08-4917-cv

To Be Argued By:
BENJAMIN H. TORRANCE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-4917-cv

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL,

Plaintiffs-Appellees,

—v.—

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, JULIE LOUISE GERBERDING, in her official capacity as

(*caption continued on inside front cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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Director of the U.S. Centers for Disease Control and Prevention, and her successors, MICHAEL O. LEAVITT, in his official capacity as Secretary of the U.S. Department of Health and Human Services, and his successors, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HENRIETTA FORE, in her official capacity as Administrator of the United States Agency for International Development, and her successors,

Defendants-Appellants.

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ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL,*

Plaintiffs-Appellees,

—v.—

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, JULIE LOUISE GERBERDING, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, AND HER SUCCESSORS, MICHAEL O. LEAVITT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND HIS SUCCESSORS, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HENRIETTA FORE, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, AND HER SUCCESSORS,

Defendants-Appellants.

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* InterAction, named as a plaintiff in the Second Amended Complaint (Joint Appendix ("JA") 1013), was erroneously omitted from this Court's official caption.

BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

Defendants (the "government") appeal from a preliminary injunction entered by the United States District Court for the Southern District of New York (Hon. Victor Marrero, J.) on August 8, 2008, reported at 570 F. Supp. 2d 533 (S.D.N.Y. 2008).

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act ("Leadership Act"), authorizing billions of dollars to combat the worldwide HIV/AIDS epidemic. Congress made extensive findings regarding the causes of the spread of HIV/AIDS, and analyzed many proposed means of preventing the disease's transmission. On that basis, Congress concluded that reduction of behavioral risks should be at the heart of the government's strategy. In particular, Congress found that the closely related practices of prostitution and sex trafficking were major causes of the spread of HIV/AIDS. Accordingly, Congress emphasized throughout the statute that a message promoting behavioral change—and, specifically, the eradication of prostitution and sex trafficking—was to be a centerpiece of the government's HIV/AIDS-prevention program. Thus, Congress placed conditions on Leadership Act funding in order to ensure that message was disseminated. One such condition requires that to receive funding, a non-governmental organization must have a policy opposing prostitution and sex trafficking.

The district court's preliminary injunction erroneously invalidates that reasonable condition. In speaking its own message, Congress may enlist others to speak on the government's behalf; when it does so, Congress may regulate what those private entities say or do not say. Thus, contrary to the district court's holding, the funding condition does not unconstitutionally compel speech or discriminate based on viewpoint; it merely reflects Congress's decision to subsidize speakers who will promote the government's message. Moreover, Congress may burden speech rights of those who choose to accept government funding, as long as there are adequate alternative channels for expression. Here, the government has published guidelines—nearly identical to those upheld by this Court in another case—that permit recipients to affiliate with organizations that engage in activities inconsistent with the policy required by the Leadership Act.

For all those reasons, the District of Columbia Circuit has upheld the Act's funding condition. This Court should do the same and reverse the preliminary injunctions.

Jurisdictional Statement

The district court had subject matter jurisdiction over this action under 28 U.S.C. § 1331, as plaintiffs' claims arise under the Constitution and laws of the United States. On October 6, 2008, the government timely filed a notice of appeal (JA 1046) from the district court's preliminary injunction order, entered on August 8, 2008 (Special Appendix ("SPA") 145). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

The district court granted a separate preliminary injunction in 2006, from which the government timely appealed. By order dated November 8, 2007, this Court remanded that case, but directed that "jurisdiction shall be returned to this Court upon a letter request from any party." *Alliance for Open Society International, Inc. v. USAID*, No. 06-4035-cv, 2007 WL 3334335, at *2 (2d Cir. Nov. 8, 2007). As the government has made such a request, this Court has jurisdiction to consider the appeal from the 2006 injunction.

Issues Presented for Review

1. Whether the district court erred in holding that two associations of non-governmental organizations have standing to sue because they suffered concrete injuries and individual participation of their members was not required.

2. Whether the district court erred in determining that the funding condition of 22 U.S.C. § 7631(f), now implemented by the agencies' guidelines, violates the First Amendment.

Statement of the Case

In 2005, Alliance for Open Society International Inc. ("AOSI") and Pathfinder International sued the government, alleging that 22 U.S.C. § 7631(f) violates the First Amendment and is unconstitutionally vague. Those plaintiffs moved for a preliminary injunction, which the district court granted in 2006. (JA 32, 635).*

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* The district court ruled that a third plaintiff, Open Society Institute, was not entitled to an injunction, as it did not receive funds under the Leadership

The government appealed. While the appeal was pending before this Court, two of the defendant agencies—the Department of Health and Human Services ("HHS") and United States Agency for International Development ("USAID")—issued guidance governing the implementation of the funding condition. That guidance permitted a funding recipient to affiliate with a separate organization that is not subject to the funding condition of § 7631(f) and therefore may engage in activities inconsistent with a policy opposing prostitution and sex trafficking. In light of the new guidance, this Court remanded the case to the district court. *AOSI*, 2007 WL 3334335, at *2.

On remand, plaintiffs moved to amend the complaint in order to add two more plaintiffs—Global Health Council ("GHC") and InterAction, each of which is an association of non-governmental organizations—and to preliminarily enjoin the government from enforcing § 7631(f) against those associations' members. (JA 658). By order entered August 8, 2008, the district court granted that motion. (SPA 145). The government now appeals that injunction, and reinstates the appeal from the 2006 injunction.

Statement of Facts

A. Legislative Background

The Leadership Act was enacted to address the global epidemic of HIV/AIDS. 22 U.S.C. § 7601. Congress and the President recognized that HIV/AIDS is a

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Act and therefore could not establish its standing to sue or that its claim was ripe. (SPA 139–42).

humanitarian crisis, with devastating consequences for poor and developing countries, and that it poses a serious international security threat by increasing political instability and decreasing the capacity to resolve conflicts. 22 U.S.C. § 7601(3)(A), (4)–(10); (JA 376). The Leadership Act is the primary component of the United States' "[e]mergency [p]lan" to fight HIV/AIDS abroad (JA 375)—a program that, after its 2008 reauthorization, has authorized $63 billion over ten years to combat the epidemic. 22 U.S.C. § 7671; Pub. L. No. 110-293, 122 Stat. 2918 (2008) ("Reauthorization Act").

1. Congressional Findings Regarding Prostitution

A cornerstone of the Leadership Act's strategy is the prevention of the transmission of HIV/AIDS, with particular emphasis on the reduction of behavioral risks. 22 U.S.C. § 7611(a)(12); H.R. Rep. No. 108-60, at 26 (Apr. 7, 2003) ("importance of behavior change . . . as the foundation of efforts to fight AIDS"). As part of that focus on behavioral risks, eradication of prostitution is central to the government's efforts. In the 2003 Leadership Act, Congress directed that "the reduction of HIV/AIDS behavioral risks shall be a priority of all prevention efforts in terms of funding, educational messages, and activities by . . . eradicating prostitution, the sex trade . . . and sexual exploitation of women and children." 22 U.S.C. § 7611(a)(4) (2006) (amended in 2008 by Reauthorization Act). In reauthorizing the Act in 2008, Congress continued to require that "the reduction of HIV/AIDS behavioral risks [be] a priority of all prevention efforts"; emphasized "the risks of procuring sex commercially," "the need to end violent behavior

toward women and girls," and the importance of "eliminat[ing] . . . sexual exploitation of women and children"; and mandated "comprehensive programs to promote alternative livelihoods, safety, and social reintegration strategies for commercial sex workers and their families." 22 U.S.C. § 7611(a)(12)(F), (H), (J).

Congress expressly found that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence" are "causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. § 7601(23). Congressional hearings showed both the high incidence of HIV among prostitutes and that the existence of prostitution fuels the demand for trafficking of women and children. S. Hrg. 108-105, Hearing Before Subcommittee on East Asian and Pacific Affairs of Senate Committee on Foreign Relations, at 18–19 (Apr. 9, 2003) (testimony of J. Miller, State Department) ("[T]here wouldn't be sex trafficking without prostitution."). Moreover, in hearings on international slavery and sex trafficking held contemporaneously with consideration of the Leadership Act, Congress learned that hundreds of thousands of women and girls had been trafficked to countries where they were "beaten, raped, [and] infected with HIV/AIDS so that organized crime" could profit, and that young children were being "targeted as sexual partners in order to reduce the risk of contracting HIV/AIDS" or raped by those "who believe that sex with a virgin will cure them from HIV/AIDS." S. Hrg. 108-105, at 4 (testimony of J. Miller); H.R. Hrg. 108-137, Hearing Before Subcommittee on Human Rights and Wellness, House Committee on Government Reform, at 96 (Oct. 29, 2003) (testimony of M. Mattar). For such victims of prostitution and sex trafficking, education-based methods of combating HIV/

AIDS transmission, such as campaigns to promote abstinence, monogamy, and condom use, are ineffective: as Congress found, the "[v]ictims of coercive sexual encounters do not get to make choices about their sexual activities." 22 U.S.C. § 7601(23); *accord* S. Hrg. 108-105, at 29 (testimony of G. Haugen).

