justify a severe burden on the private speech of its employees by showing that it is tailored to serve important government interests. *See, e.g., U.S. v. National Treasury Employees Union* ("*NTEU*"), 513 U.S. 454, 475 (1995) (holding that such burdens are constitutional only if the government can "'demonstrate that the recited harms are real, not merely conjectural, and that

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[6] The guidelines here are more restrictive than those at issue in *Rust v. Sullivan*. *See* discussion *infra* p. 8 n.9.

[7] 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).

the regulation will in fact alleviate these harms in a direct and material way'") (quoting *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994)). *See also Latino Officers Ass'n v. City of N.Y.*, 196 F.3d 458, 463 (2d Cir. 1999) (discussing heightened burden that government bears to justify prospective employee speech restrictions); *Harman v. City of N.Y.* 140 F.3d 111, 122 (2d Cir. 1998) ("Where the predictions of harm are proscriptive, the government cannot rely on assertions, but must show a basis in fact for its concerns.").

In *Board of County Commissioners v. Umbehr*, the Court recognized that the government has even less latitude to regulate the private speech of its independent contractors, "who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing," than it does to regulate the private speech of government employees such as the *NTEU* plaintiffs. 518 U.S. at 680. Thus, the government employee speech cases reinforce the holding of the grantee speech cases: the imposition of severe burdens on the private speech of recipients of government funds must always be justified by a proven need to advance important governmental interests.

In keeping with this principle, this Court has more recently reaffirmed 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). In *Brooklyn Legal Services*, a panel of this Court considered the regulation on which Defendants claim their new guidelines are based: a requirement that recipients of government legal services funds use their private funds to engage in constitutionally protected activities disfavored by the government only through a physically and legally separate entity.[8] Without ruling on the constitutionality of the specific regulation before it, the panel affirmed its earlier ruling, in *Velazquez*, setting forth the legal standard applicable to such restrictions on the use of private funding: "'[I]n 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.*'" *Brooklyn Legal Servs.*, 462 F.3d at 231 (emphasis in original) (quoting *Velazquez*, 164 F.3d at 766). Elaborating on this language, the panel stated that "[s]ubstantially burdening an organization's ability to set up an affiliate violates the standard in [*Velazquez*] that require[s] not simply the existence of an alternative channel but the existence of an 'adequate' one. By definition, an alternative is inadequate if the government substantially or unduly burdens the ability to create the alternative." *Id.* at 232. Criticizing the district court for failing to apply this standard, the Court remanded the case so that specific factual findings under this standard could be made. *Id.* at 232-33.

Taken together, the Supreme Court grantee and employee speech cases, and this Circuit's *Brooklyn Legal Services* opinion, make clear that if Defendants' new guidelines impose substantial burdens on the Plaintiffs' speech, they can survive constitutional scrutiny only if they

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[8] Although, as previously noted, *Brooklyn Legal Services* did not involve compelled speech and therefore is not controlling here, it is nonetheless instructive with regard to the separate issue of what constitutes an adequate alternative channel.

are adequately supported by legitimate government interests. As explained below, the guidelines fail such scrutiny.

B. The Policy Requirement Is So Burdensome That It Does Not Provide an Adequate Alternative Channel Through Which Plaintiffs May Speak Freely With Private Funds.

1. The Guidelines Are More Restrictive Than the LSC Rules and the Model Contemplated by the *DKT* Decision.

While Defendants characterize their guidelines as being modeled on the LSC regulation upheld as facially constitutional in *Velazquez*, 164 F.3d 757, and *Brooklyn Legal Services*, 462 F.3d 219, the guidelines are more onerous in two crucial respects. As a result, they do not provide grantees with the "adequate alternative channel" required by *Brooklyn Legal Services*, 462 F.3d at 231, and thus fail to remedy the Policy Requirement's violation of the First Amendment.

First, as discussed in Section I above, the guidelines continue to require grantees to adopt the government's message as their own and thus burden Plaintiffs' First Amendment rights in a manner not present in the legal services cases.

