06-4035-cv

To Be Argued By:
RICHARD E. ROSBERGER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4035-cv

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, and PATHFINDER INTERNATIONAL,

Plaintiffs-Appellees,

—v.—

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ANDREW NATSIOS, in his official capacity as

(*Caption continued on inside cover*)

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

BRIEF FOR DEFENDANTS-APPELLANTS

MICHAEL J. GARCIA,
United States Attorney for the Southern District of New York,
Attorney for Defendants-Appellants.
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2716

RICHARD E. ROSBERGER,
SEAN H. LANE,
Assistant United States Attorneys,
Of Counsel.

Administrator of the 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, and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.

TABLE OF CONTENTS

PAGE

Preliminary Statement 2

Jurisdictional Statement 7

Issue Presented for Review 7

Statement of the Case 7

Statement of Facts 8

A. The Legislative Background 8

B. The Government's Implementation of the Leadership Act 15

C. District Court Proceedings 17

1. Plaintiffs' Complaint and Motions for a Preliminary Injunction and a Temporary Restraining Order 17

2. The District Court's Decision Granting the Preliminary Injunction 19

Summary of the Argument 21

ARGUMENT 25

THE DISTRICT COURT ERRED IN GRANTING A PRELIMINARY INJUNCTION TO AOSI AND PATHFINDER 25

A. Standard of Review 25

PAGE

B. The Funding Condition Does Not Violate AOSI's or Pathfinder's First Amendment Rights 26

1. The Spending Clause Permits Congress to Attach Conditions Upon the Receipt of Federal Funds 26

2. The Funding Condition Is Permissible Under the Spending Clause 27

a. The Funding Condition Is Germane to the Government's HIV/AIDS Program 28

b. The Funding Condition Advances the General Welfare and Provides Clear Notice to Potential Funding Recipients of the Consequences of Accepting Federal Funds 36

3. The Funding Condition Is Not An Unconstitutional Condition 38

a. The District Court Should Have Applied a More Deferential Balancing of Interests Test to a Restriction Relating to the Provision of Government Services 38

PAGE

b. Even if the Heightened Scrutiny Test Applied, the Funding Condition Is Constitutional Because It Is Narrowly Drawn 45

c. The District Court Erred in Holding That the Funding Condition Unconstitutionally Restricts AOSI's and Pathfinder's Private Speech and Compels Them to Adopt the Government's Viewpoint 47

CONCLUSION 54

PAGE

TABLE OF AUTHORITIES

Cases

American Communications Ass'n v. Douds,
339 U.S. 382 (1950) 36

Board of County Comm'rs v. Umbehr,
518 U.S. 668 (1996) 39, 40

Borey v. National Union Fire Ins. Co. of Pittsburgh v. Martin, 934 F.2d 30 (2d Cir. 1991) 25

Brooklyn Legal Services Corp. v. Legal Services Corporation, 462 F.3d 219 (2d Cir. 2006) . . 46, 49

Buckley v. Valeo, 424 U.S. 1 (1976) 47

City of San Diego v. Roe, 543 U.S. 77 (2004) 40

Connecticut Department of Environmental Protection v. OSHA, 356 F.3d 226 (2d Cir. 2004) 25

DKT Memorial Fund, Inc. v. AID
887 F.2d 275 (D.C. Cir. 1989) 33, 37, 51

Disabled American Veterans v. United States Department of Veteran Affairs,
962 F.2d 136 (2d Cir. 1992) 25

FCC v. League of Women Voters,
468 U.S. 364 (1984) 31, 49

National Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 52

Garcetti v. Ceballos,
126 S. Ct. 1951 (2006) 39, 41, 43

Haig v. Agee, 453 U.S. 280 (1981) 33

PAGE

Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988) 44

Legal Serv. Corp. v. Velazquez,
531 U.S. 533 (2001) . . . . . *passim*

Lewis v. Cowen, 165 F.3d 154 (2d Cir. 1999) 44

National Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989) 29

New York City Environmental Justice Alliance v. Giuliani, 214 F.3d 65 (2d Cir. 2000) 25