Furthermore, in enacting the Leadership Act, Congress was guided by the President's National Security Directive relating to trafficking in persons. (JA 379–80). The President determined that "[p]rostitution and related activities, which are inherently harmful and dehumanizing, contribute to the phenomenon of trafficking in persons." (*Id.*) The President deplored the "exposure of trafficked people to abuse, deprivation and disease, including HIV," as a result of these practices, and committed the government to a policy of eradication of prostitution and sex trafficking. (*Id.*)

Accordingly, Congress unambiguously called for the elimination of prostitution and sex trafficking as part of the United States' fight against HIV/AIDS: "Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices." 22 U.S.C. § 7601(23).

2. Restrictions on Leadership Act Funds Related to Prostitution and Sex Trafficking

In light of its findings on the links between prostitution, sex trafficking, and HIV/AIDS, Congress imposed two specific limitations on government-funded HIV/AIDS programs, to ensure the efficacy and integrity of those programs and require them to prioritize the reduction of behavioral risks, and to prevent dilution of

the government's anti-prostitution, anti-sex-trafficking message. First, under 22 U.S.C. § 7631(e), no Leadership Act funds "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking."* Second, under 22 U.S.C. § 7631(f), no funds "may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking," with the exception of four specified organizations.

B. The Government's Implementation of the Leadership Act

Funds authorized by the Leadership Act are used by USAID and HHS, as well as other governmental agencies, to provide HIV/AIDS-related programs and services worldwide. Congress directed that these programs and services be provided through non-governmental organizations, public international organizations, and other entities. 22 U.S.C. §§ 7611(a)(4)(I), (9), 7621.

USAID and HHS provide HIV/AIDS programs and services under the Leadership Act by funding non-governmental organizations. (JA 416–87). Both USAID and HHS have implemented 22 U.S.C. § 7631(e) and (f) by requiring that all funding arrangements include a provision recognizing that "[t]he United States Government is opposed to prostitution and related activities"; that no funds may be used to "promote or advocate the legalization or practice of prostitution or sex traffick-

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* The restriction does not bar the use of federal funding for palliative care, treatment, or certain medicines and supplies. 22 U.S.C. § 7631(e).

ing"; and that a non-governmental organization that enters into an agreement or sub-agreement to receive funding must have a policy explicitly opposing prostitution and sex trafficking. (JA 381–88 (USAID Acquisition & Assistance Policy Directive (AAPD) 05-04, at 5); JA 390–91 (HHS Notice, 70 Fed. Reg. 29,759 (May 24, 2005))). Prime recipients of USAID and HHS funding are required to include this provision in any sub-agreements used to provide the funded programs or services. (*Id.*) Finally, the prime recipient of funds is required to certify that it complies with the conditions on the use of government funds. (JA 386, 391).

On July 23, 2007, USAID and HHS each issued program-integrity guidance specifying that a recipient of Leadership Act funds may maintain an affiliation with an organization that lacks the policy required by § 7631(f), as long as the affiliation does not threaten the integrity of the government's programs or its anti-prostitution, anti-sex-trafficking message. (JA 1007 (USAID AAPD No. 05-04 Amend. 1 (July 23, 2007)); 1009 (72 Fed. Reg. 41,076 (July 23, 2007))). HHS issued a final rule—filed for public display on December 19, 2008, published on December 24, 2008, and taking effect January 20, 2009—implementing its guidance as a formal agency regulation. (SPA 16 (73 Fed. Reg. 78,997 (Dec. 24, 2008))). USAID continues to adhere to its guidance.

The program-integrity regulation and guidance (collectively, the "guidelines") are expressly modeled on criteria upheld in a similar context by this Court in *Velazquez v. Legal Services Corp. ("Velazquez I")*, 164 F.3d 757, 763 (2d Cir. 1999), *aff'd in part*, 531 U.S. 533 (2001), and *Brooklyn Legal Services Corp. v. Legal*

Services Corp., 462 F.3d 219, 232 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 44 (2007). The guidelines set forth criteria the agencies will use to determine whether funding recipients have the requisite "objective integrity and independence from any organization that engages in activities inconsistent with a policy opposing prostitution and sex trafficking." (SPA 20 (73 Fed. Reg. 79,001)).* Specifically, the guidelines state that the requisite independence will be found for an affiliated organization if:

> (1) The organization is a legally separate entity;
>
> (2) The organization receives no transfer of Leadership Act funds, and Leadership Act funds do not subsidize activities inconsistent with a policy opposing prostitution and sex trafficking; and
>
> (3) The recipient is physically and financially separate from the organization. Mere bookkeeping separation of

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* The two agencies' guidelines differ in that the USAID guidance refers to an "affiliated organization" where the HHS regulation refers to an "organization." *Compare* SPA 20 (HHS) *with* SPA 24 (USAID) (also defining term "affiliates"). As explained in the HHS notice of final rule, HHS determined that "the term 'affiliate' is not necessary to the rule" and thus deleted it from its prior guidance. (SPA 18). While this brief quotes the final HHS rule, the meaning of the agencies' rules is essentially the same.

Leadership Act funds from other funds is not sufficient. [The agency] 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. Factors relevant to this determination shall include, but will not be limited to, the following:

(i) The existence of separate personnel, management, and governance;

(ii) The existence of separate accounts, accounting records, and timekeeping records;

(iii) The degree of separation from facilities, equipment and supplies used by the organization to conduct activities inconsistent with a policy opposing prostitution and sex trafficking, and the extent of such activities by the organization;

(iv) The extent to which signs and other forms of identification that distinguish the recipient from the organization are present, and signs and materials that could be associated with the organization or activities inconsistent with a policy opposing prostitution and sex trafficking are absent; and

> (v) The extent to which [the agency], the U.S. Government and the project name are protected from public association with the organization and its activities inconsistent with a policy opposing prostitution and sex trafficking in materials such as publications, conferences and press or public statements.

(*Id.*; SPA 24–25).

C. Prior Proceedings

1. Plaintiffs' Initial Motions for Preliminary Injunctions

In 2005, plaintiffs AOSI, Open Society Institute, and Pathfinder sued the government. (JA 16–31, 336–59). Plaintiffs challenged the funding condition of § 7631(f) requiring a policy explicitly opposing prostitution and sex trafficking. (JA 357–58).*

AOSI and USAID are parties to a cooperative agreement under which AOSI receives Leadership Act funding to operate a program aimed at stopping the spread of HIV/AIDS in Central Asia. (JA 351). As a condition of receiving continued funding, AOSI signed a certification in August 2005, affirming its compliance with the funding condition. (JA 352). Pathfinder receives funding under the Leadership Act from both

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* Plaintiffs did not challenge the requirement in 22 U.S.C. § 7631(e) that Leadership Act funds may not be used to promote or advocate the legalization or practice of prostitution or sex trafficking. (JA 342).

USAID and HHS. (JA 339). In July 2005, Pathfinder adopted a policy explicitly opposing prostitution in order to continue receiving funds. (JA 353).

2. The 2006 Preliminary Injunction

AOSI and Pathfinder moved for preliminary injunctions against the government's enforcement of § 7631(f)'s funding condition. (JA 5, 6, 33–35). The district court granted the motions on plaintiffs' as-applied challenge to the funding condition. (JA 543–45). The district court recognized that Congress has broad authority under its spending powers to define the limitations of its program. Nonetheless, the district court held that the funding condition likely violated plaintiffs' First Amendment rights by restricting their privately funded speech, leaving them no alternative means of communicating countering viewpoints and compelling them to adopt an organization-wide policy. (JA 545, 571–75, 629–30).

Although the district court held strict scrutiny inapplicable because the funding condition was not a direct regulation of speech, the court applied heightened scrutiny and required the government to show that the funding condition is "narrowly tailored to fit Congress's intent" and that no "less restrictive means" were available. (JA 578–80, 608–17). The district court recognized the government's interest in clearly communicating its message, particularly in the field of international relations. (JA 604–08, 620). However, the district court held that the condition was not narrowly tailored to meet that interest, relying substantially on the funding condition's exemption of four organizations. (JA 611–16). The district court further held that the

government could preserve the clarity of its message by requiring that recipients of government funding segregate their government-financed activities from those privately conducted, and by requiring disclaimers for privately funded projects. (*Id.*). Finally, the district court found that the government did not show why permitting funding recipients to refrain entirely from taking a position regarding prostitution and sex trafficking would undermine the government's message. (JA 616).

3. The Government's 2006 Appeal

The government appealed the 2006 preliminary injunction. While the appeal was pending, the agencies issued the guidance pertaining to organizational affiliates, described above. This Court found that with the new guidance in place, "the case that was before the District Court is substantively different than the case as it stands today and . . . new fact-finding may be required to resolve the dispute." *AOSI v. USAID*, 2007 WL 3334335, at *2 (citing *Brooklyn Legal Services*, 462 F.3d at 231). For that reason, the Court remanded the matter for the district court "to determine in the first instance whether the preliminary injunction should be granted in light of the new guidelines." *Id.*

4. The 2008 Preliminary Injunction

After remand, plaintiffs moved to amend the complaint to add two new plaintiffs, GHC and InterAction: umbrella associations of non-governmental organizations, some of whose members receive funding under the Leadership Act. Plaintiffs simultaneously moved for

a preliminary injunction prohibiting enforcement of § 7631(f) against those associations' members. (JA 658).