Second, and equally fatally, the guidelines go beyond the LSC regulation to require not just separate personnel and facilities but also separate "management and governance."[9] *See* discussion *supra* p. 2. This requirement, which bars the grantee from controlling its privately funded affiliate, robs the grantee of any ability to exercise First Amendment rights through that affiliate as required by *Brooklyn Legal Services*, 462 F.3d at 231. Indeed, LSC specifically rejected a rule requiring separation in management and governance in favor of a rule "allow[ing] 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).

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.*, 477 F.3d 758. That court 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 D.C. Circuit found that the statute left open channels for protected speech and conduct:

> Nothing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution. As the government stated at oral argument, the subsidiary would qualify for government funds as long as the two

[9] The guidelines are also much harsher than the regulation considered by the Supreme Court in *Rust v. Sullivan*, which required separate facilities, personnel, and records, but did not mandate separate legal entities, management, or governance. 500 U.S. at 180-81..

> organizations' activities were kept sufficiently separate. The parent organization need not adopt the policy.

Id. (internal footnotes omitted). In support of this point, the court relied upon a colloquy with counsel:

> COURT: Suppose that DKT just spins off a subsidiary corporation, and the subsidiary takes the pledge, but the parent organization does not. Is that okay? There's nothing in the regulations that would prohibit that, is there?
> GOVERNMENT COUNSEL: There's absolutely nothing in the regulations that could prohibit it. . . . There's nothing preventing them from doing that.
> COURT: All their complaints could be solved by a corporate reorganization?
> GOVERNMENT COUNSEL: That's right.

Id. at 763 n.4. Of course, the physical separation and ban on shared management and governance that Defendants now require are far more burdensome than a simple "reorganization" involving creation of a "subsidiary corporation."[10]

2. Defendants Themselves Have Rejected These Requirements as Too Burdensome When Issuing Separation Rules Applicable to Faith-Based Grantees.

The Defendants themselves have conceded in another context that the measures they now impose on Plaintiffs excessively burden grantees' privately funded First Amendment activities. Consequently, the guidelines cannot be said to provide the "adequate alternative channel" for Plaintiffs' privately funded speech that *Brooklyn Legal Services* requires. *See* discussion *supra* § II.A.

In the analogous context of rules governing faith-based grantees, USAID and HHS have issued regulations requiring grantees to separate in time or location their privately funded,

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[10] While parent and subsidiary models vary, they all contemplate control by the parent over the subsidiary and do not require the type of physical and financial separation mandated here. *See, e.g.*, 15 U.S.C. § 80a-2(24) (defining "majority-owned subsidiary" as a company in which 50 percent of its outstanding shares are owned by the parent company); 15 U.S.C. § 80a-2(43) (defining wholly-owned subsidiary as one in which the parent company owns 95% or more of the outstanding shares); I.R.C. § 1361(b)(3) (defining subchapter S subsidiary as organization where 100 percent of the stock is owned by the S corporation and all assets, liabilities, income, and credit are treated as belonging to the parent corporation).

A corporate reorganization can entail measures as informal as "a mere change in identity, form, or place of organization of one corporation, however effected," a far cry from the onerous steps mandated here. I.R.C. § 368(a)(1)(F).

inherently religious activities (*i.e.*, speech that the government may not endorse) from federally funded activities. *See* 22 § C.F.R. 205.1(b) (USAID); 45 C.F.R. § 87.1(c) (HHS). After the notice and comment period, the agencies rejected as too burdensome suggestions that in order to use private funds to engage in religious activities grantees should be required to establish a new, legally separate affiliate and to maintain extensive separation between the physical premises used by the federally funded and privately funded entities. *See* 69 Fed. Reg. 61,716-01, 61,719, 61,721 (Oct. 20, 2004); 69 Fed. Reg. 42,586, 42,587-88, 42,591-92 (July 16, 2004). USAID specifically rejected the idea that added physical separation requirements should be imposed on faith-based grantees, stating:

> *USAID believes that separation in both time and location is legally unnecessary and would impose an unnecessarily harsh burden* on small religious organizations, which may have access to only one location that is suitable for the provision of the USAID-funded service(s).