On August 8, 2008, the district court granted leave to add the new plaintiffs and granted a preliminary injunction in their favor. (SPA 145–81). The court first ruled that the two associations had standing to sue. (SPA 152–67). The court determined that at least one member of each association had suffered an injury in fact by being forced to choose between forgoing Leadership Act funds and adopting the required policy. (SPA 154–57). In addition, the court ruled that individual participation of the associations' members was not necessary. (SPA 157–67). Although the court found "some merit" in arguments that organization-specific evidence would be required to establish the burden imposed on recipients, it concluded that plaintiffs' vagueness and compelled-speech claims would not need individualized proof. (SPA 163–64). Moreover, the court ruled that the program-integrity guidelines impose a common burden on the affected organizations such that associational standing was appropriate; in so doing, the court noted that the prudential limitation on associational standing was "left to the discretion of the court" and could be "relaxed because of the important societal interests that are implicated." (SPA 158, 164–67).

Reaching the merits, the district court reiterated its 2006 conclusion that § 7631(f) impermissibly compels speech, and determined that the affiliate guidelines do not alleviate that constitutional flaw. (SPA 168–69). On the question of whether the funding condition imposes an unconstitutional condition on the receipt of government benefits, the court again concluded that heightened scrutiny and a less-restrictive-means test were

appropriate, despite the rejection of that standard in *Brooklyn Legal Services*. (SPA 169–73). Applying heightened scrutiny, the district court held that the statute's exemption of four organizations from the funding condition undercut the government's interest in ensuring the uniformity of its message. (SPA 173). The court also noted other differences between the Leadership Act funding condition and those at issue in *Brooklyn Legal Services*, particularly that the associations here operate internationally, and that the Leadership Act guidelines do not "allow for control at the board level." (SPA 175). The court distinguished a ruling by the District of Columbia Circuit upholding § 7631(f), on the ground that that court "was not aware of the restrictions placed on recipients" by the affiliate guidelines. (SPA 175–76 (citing *DKT International, Inc. v. USAID*, 477 F.3d 758 (D.C. Cir. 2007))). The district court then determined that the restrictions upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), constitute a less-restrictive alternative means for the government to accomplish its goals. (SPA 176–79). The court therefore found that plaintiffs had demonstrated a likelihood of success on the merits and were entitled to an injunction. (SPA 179). Having so ruled, the court declined to consider plaintiffs' vagueness claims. (*Id.*).*

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* The court also ruled that DKT International—a member of plaintiff GHC and the plaintiff in *DKT International, Inc. v. USAID*, in which the D.C. Circuit upheld the funding condition—was barred by res judicata from benefitting from the newly entered injunction. (SPA 179–80). Plaintiffs have not appealed that ruling.

The government now appeals the 2008 injunction, and reinstates its appeal of the 2006 injunction.

Summary of Argument

In passing the Leadership Act, Congress repeatedly emphasized the importance of behavioral change as a means to combat HIV/AIDS. More specifically, Congress condemned prostitution and sex trafficking, finding them to be causes of the spread of the epidemic and seeking their eradication. The statute itself thus conveys a strong anti-prostitution, anti-sex-trafficking message, and calls for the government and its partners to disseminate that same message as part of the fight against HIV/AIDS. As such, Congress required that any organization that chooses to accept Leadership Act funds to provide anti-HIV/AIDS programs and services on the government's behalf must "have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. § 7631(f).

The district court erred in striking down that requirement. As an initial matter, the two associational plaintiffs lack standing. The associations' members (including the two individual plaintiffs) have not suffered an actual or imminent injury. Under the guidelines implementing the Leadership Act, funding recipients may affiliate with other organizations, to ensure there is an alternative channel for expression inconsistent with § 7631(f). But none of the plaintiffs have even attempted to avail themselves of this channel; their alleged injuries are therefore conjectural and insufficient to support standing. *See infra* Point I.A. Additionally, the associations lack standing because this case requires the participation of individual

recipient organizations. Plaintiffs claim that the guidelines implementing the alternative channel of communication will impose prohibitive burdens on those organizations, a claim that requires each such organization to prove the degree of hardship it will suffer. Thus, under the law governing associational standing, the associations cannot bring this action on behalf of their members. *See infra* Point I.B.

The district court's decision also fails on the merits, contradicting the law of this Court and a decision by another circuit expressly upholding the statute at issue. When, as here, Congress enacts a program to convey its own message, it has broad leeway to regulate the program-related expression of those whom it enlists to speak that message on its behalf. *See infra* Point II.A. Moreover, when acting under the spending clause of the Constitution, Congress is free to attach conditions to the benefits it disburses, including conditions that burden rights of expression, as long as some alternative channel for expression exists. *See infra* Point II.B.1. The district court erred in concluding that the conditions Congress imposed here are unconstitutionally viewpoint-discriminatory or subject to heightened scrutiny, a standard this Court has rejected. *See infra* Points II.B.2, II.E. The alternative channel for expression provided by the agencies' guidelines is nearly identical to similar rules upheld by this Court, and should be upheld here for the same reasons. *See infra* Point II.C. Nor does the statute unconstitutionally compel speech. Congress offered to fund organizations to help convey the government's message, and reasonably required that recipients of that funding agree with that message to prevent it from being distorted. Any recipient that does not wish to adopt the government's

message may either decline the funding or avail itself of the ability to form an affiliate organization to engage in other expressive activities. *See infra* Point II.D.

For all those reasons, the district court's injunctions should be reversed.

ARGUMENT

Standard of Review

This Court reviews the grant of a preliminary injunction for abuse of discretion. *Malkentzos v. DeBuono*, 102 F.3d 50, 54 (2d Cir. 1996). A district court abuses its discretion when it commits an error of law, and this Court reviews legal questions *de novo*. *Id.*

"A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008) (internal quotation marks and citations omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 129 S. Ct. 365, 374 (2008). The rigorous likelihood-of-success standard always applies when a party seeks to preliminarily enjoin the enforcement of governmental rules, *Velazquez I*, 164 F.3d at 763;* in such a case, a

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* Although this Court has permitted a movant to obtain a preliminary injunction under a more lenient "serious questions" test in some circumstances, the viability of that standard is in doubt after *Munaf* and

plaintiff must, "by a *clear showing*, carr[y] the burden of persuasion," and must "establish a clear or substantial likelihood of success on the merits." *Sussman v. Crawford*, 488 F.3d 136, 139–40 (2d Cir. 2007).

POINT I

THE ASSOCIATIONAL PLAINTIFFS LACK STANDING

After remand, plaintiffs moved to amend their complaint to add two associations of non-governmental organizations as plaintiffs: InterAction and GHC. The district court erred in granting a preliminary injunction to those new plaintiffs, because they lack standing and, accordingly, cannot establish likelihood of success. *Granite State Outdoor Advertising, Inc. v. Town of Orange*, 303 F.3d 450, 451 (2d Cir. 2002) (court's lack of jurisdiction "negate[s] litigant's chance of success" necessary for injunction).

An association attempting to bring suit on behalf of its members must establish standing by proving that

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor

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Winter. *See FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1042–43 (D.C. Cir. 2008) (Tatel, J., concurring); *id.* at 1060–61 (Kavanaugh, J., dissenting). Regardless, when the injunction sought is against enforcement of governmental rules, the stricter likelihood-of-success requirement undoubtedly applies.

> the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977); *accord Bano v. Union Carbide Corp.*, 361 F.3d 696, 713 (2d Cir. 2004). Associational standing is a "narrow exception" from the ordinary rule against third-party standing. *Bano*, 361 F.3d at 715.

A. The Alleged Injuries Are Conjectural

Under the first prong of the *Hunt* test for associational standing, the associations must show that their members would have standing to sue in their own right —as must the individual plaintiffs. To establish standing, a party must "allege, and ultimately prove, that he has suffered an injury-in-fact that is fairly traceable to the challenged action of the defendant, and which is likely to be redressed by the requested relief." *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted).

Here, the nature and scope of the alleged injuries are hypothetical. Plaintiffs claim they will be burdened in creating affiliate organizations pursuant to the agency guidelines. (JA 1040–42). But plaintiffs have not alleged that any one of them has ever attempted to form an affiliate to comply with the guidelines, or even that an organization would do so if not for the allegedly prohibitive burdens imposed by those guidelines. Plaintiffs have failed to meet even the minimal require-

ment of pleading that they are "able and ready" to avail themselves of the alternative avenues for communication available to them. *Gratz v. Bollinger*, 539 U.S. 244, 260–62 (2003). The asserted injuries, therefore, are conjectural rather than "actual or imminent." *Lujan*, 504 U.S. at 560.

Instead, plaintiffs' sole allegation of injury is that some funding recipients have unwillingly complied with the funding condition and adopted a policy against trafficking and prostitution. (JA 1038–40). But with the program-integrity guidelines in place, absent any attempt by plaintiffs to comply with the guidelines and "avail[] themselves of the opportunities provided . . . to obtain . . . relief," plaintiffs "cannot at this juncture legitimately raise complaints . . . about the manner in which the challenged provisions . . . have been or will be applied in specific circumstances." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (rejecting constitutional challenge due to failure to seek administrative relief).* Plaintiffs thus lack standing.

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* Although *Hodel* addressed the jurisdictional requirement of ripeness rather than standing, "the two doctrines are closely related, most notably in the shared requirement that the injury be imminent rather than conjectural or hypothetical." *Brooklyn Legal Services*, 462 F.3d at 225.