69 Fed. Reg. at 61,719 (emphasis added). HHS similarly warned of the burdens of requiring organizations to operate federally funded programs in separate facilities, stating:

> [A] prohibition on the use of religious icons would make it more difficult for many faith-based organizations to participate in Department programs than for other organizations by forcing them to procure additional space. It would thus be *an inappropriate and excessive restriction* ....

69 Fed. Reg. at 42588 (emphasis added).

USAID and HHS have not explained why these same measures should not be considered "harsh," "inappropriate," and "excessive" when imposed on Plaintiffs. Accordingly, the guidelines do not provide Plaintiffs with the required adequate alternative channel.[11]

3. Physical, Financial and Legal Separation Impose Harsher Burdens in the International Humanitarian Arena Than in the Domestic Legal Aid Context.

Defendants' reliance on *Velazquez* and *Brooklyn Legal Services* is further misplaced because of the wholly different context in which the government's international HIV/AIDS program operates. The burdens of physical, financial and legal separation are far harsher in the

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[11] Moreover, by promoting the dissemination of religious ideas through their faith-based rules while simultaneously burdening Plaintiffs' secular speech, Defendants convey a message of endorsement of religion in violation of the Establishment Clause. *See Texas Monthly v. Bullock*, 489 U.S. 1, 14 (1989) (striking down sales tax scheme that taxed secular magazines while exempting publications with religious content).

international humanitarian arena – where Plaintiffs struggle to maintain offices in a number of countries – than in the domestic legal aid context considered in those cases.

In many of the countries in which Plaintiffs operate, NGOs face substantial obstacles to establishing new entities and opening new offices.[12] At the very least, Plaintiffs will incur substantial financial burdens and delays as they try to navigate hostile registration requirements in order to establish new organizations and operate new offices. *See, e.g.*, *The Role of Non-Governmental Organizations in the Development of Democracy: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 844 (2006) (statement of Carl Gershman, President, National Endowment for Democracy) (describing use of registration requirements to control NGOs worldwide), *available at* 2006 WL 1591325 (F.D.C.H.); *Democratic Developments in Sub-Saharan Africa: Moving Forwards or Backwards?: Hearing Before the Subcomm. on African Affairs of the S. Comm. on Foreign Relations* (statement of Barry Lowenkron, Assistant Secretary, Bureau of Democracy, Human Rights, and Labor, Department of State) (July 17, 2007) (describing the use of burdensome registration requirements by African governments to prevent NGOs from functioning).[13] In the past two years alone, "more than twenty countries have introduced restrictive regulations."[14]

The U.S. Department of State[15] has documented numerous obstacles to the running of new NGOs in many of the countries in which Plaintiffs operate. For example, in Uzbekistan, where AOSI works:

> The government sought to control completely all NGO activity. The law broadly limits the types of groups that may form and requires that all organizations be formally registered with the government. The law allows for a six month grace period for new organizations to operate while awaiting registration, during which time they are officially classified as "initiative groups." Registration of NGOs and other public associations was difficult and time consuming, with many opportunities for government obstruction.

Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, *Country Report on Human Rights Practices in Uzbekistan – 2006*, § 2(b) (2007).[16] Moreover, the government has forced

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[12] The countries where Plaintiffs operate are described at JA-233, 364-65, 370-71, 425-27.

[13] A transcript of the hearing is available at LEXIS News, and will be supplied by Plaintiffs upon request.

[14] David Moore, *Safeguarding Civil Society in Politically Complex Environments*, 9 Int'l J. Not-for-Profit L. 3, ¶ 2 (July 2007), *available at* http://www.icnl.org/knowledge/ijnl/vol9iss3/special_1.htm.

[15] This Court "routinely rel[ies] on the State Department . . . in assessing the situation in foreign countries." *Chen v. Gonzales*, 490 F.3d 180, 183 (2d Cir. 2007).