B. Individual Participation of the Association Members Is Required

To satisfy the third prong of the *Hunt* test,* plaintiffs must show that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343; *accord Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993).

> [A]n association [does not] automatically satisf[y] the third prong of the *Hunt* test simply by requesting equitable relief rather than damages. The organization lacks standing to assert claims of injunctive relief on behalf of its members where "the fact and extent" of the injury that gives rise to the claims for injunctive relief "would require individualized proof," or where "the relief requested [would] require[] the participation of individual members in the lawsuit."

Bano, 361 F.3d at 714 (quoting *Warth v. Seldin*, 422 U.S. 490, 515–16 (1975), and *Hunt*, 432 U.S. at 343); *accord Rent Stabilization*, 5 F.3d at 596.

Individualized proof is required in this case. As this Court recognized in its remand order, the predominant issue in this matter now that the agencies have issued their program-integrity guidelines is whether the

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* The government does not contest that plaintiffs have sufficiently pleaded the second prong of the *Hunt* test at this pre-discovery stage of the litigation.

statute and those guidelines meet the requirements of *Brooklyn Legal Services*, 462 F.3d 219, detailed *infra* Point II.C. *AOSI*, 2007 WL 3334335, at *1–*2. Thus, this Court remanded for the district court to determine "whether the preliminary injunction should be granted in light of the new guidelines," a task that requires an assessment "'*as a factual matter* [of whether] the regulations have not left plaintiffs adequate alternative channels for protected expression.'" *Id.* at *2 (quoting *Brooklyn Legal Services*, 462 F.3d at 231 (alterations omitted)). Plaintiffs were thus required on remand to show that the "restrictions . . . unduly burden the ability of an organization to set up adequate alternative channels for protected expression such that [it is] in effect precluded from doing so." *Brooklyn Legal Services*, 462 F.3d at 232.

That fact-specific determination must be made for each allegedly aggrieved funding recipient. Indeed, the arguments advanced by GHC and InterAction and accepted by the district court compel that conclusion. The associations contend that their members would be harmed by a number of specific burdens allegedly imposed on them by the guidelines. In particular, they claim that, in some countries, non-governmental organizations must navigate onerous bureaucracies to register and operate. (JA 1040–42). Putting aside the fact that none of the associations' members has apparently tried to do so, *see supra* Point I.A, any proof that this hurdle is so burdensome that it "in effect preclude[s]" use of affiliates as an alternative channel of communication, *Brooklyn Legal Services*, 462 F.3d at 232, will necessarily require organization-specific evidence. A court cannot determine the burden on a funding recipient without considering, at a minimum,

what countries that organization operates in; the degree to which the organization wishes to communicate in that country in a manner inconsistent with an anti-prostitution, anti-sex-trafficking policy; and the actual legal and practical requirements of operating an affiliate in that country. As stated in *Brooklyn Legal Services*, the Court must "analyze . . . specific financial [and] other burden[s]" to ascertain whether the program-integrity guidelines are unconstitutionally applied to any particular group. 462 F.3d at 233. That analysis depends on facts "unique to each [association member]." *Rent Stabilization*, 5 F.3d at 597. Because each affected organization must show that the guidelines unconstitutionally burden its speech under the specific circumstances in which it operates, the associations lack standing.

The associations also claim that some countries may refuse to issue visas or work permits for a separate organization's personnel; that in some countries it may be difficult to open separate bank accounts; and that in some countries it may be difficult to obtain separate offices and equipment. (JA 1040–42). Those arguments fail for the same reason: they depend on showings that will vary from organization to organization, and therefore individual proof is required. Additionally, they fail because the program-integrity guidelines do not actually require separate personnel, separate accounts, or separate offices or equipment; those are simply "[f]actors relevant to th[e] determination" of whether funding recipients and their affiliates are sufficiently separate, a determination made "on a case-by-case basis and based on the totality of the facts." (SPA 20, 25). Separate personnel and management, separate accounts, and separate facilities are factors to

be considered, but "[t]he presence or absence of any one or more factors will not be determinative." (*Id.*). Thus, these alleged barriers to forming separate affiliates not only require individualized proof, they are also speculative.

Instead of assessing individual burdens on the associations' members in accordance with this Court's remand order, the district court merely stated that individualized participation is not required because the member organizations share a "common burden" of compliance with the guidelines, and "the issue in this case is whether the baseline burden enumerated in the Guidelines imposes unconstitutional conditions upon the protected speech of Plaintiffs." (SPA 164–65). But the court never articulated what it considered that "baseline burden" to be, or why it might amount to a constitutional injury. To the contrary, this Court in *Velazquez I* held that nearly identical program-integrity guidelines were constitutional "in at least some cases," thus rejecting any argument that merely requiring organizational separation in these circumstances—the requirement that the district court considered the "common burden of complying with the Guidelines"—could alone violate the Constitution. 164 F.3d at 765–67. The "baseline burden" relied on by the district court therefore does not constitute sufficient legal injury for the associations' members to establish standing.

The district court also based its holding on its view that the "third [*Hunt*] prong is a prudential requirement left to the discretion of the court, not a constitutional requirement," and, similarly, that "the prudential limitations of associational standing are generally relaxed because of the important societal interests that

are implicated." (SPA 158, 165–66). Both conclusions are legally incorrect. The third *Hunt* prong is indeed a prudential rather than constitutional limitation on standing—that is, one of "several judicially self-imposed limits on the exercise of federal jurisdiction" rather than one of the "irreducible" requirements of Article III. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551, 555 (1996). But while a "prudential" limitation on standing, unlike a constitutional limit, may be abrogated by Congress, its application is not subject to the district court's discretion:

> [T]he fact that the limitations of the standing doctrine . . . are termed "prudential limitations" does not mean that the lower courts have discretion as to whether to apply these limitations or not. The Supreme Court has announced these prudential limitations in its supervisory capacity over the federal judiciary and . . . there is a nondiscretionary duty to apply the limitations.

Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 137 n.37 (D.C. Cir. 1977). The district court thus erred in its case-specific discretionary approach, specifically in "balanc[ing]" the "interests in judicial economy and protecting the right to free expression . . . against the restriction of associational standing." (SPA 167; *accord* SPA 165).

Similarly, the court's ruling that prudential limitations on standing are "generally relaxed" in First Amendment cases is incorrect. The district court based that conclusion on *Secretary of State of Maryland v.*

Joseph H. Munson Co., 467 U.S. 947, 956–57 (1984). But *Munson* merely reiterated the established First Amendment overbreadth exception to the prudential rule against third-party standing; it did not state that prudential standing requirements are "generally relaxed" in any other context. Indeed, this Court has denied an association standing on behalf of its members based on the third *Hunt* prong in a First Amendment case. *Irish Lesbian & Gay Organization v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998). Contrary to the district court's holding, *Munson*'s rationale reinforces the need for application of the third *Hunt* prong: in that case, the Court relaxed the prudential limit against third-party standing because "practical obstacles [would] prevent a party from asserting rights on behalf of itself," 467 U.S. at 956, but in a case involving the third *Hunt* requirement the opposite is true: practical obstacles—the need for individualized proof—prevent the association from asserting the rights of its members. In such a case, where "the involvement of individual members of an association is necessary . . . [there is] no sound reason to allow the organization standing to press their claims," and thus "no reason to relax [prudential standing requirements]." *Bano*, 361 F.3d at 715.

Finally, the district court held that the associations' compelled-speech and vagueness claims do not require individualized proof. (SPA 163–64, 166). But the court never reached the vagueness claims, and whatever standing the plaintiffs have to raise that argument is irrelevant to their standing to raise others. *Davis v. FEC*, 128 S. Ct. 2759, 2769 (2008) (plaintiff must demonstrate standing for each claim). As for the compelled-speech arguments, as explained below, *infra* Point II.D, the purported compulsion of speech is also

affected by the program-integrity guidelines, and thus requires individualized proof of the burden the guidelines impose.

For all those reasons, the associations cannot demonstrate their standing to sue, and the preliminary injunction should have been denied.

POINT II

THE FUNDING CONDITION AS IMPLEMENTED BY THE GOVERNMENT DOES NOT VIOLATE THE FIRST AMENDMENT

When Congress distributes funding or other government benefits to private parties, it retains broad power under the spending clause of the Constitution to attach conditions to those benefits—including conditions that may burden the recipients' freedom of expression. Congress's power is even greater when the government enlists those recipients as part of a program to convey the government's own message; in that case, Congress is entitled to require the recipients to adopt and support the government's policy.

Here, Congress made clear its intention to convey a message strongly condemning prostitution and sex trafficking, and authorized Leadership Act funding as part of its broad spending power. Moreover, by implementing guidelines nearly identical to those upheld by this Court, the government has provided an alternative channel for expression by funding recipients, alleviating any burden on their rights to free expression. For those reasons, as the District of Columbia Circuit has held, the Leadership Act is permissible under the First Amendment.