[16] Available at http://www.state.gov/g/drl/rls/hrrpt/2006/78848.htm.

many international NGOs to close as "part of government efforts to minimize the presence of Western organizations." *Id.* AOSI also works in Tajikistan, where "[a]ll NGOs must register with the [Ministry of Justice]. International NGOs, particularly ones supported by Western donors and involved in democracy-building activities, face[ ] registration problems from the government . . . ." Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, *Country Report on Human Rights Practices in Tajikistan – 2006*, § 2(b) (2007).[17]

In Egypt, where plaintiff Pathfinder operates, the State Department reports that:

> A July 2005 [Human Rights Watch] report ... documented multiple cases where the government rejected NGO registrations, decided who could serve on NGO boards of directors, harassed NGO activists, and interfered with donations to the groups.

Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, *Country Report on Human Rights Practices in Egypt – 2006*, § 2(b) (2007).[18] Pathfinder also works in Sudan, where all NGOs must register with the Humanitarian Aid Commission, which has assumed a role in NGO staff hiring, applies rules for NGOs inconsistently and often changes them without prior notification. In August 2005, a presidential decree required all international NGOs to re-register and did not permit applicants to appeal a denial. Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, *Country Report on Human Rights Practices in Sudan – 2006*, § 4 (2007).[19] In Uganda, where Pathfinder works as well, the law requires NGOs to register with a government board that may impose conditions "generally as it may think fit," including dictating where the organization may carry out its activities and how it may be staffed. Nongovernmental Organisations Registration Act, ch. 113, §2(2) (1989) (Uganda).[20] By forcing grantees to create legally separate organizations with physically separate offices and separate staff, the guidelines have placed Plaintiffs' free speech rights at the mercy of arbitrary and sometimes hostile foreign regulators.

The guidelines also impose unique and undue financial burdens on the Plaintiffs because of the foreign aid context in which they operate. If the newly formed affiliate is to be the recipient of funds from the Defendants, U.S. law and regulations 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 USAID funding). On the other hand, if the newly formed organization is to be privately funded, it will encounter similar problems attracting funding due to its lack of any track record.

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[17] Available at http://www.state.gov/g/drl/rls/hrrpt/2006/78843.htm.

[18] Available at http://www.state.gov/g/drl/rls/hrrpt/2006/78851.htm.

[19] Available at http://www.state.gov/g/drl/rls/hrrpt/2006/78759.htm.

[20] Available at http://www.usig.org/countryinfo/laws/Uganda/ (follow NGO Registration Act 1989 Chap. 113.pdf hyperlink).

C. The Substantial Burdens Imposed by the Policy Requirement and Guidelines Are 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. For example, Defendants 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." HHS Guidelines, 72 Fed. Reg. at 41,076; USAID Guidelines at 3. Yet, as with the Policy Requirement itself, there is no evidence that the guidelines avoid this harm.

Indeed, in the faith-based context, Defendants have specifically rejected similar separation measures as unnecessary to guard against government endorsement of a grantee's message.[21] During the notice and comment process for the faith-based regulations discussed *supra* § II.B.2, commenters urged USAID to require additional separation between federally funded activities and privately funded religious speech in order to comply with the Establishment Clause bar on endorsing religious speech. 69 Fed. Reg. at 61,718. *See also Lee v. Weisman*, 505 U.S. 577, 609 (1992) (Blackmun, J., concurring) (government may neither sponsor nor endorse religion). USAID rejected this concern, 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* 69 Fed. Reg. at 42,588 (aid to inherently religious organizations that engage in religious activities in the same space where they conduct their federally funded activities would not impermissibly advance religious purposes).

Thus, Defendants themselves believe that stringent separation requirements of the sort they are imposing on AIDS Leadership Act grantees are not necessary to avoid the appearance of endorsing a grantee's privately funded speech. Their adoption of the burdensome new 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.[22]

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[21] Defendant HHS also has experience administering less onerous separation requirements to fulfill Title X of the Public Health Service Act, which requires that no federal funds for family planning services "shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Current HHS guidelines require that any abortion activities "must be separate and distinct from Title X project activities." 65 Fed. Reg. 41,281, 41,282 (July 3, 2000). The guidance permits a grantee to run its Title X project out of the same facilities and with the same staff as it conducts abortion-related activities, so long as costs are properly allocated. It may also maintain a single file system for abortion and family planning patients. *Id.*

[22] *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

Moreover, just as none of Defendants' other interests were sufficient to justify the Policy Requirement, none of those interests are sufficient to justify the implementing guidelines. Defendants still have not established that AIDS Leadership Act programs will be undermined without the Policy Requirement and guidelines, that foreign listeners will believe privately funded speech in the same space by the same legal entity represents U.S. government policy, or that grantees with different views on prostitution cannot be trusted to abide by restrictions on the use of public funds. *See* Pls.' Br. of Dec. 14, 2006, at 37-42.