Nevertheless, the district court essentially invalidated the statute on its face. Despite this Court's remand order suggesting that fact-finding is required to determine the extent of the actual burden (if any) on plaintiffs, the district court declined to consider the particular circumstances faced by each funding recipient. Instead, the court ruled that the Leadership Act unconstitutionally compels speech—disregarding repeated precedent that the government, in conveying its own message, may selectively fund messages it agrees with, and may take reasonable steps to ensure its own message is not distorted. Similarly, the district court further erred in holding that the statute discriminates based on viewpoint, because the government may favor a message when it is the speaker. And the court was incorrect in holding that the funding condition is not the least restrictive means to advance the government's interests, a standard this Court has expressly rejected in a similar case. Finally, the court erred in determining that the guidelines allowing recipients' affiliates to express views contrary to the government's policy—guidelines modeled on those upheld by this Court and the Supreme Court—impose undue burdens on recipients, without considering any evidence regarding the supposed hardships suffered by plaintiffs.

Those rulings were inconsistent with governing precedent, and for the following reasons should be reversed.

A. Congress May Regulate the Content of Expression by Speakers Enlisted to Convey the Government's Message

A central component of Congress's efforts embodied in the Leadership Act is a message: that prostitution and sex trafficking are causes of the spread of HIV/AIDS and should be eradicated. Congress specifically designated the reduction of those and other behavioral risks as "a priority of all prevention efforts," 22 U.S.C. § 7611(a)(12), and sought to advance to the greatest extent possible its message about eradicating prostitution and sex trafficking, *id.* § 7601(23); *see also id.* §§ 2151b-2(d)(1)(A); 7101(b)(2), (11), (22). To do so, Congress chose to enlist the recipients of Leadership Act funding to disseminate its message; to ensure that the message was conveyed effectively, Congress required that those recipients have a policy that comports with the government's anti-prostitution, anti-sex-trafficking message. That funding condition thus furthers the government's message and guards against its dilution and distortion, and is therefore permissible under the First Amendment.

As the Supreme Court has explained, the government is "permitted . . . to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger v. University of Virginia*, 515 U.S. 819, 833 (1995) (citing *Rust*, 500 U.S. at 194, 196–200). Congress may create a mechanism to "use[] private speakers to transmit specific information pertaining to [the government's] own program." *Id.* In such a case, "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it

wishes." *Id.* That is no less true when the government conveys its message through third parties: "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.*; *accord Rust*, 500 U.S. at 193 ("Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest"); *DKT*, 477 F.3d at 762 ("[T]he government may . . . constitutionally communicate a particular viewpoint through its agents and require those agents not convey contrary messages. . . . [I]t follows that in choosing its agents, the government may use criteria to ensure that its message is conveyed in an efficient and effective fashion.").

The ability to regulate the expression of those who speak the government's message follows from the more general principle that the government may restrict the private speech of those working on its behalf in order to protect the efficiency and integrity of public services. "[T]he efficient provision of government services" requires the government to have "a significant degree of control" over the "words and actions" of those who act for it. *Garcetti v. Ceballos*, 547 U.S. 410, 418–19 (2006) (government employees); *accord Board of County Commissioners v. Umbehr*, 518 U.S. 668, 676–77 (1996) (government contractors). That applies not only to the official speech of government employees (which enjoys no First Amendment protection at all), but to private speech or conduct unrelated to the provision of government services if it threatens the government's ability to "operate efficiently and effectively." *Garcetti*, 547 U.S. at 418–19. In this context, the courts balance the

government's interests in the efficiency and effectiveness of its operations against the citizen's rights to comment on matters of public concern, *id.* at 417 (citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)), while "consistently giv[ing] greater deference to government predictions of harm" than when the speech of the public is at issue, *Umbehr*, 518 U.S. at 676 (internal quotation marks omitted).

The government's need and ability to regulate the expression of those who speak on its behalf is heightened when the message is disseminated abroad, where there is a special need to prevent those who serve as the United States' representatives from undermining the government's mission. In general, government actions in the field of foreign affairs are accorded great latitude. *Haig v. Agee*, 453 U.S. 280, 292, 307–08 (1981). Specifically, in foreign affairs the government speaks "not only with its words and its funds, but also with its associations." *DKT Memorial Fund, Inc. v. USAID*, 887 F.2d 275, 290–91 (D.C. Cir. 1989); *see Palestine Information Office v. Schultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (in applying constitutional scrutiny, courts defer to political branches' evaluation of interests in foreign relations and selection of means to further those interests). The government's interests in controlling its representatives thus carry extra weight abroad, and are entitled to additional leeway. *DKT*, 477 F.3d at 762.

Applied to this case, these principles require the Leadership Act's funding condition to be upheld. The statute promotes a governmental message to further a governmental program to combat HIV/AIDS. As the D.C. Circuit recognized, one of the means the government uses to fight that epidemic

> is for the United States to speak out against legalizing prostitution in other countries. The Act's strategy in combating HIV/AIDS is not merely to ship condoms and medicine to regions where the disease is rampant. Repeatedly the Act speaks of fostering behavioral change, *see, e.g.*, 22 U.S.C. § 7601(22)(E), and spreading "educational messages," *id.* § 7611(a)(4).

Id. at 761. Thus, at the center of Congress's anti-HIV/AIDS strategy is a message conveyed by the government, in favor of behavioral change and, concomitantly, against sex trafficking and prostitution. *Id.* The *DKT* court's conclusions in that regard are amply supported by Congress's findings detailed above in the Statement of Facts Part A.1, and by its express pronouncements that "the reduction of HIV/AIDS behavioral risks [must be] a priority of all prevention efforts," 22 U.S.C. § 7611(a)(12); that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence" are "causes of and factors in the spread of the HIV/AIDS epidemic," *id.* § 7601(23); and, most explicitly, "[p]rostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices," *id.*

Having chosen to propagate its message through third parties, Congress is entitled to "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger*, 515 U.S. at 833. Congress has done so by requiring that recipients of Leadership Act funding

have a policy that—like the government's policy expressed in 22 U.S.C. § 7601(23)—explicitly opposes prostitution and sex trafficking. The policy requirement aims only at recipients' "speech at odds with the values Congress was seeking to advance through its grant program," *Velazquez I*, 164 F.3d at 766, and is therefore "legitimate and appropriate" under the First Amendment.

B. Congress May Limit Relevant Expression as a Condition of Funding a Federal Program

1. Congress Has Broad Powers to Impose Funding Conditions

Even when dissemination of a message is not integral to the government's program, Congress has broad power under the spending clause of the Constitution,* and in exercising that power may burden the speech rights of funding recipients to a far greater degree than it may restrict the rights of the general public. The Leadership Act's funding condition falls well within that power, and should be upheld on that ground as well.

Congress may "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotation marks omitted). The constitutional limitations on Congress's exercise of the spending power "are less exacting than those on its authority to regulate directly." *Id.* at 209; *accord*

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* U.S. Const. art. I, § 8, cl. 1.

National Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998). Thus, "Congress may attach conditions on the receipt of federal funds" to accomplish particular objectives, even if the Constitution bars Congress from imposing the same conditions through direct government regulation. *Dole*, 483 U.S. at 206–07. Those who do not wish to comply with the conditions may avoid them by declining the funds. *Grove City College v. Bell*, 465 U.S. 555, 575 (1984) (rejecting First Amendment challenge because "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that [recipients] are not obligated to accept. [The recipient] may terminate its participation in the . . . program and thus avoid the requirements . . . ." (citation omitted)); *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582, 596 (1983) (plurality) ("receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt"); *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (spending legislation "is much in the nature of a contract: in return for federal funds, [recipients] agree to comply with federally imposed conditions").

The government does not lose its power to set conditions on a government funding program simply because those conditions implicate expressive activity. *United States v. American Library Ass'n*, 539 U.S. 194, 211–12 (2003) (plurality) (applying reasonableness standard to Congress's expression-related restriction on library funding); *Oklahoma v. U.S. Civil Service Commission*, 330 U.S. 127, 143 (1947) (government's "power to fix the terms upon which" money is disbursed

overcomes free-expression challenge). In *Rust*, for example, the Supreme Court upheld federal restrictions under which a federally funded family-planning program could not provide abortion counseling or referrals to abortion services. 500 U.S. at 179–81, 192–93. The Supreme Court held that there was "no question but that the statutory prohibition," as applied to the plaintiffs, "is constitutional." *Id.* at 192–93. As the Court explained, "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest." *Id.* at 193. The Court also upheld agency regulations implementing the statute in *Rust*, which were "designed to ensure that the limits of the federal program are observed" by requiring that federally funded projects "be organized so that they are 'physically and financially separate' from prohibited abortion activities"; the regulations were permissible because they "simply required a certain degree of separation . . . in order to ensure the integrity of the federally funded program." *Id.* at 180, 193, 198.

Similarly, in *Regan v. Taxation With Representation*, the Supreme Court upheld a restriction on political lobbying by § 501(c)(3) non-profit organizations, whose operations are subsidized by the federal government by virtue of the tax-deductibility of private contributions. 461 U.S. 540, 551 (1983). The Court held that Congress was entitled to choose what conduct or speech to subsidize, and did not violate the First Amendment by choosing "not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare." *Id.* at 544. And, in *FCC v. League of Women Voters*, the Court struck down a provision denying federal funds to

public broadcast stations that engage in editorializing, but emphasized that the statute would "plainly be valid" if stations were allowed "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds." 468 U.S. 364, 400 (1984).