Additionally, four organizations including one U.S.-based non-profit, continue to be exempted from any requirement that they comply with the Policy Requirement or guidelines. As Plaintiffs argued in their initial brief, the exemption of these organizations, some of which have called for a reduction or removal of penalties imposed on prostitution, demonstrates that the Policy Requirement is not adequately tailored to the governments' interests. *Id.* at 44-46.

III. The Guidelines Are Impermissibly Vague.

The guidelines' failure to provide clear guidance to agency officials and organizations that seek funding also dooms their prospects under the First Amendment.[23] The Supreme Court has made clear that 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 on three counts.

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, and even more troubling, the guidelines fail to inform grantees about which activities are "restricted" and must be performed through a separate affiliate. Indeed, the guidelines' sole definition of "restricted activities" is circular: the restrictive activities are those "activities inconsistent with a policy opposing prostitution." HHS Guidelines, 72 Fed. Reg. at 41,076;

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that apply to faith-based grantees."); Ltr. from Rep. Henry J. 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 Rep. Henry Waxman et al. to Hon. Michael O. Leavitt, Secretary, HHS (July 20, 2007), *available at* http://oversight.house.gov/documents/20070720162655.pdf; Ltr. from Rep. Henry Waxman et al. to Hon. Henrietta H. Fore, Acting Administrator, USAID (July 20, 2007), *available at* http://oversight.house.gov/documents/20070720162731.pdf.

[23] The District Court did not reach Plaintiffs' vagueness claim because it had already determined that an injunction was warranted on other First Amendment grounds. JA-629. However, the impermissible vagueness of the Policy Requirement – as implemented by the guidelines – continues to be an alternative ground for upholding the injunction.

USAID Guidelines, p. 3. The guidelines' vagueness places Plaintiffs in an untenable position. Pathfinder International, for example, still does not know if the government views its privately funded HIV prevention program in India, which organizes prostitutes and does outreach to brothel owners to foster safer sex, as "restricted" such that it would have to be run out of a separate affiliate. *See* JA 370-71.[24]

Third, the guidelines introduce a new, wholly amorphous concept into the regulatory scheme. Government officials must now consider 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." HHS Guidelines, § 3(v), 72 Fed. Reg. at 41,077; USAID Guidelines, § (3)(v), at 4. In the absence of any criteria for making such a determination, agency officials have no standards for enforcement and grantees will be forced to self-censor in order not to run afoul of this rule.

IV. The Guidelines Wrench the Policy Requirement Even Further Away From Congress's Intent.

Plaintiffs' initial brief argued that Defendants' interpretation of 22 U.S.C. § 7631(f), which was created out of thin air, is contrary to Congress' intent and the canons of statutory construction in two ways: 1) Defendants' interpretation requires Plaintiffs to adopt as their own a government-mandated notion of opposition to prostitution, when the statute in fact requires only a statement that the Plaintiffs oppose prostitution, while permitting Plaintiffs to state that what they oppose are the evils of prostitution; and 2) Defendants' interpretation bars the use of private funds to discuss or advocate the decriminalization of prostitution, when the statute in fact bars the use of federal funds to engage in such speech, but leaves Plaintiffs free to use their private funds to discuss and advocate alternative methods of exercising social control over prostitution. *See* Pls.' Br. of Dec. 14, 2006, at 56-59. As Plaintiffs explain below, the guidelines do nothing to shore up this reading of the statute, and are themselves an impermissible interpretation of the statute.

A. Defendants' Original Interpretation of the Statute Was Impermissible.

Even without the guidelines, Defendants' original interpretation of the statute was impermissible for several reasons. First, Defendants' interpretation is contrary to Congress' clear intent to sustain and promote public-private partnerships. *See* Pls.' Br. of Dec. 14, 2006, at 57; *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

Second, Defendants' interpretation violates the canon of statutory construction requiring courts to give independent meaning to each provision of a statute. If Section 7631(f) bars recipients from using any of their funds to promote the legalization or practice of prostitution,

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[24] As previously noted, the guidelines' failure to define the restricted activities distinguishes the guidelines from the LSC regulation at issue in *Brooklyn Legal Services*. *See* discussion *supra* p. 3.

then the adjoining federal funds restriction, Section 7631(e), has no independent meaning. *See* Pls.' Br. of Dec. 14, 2006, at 57.

Third, Defendants' original interpretation violates the canon of statutory construction requiring the courts to assume that the omission of language in one place but inclusion in another is purposeful. *See Erlenbaugh v. U.S.*, 409 U.S. 239, 244 (1972) (stating that the rule of *in pari materia* has special force when "the statutes were enacted by the same legislative body at the same time"). Elsewhere in the Leadership Act, and also in the Trafficking Victims Protection Act, which was passed at the same time, Congress specifically barred advocacy of the legalization or practice of prostitution. *See* 22 U.S.C. § 7631(e) (specifically barring the use of AIDS Leadership Act funds "to promote or advocate the legalization or practice of prostitution or sex trafficking"); 22 U.S.C. § 7110(g)(2) (requiring each recipient of funding to assist victims of severe forms of trafficking to certify "that it does not promote, support, or advocate the legalization or practice of prostitution"). The absence of language in Section 7631(f) specifically barring such speech thus indicates that Congress did not mean to bar such speech.

Finally, because Defendants' original interpretation raises the significant constitutional issues discussed here and in Plaintiffs' initial brief, it violates the canon of constitutional avoidance. *See* Pls.' Br. at Dec. 14, 2006, at 57.

The D.C. Circuit's opinion in *DKT International* adds weight to Plaintiffs' interpretation, noting:

> DKT assumes, as does the government, that if an organization signs a pledge in accordance with § 7631(f) and then goes out and advocates legalizing prostitution it will have violated the condition on its grant. Although neither the statute nor the regulations expressly say as much, we will accept the position of the parties.

477 F.3d at 761 n.1.[25]

B. The Guidelines Exacerbate the Impermissible Nature of Defendants' Interpretation of the Statute.

Defendants' new guidelines impose yet another layer of entirely unjustified regulations on the already unstable statutory edifice. As Plaintiffs have demonstrated, the guidelines raise serious constitutional issues. They also further undermine Congress' dual desires to promote public-private partnerships, and to do so in the most efficient manner. The new guidelines are not entitled to deference for several reasons: 1) they were promulgated without notice and

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[25] The District Court below was wrong that Plaintiffs' interpretation of the statute would rob it of any force. JA 547-48. Requiring non-profits to adopt a viewpoint-based policy is hardly devoid of meaning, even if the viewpoint is one with which the non-profits agree, and Defendants could continue to bar statements that prostitution is good for or does not harm women.

comment; 2) they are premised on a new, even less tenable interpretation of the statute; and 3) they are justified only by their purported similarity to the LSC regulations instead of by an independent exercise of the Defendants' considered judgment. *See Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (granting deference because of "the careful consideration the Agency has given the question over a long period of time"). Moreover, when, as here, an agency's interpretation of a statute casts doubt on the statute's constitutionality, deference to the agency's interpretation is inappropriate. *See Edwards v. INS*, 393 F.3d 299, 308 (2d Cir. 2004).