Synthesizing these three cases, this Court concluded in *Velazquez I* and *Brooklyn Legal Services* that "Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." 164 F.3d at 766; 462 F.3d at 231. In those cases, the plaintiffs challenged a congressional requirement that recipients of funding from the Legal Services Corporation ("LSC"), a federal agency, could not engage in certain types of advocacy, regardless of whether the prohibited activities were funded by federal or other sources. *Velazquez I*, 164 F.3d at 760. However, pursuant to LSC regulations, the recipients were permitted to "maintain a relationship with 'affiliate' organizations, which could in turn engage in restricted activities so long as the association between the organizations met standards of 'program integrity.' " *Id.* at 761–62.

This Court upheld the LSC regulations—modeled on the rules upheld in *Rust*—on the ground that they supplied a constitutionally adequate alternative channel for expression: they could be applied "in at least some cases without unduly interfering with grantees' First Amendment freedoms," and "[i]t appears likely that . . . grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty." *Velazquez I*, 164 F.3d at 767. The

restrictions on expression thus withstood a facial challenge. *Id.* The only remaining question pertained to as-applied challenges: whether funding recipients could "demonstrate[] as a factual matter that the regulation has not left them adequate alternative channels for protected expression." *Brooklyn Legal Services*, 462 F.3d at 231. To do so, a recipient must prove that the "restrictions . . . unduly burden the ability of an organization to set up adequate alternative channels for protected expression such that they are in effect precluded from doing so." *Id.* at 232; *accord DKT*, 477 F.3d at 763 (First Amendment satisfied as long as government does not " 'effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program' " (quoting *Rust*, 500 U.S. at 197)).

That framework governs here. As demonstrated below, *infra* Point II.C, the Leadership Act program-integrity guidelines are facially valid for the same reasons the nearly identical LSC rule was upheld in *Velazquez I*. Nor are the guidelines unconstitutional as applied to plaintiffs, who have made no factual showing that they are "in effect precluded" from utilizing the alternative channel for privately funded expression. The district court thus erred in concluding that plaintiffs showed that they are likely to succeed on the merits.

2. Heightened Scrutiny Does Not Apply to Restrictions on Expression Imposed as Conditions on Funding

In *Brooklyn Legal Services*, decided after the 2006 injunction was granted, this Court rejected heightened

scrutiny for restrictions imposed as a condition of LSC funding, holding that "the federal government's interests . . . cannot be subject to the least- or less-restrictive-means mode of analysis—which . . . is more appropriate for assessing the government's direct regulation of a fundamental right—when the government creates a federal spending program." 462 F.3d at 229. "This is so because while the First Amendment has application in the subsidy context, the government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech at stake"; in doing so, " 'Congress has wide latitude to set spending priorities.' " *Id.* at 230 (quoting *Finley*, 524 U.S. at 588). Heightened scrutiny is inconsistent with that broad power: "far from granting Congress wide latitude to set spending priorities, . . . application of the less-restrictive-means analysis essentially demand[s] the government provide a compelling interest for the regulation—a demand more appropriate for the strict scrutiny analysis that was rejected in *Velazquez [I]* and not used in the government subsidies cases we found relevant there." *Id.* *Brooklyn Legal Services* stated clearly that the framework it described—the "adequate alternative test," in which courts consider "whether the potential alternative channels [are] adequate in light of the burdens imposed" and whether "the associated burdens in effect preclude the plaintiffs from establishing an affiliate"—was alone sufficient for constitutional analysis in cases where Congress imposes restrictions on expression as a condition of funding, and no further test is needed. *Id.* at 231–33.

Nevertheless, in its 2008 order the district court disregarded this precedent and continued to apply heightened scrutiny, as it had in 2006. (SPA 169–73).

The court distinguished *Brooklyn Legal Services* as purportedly "premised on a finding that the statute at issue did not discriminate on the basis of viewpoint." (SPA 171). First, that misreads *Brooklyn Legal Services*, which rested its rejection of heightened scrutiny on the difference between "direct regulation of a fundamental right" and the government's "creat[ion of] a federal spending program." 462 F.3d at 229. The district court ignored that crucial distinction.

Second, *Brooklyn Legal Services* stated that "[w]hen the government's interests are so attenuated from the benefit condition as to amount to a pretextual device for suppressing dangerous ideas or driving certain viewpoints from the marketplace, then relief may indeed be appropriate." *Id.* at 230. That language repeats the holdings of *Rust* and *Regan*: the government may not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas." *Regan*, 461 U.S. at 548 (internal quotation marks and alteration omitted), *quoted in Rust*, 500 U.S. at 192. But declining to subsidize speech or certain speakers is a far cry from suppressing speech. *Regan*, 461 U.S. at 549 ("a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right"); *Planned Parenthood Federation v. USAID*, 915 F.2d 59, 63 (2d Cir. 1990) ("A policy of not subsidizing the exercise of a fundamental right differs in an important respect from a prohibition on the exercise of a fundamental right, or from the imposition of an unconstitutional condition on the exercise of a fundamental right, because the mere refusal to subsidize a fundamental right places no governmental obstacle in the path of a plaintiff seeking to exercise that right." (internal quotation marks and citations omitted)). And

while Congress may not "aim[] at the suppression of dangerous ideas," it retains the "broad power" to "'encourage actions deemed to be in the public interest.'" *Regan*, 461 U.S. at 550 (quoting *Maher v. Roe*, 432 U.S. 464, 476 (1977)). Thus, in *Regan*, the Supreme Court expressly rejected "strict scrutiny," and upheld a statute that subsidized certain types of speech but not others on the ground that it was "not irrational." *Id.* at 549–50. And in *Rust* the Court considered a program that forbade grantees from giving abortion-related advice, but permitted them to discuss other family-planning methods. 500 U.S. at 178–80. Despite that speech restriction, the *Rust* Court held the program was "not a case of the Government 'suppressing a dangerous idea'"—"the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Id.* at 192–94.

Such is the case here. The Leadership Act does not aim to "suppress" any ideas favoring sex trafficking or prostitution; it merely seeks to subsidize anti-sex-trafficking, anti-prostitution non-governmental organizations while declining to subsidize organizations that do not espouse that position. As in *Regan*, despite the unequal subsidization there is "no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." 461 U.S. at 548. Rather, the purpose of the funding condition is to advance Congress's goal of eradicating prostitution and sex trafficking as a means to curtail the spread of HIV/AIDS. In ruling that heightened scrutiny applies here, the district court never even considered the question posed in *Brooklyn Legal Services*, whether "the government's interests are so attenuated from the benefit condition as to amount to a pretextual device for

suppressing dangerous ideas or driving certain viewpoints from the marketplace." 462 F.3d at 230. Had it done so, the court would have been compelled to conclude that the government's interests are closely related to the benefit condition: the government's interest in eradicating sex trafficking and prostitution, and more specifically in conveying its anti-sex-trafficking, anti-prostitution message, is directly connected to a funding condition that requires funding recipients to also oppose sex trafficking and prostitution. The funding condition is thus in no way a pretext for speech suppression.

The subsidization of one side of a debated question—whether it be the appropriateness of abortion, or the goal of eradicating sex trafficking and prostitution—is not unconstitutional viewpoint discrimination, but a legitimate legislative choice to "'make a value judgment . . . and . . . implement that judgment by the allocation of public funds.'" *Rust*, 500 U.S. at 192–93 (quoting *Maher*, 432 U.S. at 474). And in making that allocation, Congress may "subsidiz[e] some speech, but not all speech." *Regan*, 461 U.S. at 548. Nor does it "unconstitutionally discriminate[] on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals." *Rust*, 500 U.S. at 194. Congress's decision to favor an anti-prostitution, anti-sex-trafficking message is no more a First Amendment violation than its decision to encourage democracy without subsidizing speech in favor of communism, *id.*, to favor decency over indecency in subsidizing art, *Velazquez I*, 164 F.3d at 771, or to sponsor a campaign urging young people to "Just Say No" to drugs without

also funding a "Just Say Yes" campaign, *DKT*, 477 F.3d at 761. Its preference for one view over another does not mean Congress is acting to "suppress dangerous ideas"; the *Brooklyn Legal Services* framework therefore controls, and heightened scrutiny has no place here.

In defense of its application of heightened scrutiny, the district court cited *Velazquez I*, which invalidated "one tiny restriction in the statute" as viewpoint-discriminatory. 164 F.3d at 772. But the Supreme Court, reviewing that portion of the decision in *Legal Services Corp. v. Velazquez* ("*Velazquez II*"), did not adopt this Court's reasoning: the Supreme Court never described the restriction as viewpoint-based, instead finding that Congress had exceeded its power to impose funding conditions by attempting to use those conditions to insulate government policies from judicial challenge. 531 U.S. 533, 540–49 (2001). Indeed, the dissenting justices, without disagreement from the majority, noted that the statute "does not . . . discriminate[] on the basis of viewpoint. The Court agrees with all this . . . ." *Id.* at 549 (Scalia, J., dissenting). In any event, even if this Court's rationale were still controlling, it would not apply here. *Velazquez I* was careful to note that its invalidation of one of the LSC provisions was based on the "type[] of speech" at issue—"a lawyer's argument to a court that a statute, rule, or governmental practice . . . is unconstitutional or otherwise illegal." 164 F.3d at 771. A lawyer's argument has a qualitatively different impact when expressed in the courtroom; thus, a proscription on arguments to a court "effectively drives the idea from the marketplace where it can most effectively be offered." *Id.* at 771–72. But here, there is no similarly exclusive forum in which disagreement with the govern-

ment's anti-prostitution, anti-sex-trafficking message can be expressed; views for or against the government's policy can be stated with equal effectiveness in a wide variety of contexts. *Velazquez I*'s narrow ruling thus is not applicable in this case.