Even if the guidelines were entitled to deference, Defendants' interpretation would be impermissible because it is contrary to the clear intent of Congress. As Plaintiffs noted in their initial brief, throughout the Leadership Act, Congress made clear its desire to conduct its fight against HIV/AIDS through independent non-profits. 22 U.S.C. § 2151-1(b)(8) ("United States cooperation in development should be carried out to the maximum extent possible through the private sector, including those institutions which already have ties in the developing areas, such as . . . private and voluntary agencies."). *See also* Pls.' Br. of Dec. 14, 2006, at 51-52, 57. Congress specifically contemplated that Leadership Act funds would be spent not only to help its grantees fight HIV/AIDS, but also to "assist[ ] indigenous organizations in severely affected countries" in doing so, 22 U.S.C. § 7601(18); *see also* 22 U.S.C. § 7601(22)(F), and to improve coordination among NGO's and other entities working on the problem. 22 U.S.C. §§ 2151b-2(c)(3), (d)(7)(C); 22 U.S.C. § 7603(1).

In the face of this Congressional desire, Defendants' new guidelines make it dangerous at best, and potentially illegal, for grantees to affiliate with, or even work in coordination with, other U.S. and indigenous NGOs. For example, grantees risk running afoul of the guidelines if they locate their offices in the same building with, share employees or equipment with, or are associated in the public mind with an NGO that engages in research or advocacy regarding the legal approach to prostitution best calculated to help the fight against HIV/AIDS. They even risk running afoul of the guidelines if they work in coalition with an organization that engages in the restricted activities to too great an extent.[26] *See* USAID Guidelines, § 3(iii), at 4 (stating that "[f]actors relevant to the determination" of whether recipient is sufficiently separate from an affiliated organization include "the extent of ... restricted activities by the affiliate").

This broad proscription may prevent grantees from engaging in some of the affiliations in which they were expressly permitted to engage before the new guidelines were issued. Prior to issuance of the new guidelines, grantees could work with local organizations, and, so long as those organizations were legally separate, grantees did not have to worry that the organizations' activities would be imputed to them in any way. For example, earlier in this litigation Defendants assured the District Court that the activities of the Open Society Institute ("OSI")

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[26] There do not appear to be any limits on the organizations that can be considered affiliates. USAID notes that its guidelines are "not inconsistent" with a separate regulation that defines "affiliates" as follows: "(1) Either one controls or can control the other; or (2) A third party controls or can control both." USAID Guidelines p. 3 n.1. However, USAID leaves unclear whether other organizations can be deemed affiliates. HHS' guidelines make no reference to this definition.

would not be imputed to Plaintiff AOSI for purposes of 22 U.S.C. § 7631(f), because the two organizations are legally separate. JA 629-30. However, because AOSI and OSI share a U.S. address, have overlapping governance and similar names, and OSI staff provide accounting and other services to AOSI, there is a significant risk that they will be deemed affiliates under the new guidelines. *See* JA 231, 232. Thus, in order to comply with Defendants' broad proscription of affiliations with NGOs that engage in the disfavored speech, grantees must now maintain sufficient distance from all other NGOs, and scrutinize closely the activities of those NGOs with which they work, instead of working closely with those NGOs as contemplated by the Leadership Act.

Congress also intends that its foreign assistance funding to combat HIV/AIDS be spent in the most efficient manner possible. 22 U.S.C. § 2151b-2(d)(7)(B). *See also* 22 U.S.C. § 2151(a) (declaring that "development resources [should] be effectively and efficiently utilized" to meet federal development policy goals); S. Rep. No. 110-128 , at 33 (2007) (Senate Appropriations Committee urging that separation guidelines implementing Policy Requirement be based on faith-based model "so as to avoid requirements that waste resources that could otherwise be used to save lives."). Defendants' guidelines require the most onerous and inefficient separation regime imaginable – one which imposes severe financial and administrative burdens on grantees and their affiliates, and which Defendants themselves have rejected in the faith-based context as too burdensome. *See* discussion *supra* § II.B.2.

Because Defendants' guidelines conflict with Congress' specific intents to promote close collaboration among NGOs in the fight against HIV/AIDS, and to distribute funds in the most efficient and effective manner, Defendants' interpretation should be rejected. In its place, the Court should construe the statute as requiring recipients of Leadership Act funds to adopt a policy opposing the harms associated with prostitution, but permitting all other parts of the recipient organization to use non-government funds to engage in whatever speech they deem necessary.

CONCLUSION

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

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