The district court also relied on *Rust*'s statement—in a footnote—that the implementing "regulations are narrowly tailored to fit Congress' intent in [the statute]," reading that as an adoption of heightened scrutiny. (SPA 172–73); 430 F. Supp. 2d at 267 (quoting *Rust*, 500 U.S. at 195 n.4). But that again misreads the law. As is evident from the quoted language, *Rust* was considering (and rejecting) an argument that the regulations were inconsistent with the statute on which they were based—a contention of administrative, not constitutional, law. *See Rust*, 500 U.S. at 181 (detailing grantees' arguments that "the regulations were not authorized by" the statute); *id.* at 187–89 (rejecting other such arguments). When courts apply heightened scrutiny, they consider whether the means adopted by the statute are "narrowly tailored to serve a . . . *government interest*," *Lusk v. Village of Cold Spring*, 475 F.3d 480, 493 (2d Cir. 2007), not whether they are "narrowly tailored *to fit Congress' intent*." The *Rust* footnote's language thus does not support the adoption of heightened scrutiny.

Nor do the other cases cited in the district court's 2006 opinion. 430 F. Supp. 2d at 260–61. The Supreme Court did require heightened scrutiny in *League of Women Voters*, but only in considering the statutory ban on editorializing as a direct regulation of the broadcast medium. 468 U.S. at 380–81. In the portion of the opinion addressing Congress's power under the

spending clause, the Court did not define a standard of review, but stated that if the statute had permitted broadcasters to establish affiliate organizations to engage in the prohibited editorializing, that mechanism "would plainly be valid," *id.* at 399–400—a conclusion that fully accords with *Brooklyn Legal Services*'s rejection of heightened scrutiny. And, as the district court acknowledged, *Regan* applied a "rational relationship" test, 430 F. Supp. 2d at 261—as did this Court in *Planned Parenthood*, 915 F.2d at 65.

There is thus no reason to depart from this Court's holding in *Brooklyn Legal Services* that heightened scrutiny is inapposite, and the district court's conclusion to the contrary was error.

C. The Leadership Act Program-Integrity Guidelines Provide an Adequate Channel for Expression

The Leadership Act's program-integrity guidelines are virtually identical to those upheld on their face by this Court in *Velazquez I*, and should be upheld for the same reasons. Moreover, plaintiffs have not shown that they are effectively precluded from utilizing the alternative avenue of expression, and therefore cannot prevail in an as-applied challenge under *Brooklyn Legal Services*. In light of those precedents, and the government's strong interest in the integrity of its message, the preliminary injunction should be reversed.

The LSC and Leadership Act program-integrity guidelines both permit a funding recipient to affiliate with another organization if the recipient maintains "'objective integrity and independence from [the] organization that engages in restricted activities.'"

Brooklyn Legal Services, 462 F.3d at 223 (quoting 45 C.F.R. § 1610.8(a) (alteration in original)); (SPA 20, 24). Both rules elaborate that requirement with the same three-part test for separation between the entities. 45 C.F.R. § 1610.8(a); (SPA 20, 24–25). And both rules provide that separation will be determined "on a case-by-case basis" and "based on the totality of the facts." 45 C.F.R. § 1610.8(a); (SPA 20, 25); *see Rust*, 500 U.S. at 180–81 (same). The two rules both set out non-exclusive, non-determinative factors for determining separateness. 45 C.F.R. § 1610.8(a); (SPA 20, 25). In fact, while there are several small differences between the two sets of factors, only one was cited by the district court: where LSC considers "separate personnel," the Leadership Act guidelines look to "separate personnel, management, and governance." (SPA 20, 25).*

The district court relied heavily on that difference. (SPA 175–78). Erroneously describing it as a "requirement"—even though the guidelines explicitly state that the factor is not determinative—the court concluded

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* Besides minor wording changes, the LSC regulation and the guidelines here differ as follows: LSC considers separation in "facilities," while the Leadership Act guidelines consider "facilities, equipment and supplies"; and LSC assesses the presence of signs distinguishing the recipient from the affiliated organization, while the guidelines here also consider the absence of signs. 45 C.F.R. § 1610.8; (SPA 20, 24–25). Finally, the Leadership Act guidelines add a fifth factor not present in the LSC regulation, to consider materials such as publications, conferences, and press statements. (SPA 20, 25).

that the burdens imposed by the Leadership Act rule "are significantly greater than those imposed by the regulation at issue in *Rust*," and therefore there exists "a less-restrictive means . . . to adequately protect the Government's interests." (SPA 178).

To begin with, *Brooklyn Legal Services* held that the "less-restrictive means" test is inappropriate. *See supra* Point II.B.2. But even had it not, this small difference in the list of non-determinative factors is not significant. The additional language in the Leadership Act guidelines merely clarifies what the agency will consider when evaluating the separateness of affiliated entities, including, among other things, the degree to which the low-level employees, mid-level managers, and high-level corporate officials of the respective entities are the same or different. Thus, the additional language spells out a concept that is already implicit in the more generic concept of separate "personnel" contained in the words of the LSC regulation. Furthermore, the addition of "management[] and governance" to the list of factors is not, on its face, a more onerous condition, and may benefit funding recipients under some circumstances. For example, a recipient might already have different board members and officers from its affiliated organization but share records, facilities, or other relevant connections; in such a case, "separate management and governance" may tip the balance in the recipient's favor. In fact, there is no way to know how much of a burden (or benefit) this factor will impose on plaintiffs, as it has never been applied to them. Plaintiffs' alleged injuries are thus speculative, *see supra* Point I.A; for that reason too, the district court erred in effectively invalidating the funding condition on its face without assessing the degree of

actual injury it may have caused to individual recipients.

In any event, the existence of separate corporate management and governance is germane to the government's interest in avoiding the garbling or confusion of its message. For instance, a well-known public figure might be the head of both the funding recipient and the affiliate, leading to confusion among the public about the degree of separation between the entities. (*See* SPA 17, 24 ("these criteria guard against a public perception that the affiliate's views on prostitution and sex trafficking may be attributed to the recipient organization and thus to the government")). "Management" and "governance" are clearly relevant to the "totality of the facts" that determine what degree of separation is needed between two organizations to guard against such confusion, and the addition of those criteria to the Leadership Act guidelines is not enough to distinguish them from the similar rules upheld in *Rust* and *Velazquez I*.

In addition, consideration of management and governance is especially warranted because the government is acting abroad, heightening the government's need to avoid the garbling of its message and making the task of ensuring a clear and consistent message more difficult. As explained *supra* Point II.A, the government is entitled to significant deference when acting overseas, and there is a special need for representatives of the government abroad not to undermine the government's mission. It may be particularly difficult for the government to police the separation of organizations from their affiliates in foreign countries, due to the inherent difficulties of distance, conditions in

foreign countries, differing forms of corporate governance, or other factors. In this context, the government has greater latitude under the First Amendment to ensure that activities by recipients' affiliates do not undermine the effective communication of the government's message under the Leadership Act and, ultimately, the United States' foreign policy. *DKT*, 477 F.3d at 762.*

The district court noted that recipients may not be able to "control" their affiliates. (SPA 175, 178). That misses the point of a separate affiliate: the idea is not to create shell companies to operate as alter egos for plaintiffs, but to preserve the integrity of the government's anti-sex-trafficking, anti-prostitution message by requiring actual separation between organizations receiving Leadership Act funds and those espousing viewpoints antithetical to the Leadership Act message. (SPA 16–17); *Brooklyn Legal Services*, 462 F.3d at 231 ("It is noteworthy that the Supreme Court in *Rust* apparently was not concerned that the [government's] program integrity regulation, upon which LSC's regulation is modeled, 'required a *certain degree of*

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* The district court mentioned the international aspect of this case in passing, but weighed it in plaintiffs' favor, accepting at face value plaintiffs' conclusory allegations that "many" of the countries in which plaintiffs operate are "developing states," which "increases the burdens." (SPA 175). No facts or law support that analysis, nor did the court cite any. To the contrary, as explained in the text, the international operation of the Leadership Act's programs favors the government as a matter of law.

separation . . . in order to ensure the integrity of the federally funded program.' " (quoting *Rust*, 500 U.S. at 198) (emphasis added; ellipsis in original)). There is nothing in the First Amendment cases that requires the funding recipient to have "control" over the affiliate or vice versa: nowhere did the Supreme Court require such "control" over the affiliates described in *League of Women Voters*, *Regan*, or *Rust*, nor did this Court in *Velazquez I*. As long as the existence of an affiliate permits expression funded by non-federal sources to occur, the restriction on a federal funding recipient's speech is constitutional. *Brooklyn Legal Services*, 462 F.3d at 232.

Along similar lines, the district court distinguished *DKT* on the ground that although the D.C. Circuit cited recipients' ability to form affiliates, it "was not aware of the restrictions placed on recipients, such that compliance with the Guidelines is not as straightforward as the simple organization of a subsidiary, which normally does not entail the separations imposed by the Guidelines." (SPA 175–76). That ignores the reasoning of *DKT*. The circuit court—which discussed *Rust* and *Velazquez II*, both of which involved government-imposed separation requirements very similar to those here—was certainly aware that separation would be required, and said so expressly: "the subsidiary would qualify for government funds as long as the two organizations' activities were kept sufficiently separate." 477 F.3d at 763. *DKT* accepted that separation requirements would be imposed, but was unconcerned with the details as long as they did not " 'effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program,' " *id.* (quoting *Rust*, 500 U.S. at 197)—echoing the standard

enunciated by this Court in *Brooklyn Legal Services*. Certainly, *DKT* gave no indication that the mere addition of "management" and "governance" to a separation requirement already upheld by the courts would be sufficient to invalidate the guidelines, much less that a court should do so without evidence of the extent of the burden imposed on individual organizations.

For all those reasons, the government has implemented the funding condition in a manner that allows an adequate alternative channel for recipients' communication. The district court's contrary conclusion should be reversed.

D. The Leadership Act Does Not Compel Speech

The district court also erred in ruling that § 7631(f) unconstitutionally compels speech. (SPA 168–69, citing 430 F. Supp. 2d at 274–76). As the D.C. Circuit held, the Leadership Act "does not compel [plaintiffs] to advocate the government's position on prostitution and sex trafficking; it requires only that if [they] wish to receive funds [they] must communicate the message the government chooses to fund. This does not violate the First Amendment." *DKT*, 477 F.3d at 764.

The district court misread the law. The court stated that "[t]he Supreme Court has repeatedly found that speech, or an agreement not to speak, cannot be compelled or coerced as a condition of participation in a government program." 430 F. Supp. 2d at 275. But that directly contradicts *Rust*, where the Supreme Court upheld a program in which grantees were required to refrain from counseling abortion in exchange for participating, 500 U.S. at 178–80, and *Regan*, where

subsidized organizations were forbidden from lobbying, 461 U.S. at 541–42. It also contradicts this Court's decision in *Lewis v. Cowen*, upholding the termination of a government employee for his failure to present the employer's program in a "positive manner": the Court held that the government's "interest in . . . effective and efficient operation" outweighed the First Amendment rights of the employee, "who is paid a salary" to advance the government's interests and therefore could be compelled to adopt the government's position. 165 F.3d 154, 164–65 (2d Cir. 1999); *see Pickering*, 391 U.S. at 568–69.

As the district court conceded, the compelled-speech cases on which it relied "do not concern Spending Clause enactments." 430 F. Supp. 2d at 275. The D.C. Circuit, discussing those same cases—*Wooley v. Maynard,* 430 U.S. 705 (1977); *Speiser v. Randall,* 357 U.S. 513 (1958); and *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943)—recognized that distinction as crucial:

> In each of those cases, the penalty for refusing to propagate the message was denial of an already-existing public benefit. None involved the government's selective funding of organizations best equipped to communicate its message. Offering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message on pain of losing their public education,

> *Barnette,* 319 U.S. at 629, or access to public roads, *Wooley,* 430 U.S. at 715.

DKT, 477 F.3d at 762 n.2. Similarly, the district court faulted the government for a funding requirement that "essentially enlists the government's private partners to convey the government's message." 430 F. Supp. 2d at 276. Ironically, the Supreme Court has used nearly identical language for what it has allowed under the First Amendment: "we have permitted the government to regulate the content of what is or is not expressed . . . when it enlists private entities to convey its own message." *Rosenberger*, 515 U.S. at 833.

The district court disparaged the government's funding condition as " 'if you don't like it, lump it,' " 430 F. Supp. 2d at 275—an epithet that would apply no less to conditions upheld under the First Amendment in *Grove City*, 465 U.S. at 575 (recipient "may terminate its participation in the [funding] program and thus avoid the requirements"), and *American Library Ass'n*, 539 U.S. at 212 (plurality) (recipients unwilling to comply with condition on funding are "free to do so without federal assistance"). The government is permitted to convey its own message through private partners, and to decline to enlist partners who disagree with, and thus might undercut, the government's message. *Rosenberger*, 515 U.S. at 833; *DKT*, 477 F.3d at 762. Just as the First Amendment does not require the government to fund competing messages equally—pro-democracy and pro-communism, *Rust*, 500 U.S. at 194, or favoring both alternative fuels and oil, *e.g.*, 10 C.F.R. § 420.17—it does not require the government to choose equally among potential partners in propagating its message, even if those partners would undermine the

very message the government seeks to convey. The National Endowment for Democracy need not offer grants to the Communist Party, or ethanol-promotion subsidies need not be given to OPEC, because to do so would confuse and distort the government's messages. The same applies here: "[i]t would make little sense for the government to provide billions of dollars to encourage the reduction of HIV/AIDS behavioral risks, including prostitution and sex trafficking, and yet to engage as partners in this effort organizations that are neutral toward or even actively promote the same practices sought to be eradicated." *DKT*, 477 F.3d at 762 (internal quotation marks omitted); *see National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 670 (1989) (noting government's "compelling interest" in preventing its efforts from being undermined by officers' "indifference to [agency's] basic mission" or "active complicity" against it). Requiring funding recipients to certify that their policy is in line with the government's message against sex trafficking and prostitution simply ensures that the message "is conveyed in an efficient and effective fashion," and is permitted by the First Amendment. *DKT*, 477 F.3d at 762.

Moreover, that interest in effective promotion of the government's message is again heightened because the funding is provided for operations overseas. As discussed *supra* Point II.A, the government is entitled to significant deference when acting abroad, where foreign-policy interests are implicated and where perception of the United States is affected by the government's associations as well as its words. Additionally, it may be extremely difficult for the government to monitor the speech and actions of funding

recipients in foreign countries; Congress, therefore, could reasonably conclude that the most effective means to ensure against the distortion of its message is to limit funding to organizations that agree with that message.

Finally, the alternative avenue for expression in the program-integrity guidelines alleviates any burden on recipients who do not wish to communicate the government's message, vitiating plaintiffs' compelled-speech argument in the same way it does their unconstitutional-conditions claim. Any organization that lacks an anti-prostitution, anti-sex-trafficking policy need not adopt one; it can remain neutral or continue advocating the legalization of prostitution, while "setting up a subsidiary organization" with a compliant policy for the purpose of receiving and spending Leadership Act funds. *Id.* at 763. The parent organization is therefore not compelled to speak any message at all, and may continue to engage in activities inconsistent with the required policy with funding from other sources. The alternative avenue thus protects whatever interests plaintiffs have against being compelled to speak, and for that reason the funding condition as implemented by the government should be upheld under *Velazquez I* and *Brooklyn Legal Services*.

E. The Statute Is Not Impermissibly Underinclusive

As it did in 2006, the district court relied on the provision in § 7631(f) that exempts several international organizations, ruling that "the Government's interests in conveying a uniform message remain undermined." (SPA 178–79, citing 430 F. Supp. 2d at

269). That conclusion depends on the district court's adoption of a heightened-scrutiny standard, which cannot survive after *Brooklyn Legal Services*. The only relevant question under that case is the degree of burden imposed on plaintiffs in availing themselves of the alternative avenues of expression, a question that does not implicate the limited exemption for a handful of organizations. Thus, as the D.C. Circuit explained, "the Act's underinclusiveness does not violate the First Amendment. . . . Because viewpoint discrimination raises no First Amendment concerns when the government is speaking, the underinclusiveness of the certification requirement is immaterial." *DKT*, 477 F.3d at 763 n.5; *accord Regan*, 461 U.S. at 547–48 (1983) (upholding statutory restriction on lobbying by § 501(c)(3) organizations despite exclusion of veterans' organizations).

Even if that underinclusiveness were material, it would pass even heightened scrutiny, because the exempt organizations are not similarly situated to private non-governmental organizations. Three of the four excluded organizations—the World Health Organization, other United Nations agencies, and the Global Fund to Fight AIDS, Tuberculosis and Malaria—are public international organizations, that is, organizations made up primarily or exclusively of sovereign states, which are granted special status under international and domestic law. *See* 22 U.S.C. § 288; Restatement (Third) of Foreign Relations Law § 221. The terms of the United States' participation in those organizations is governed by treaties or international agreements, and any attempt to modify those terms or to require the adoption of the government's policy by the international organization would require multilateral

negotiations. Moreover, these globally recognized international organizations are not likely to be confused as representatives of the United States, or to have their views or actions attributed to the United States.

The fourth organization excluded from the funding condition, the International AIDS Vaccine Initiative, is a non-governmental organization whose focus is the development of an HIV vaccine. (JA 407–08). Given the Vaccine Initiative's research focus, Congress could reasonably conclude that there is little risk it would contradict the government's policy regarding prostitution and sex trafficking, and its exclusion from the funding condition does not undermine the validity of the government's interests.

Accordingly, § 7631(f) is carefully tailored to the government's interests in its anti-HIV/AIDS program and its anti-sex-trafficking, anti-prostitution message, and the district court erred in concluding that the narrow exemption for certain organizations was fatal to the statute's constitutionality.

CONCLUSION

The 2006 and 2008 preliminary injunction orders should be reversed.

Dated: New York, New York
January 15, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 13,972 words in this brief.

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Docket Number: 08-4917-cv

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