New York v. United States, 505 U.S. 144 (1992) . . 26

Palestine Information Office v. Schultz,
853 F.2d 932 (D.C. Cir. 1988) 33

Pickering v. Board of Educ. of Township High Sch. Dist. 205, 391 U.S. 563 (1968) 40, 41

Planned Parenthood v. Agency for Int'l Development,
915 F.2d 59 (2d Cir. 1990) 51

Rankin v. McPherson, 483 U.S. 378 (1987) 43

Regan v. Taxation With Representation,
461 U.S. 540 (1983) 27, 35

Rosenberger v. Rector of University of Virginia,
515 U.S. 819 (1995) 48, 49

Rust v. Sullivan, 500 U.S. 173 (1991) . . . . . *passim*

South Dakota v. Dole, 483 U.S. 203 (1987) . . . *passim*

State of Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) 48

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 . . . 31

PAGE

UAW-Labor Employment & Training Corp. v. Chao, 325 F.3d 360 (D.C. Cir. 2003) 44

United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers AFI-CIO, 413 U.S. 548 (1973) . 43

United States v. American Library Association, 539 U.S. 194 (2003) 47

United States v. Butler, 297 U.S. 1 (1936) 26

United States v. National Treasury Employees Union, 513 U.S. 454 (1995) 32

Velazquez v. Legal Services Corp., 164 F.3d 757 (2d Cir. 1999) 25, 49, 50

Waters v. Churchill, 511 U.S. 661 (1994) 39

Constitution

U.S. Const. Art. 1, § 8, cl. 1 . . . . . *passim*

U.S. Const. amend. I . . . . . *passim*

Statutes

22 U.S.C. § 288 34

22 U.S.C. § 2151b-2(d)(1)(A) 29, 33

22 U.S.C. § 2222(l) 15, 36

22 U.S.C. § 7101(a) 10

22 U.S.C. § 7101(b) 10, 29, 31

22 U.S.C. § 7110(g) 10

22 U.S.C. § 7601(2) 8

22 U.S.C. § 7601(3) 8, 31, 32

PAGE

22 U.S.C. § 7601(4)-(10) 8

22 U.S.C. § 7601(20) 9

22 U.S.C. § 7601(21) 15

22 U.S.C. § 7601(23) . . . . . *passim*

22 U.S.C. § 7611 . . . . . *passim*

22 U.S.C. § 7621 15

22 U.S.C. § 7631(e) 3, 14, 17

22 U.S.C. § 7631(f) . . . . . *passim*

28 U.S.C. § 1292(a)(1) 7

28 U.S.C. § 1331 7

Pub. L. No. 106-264, § 112(a) (2000) 35

Pub. L. No. 106-429, App. 1900A-5 (2000) 35

Pub. L. No. 107-115, Title II (2002) 35

Pub. L. No. 108-199, § 595(3) 14

Regulations

22 C.F.R. Part 226 15

22 C.F.R. § 226.11(a) 16, 49

45 C.F.R. Part 74 15

45 C.F.R. § 74.11 16

Orders

Exec. Order 13,395, 71 Fed. Reg. 3,203 (2006) . 14-15

PAGE

Legislative Materials

H.R. Hrg. 108-137, The Ongoing Tragedy of International Slavery and Human Trafficking: An Overview, Hearing before Subcommittee on Human Rights and Wellness, House Committee on Government Reform (Oct. 29, 2003) 11, 12

S. Hrg. 108-105, "Trafficking in Women and Children in East Asia and Beyond: A Review of U.S. Policy," Hearing before Subcommittee on East Asian and Pacific Affairs of Senate Committee on Foreign Relations, 108th Cong., 1st Sess. (Apr. 9, 2003) 10, 11, 12, 13

149 Cong. Rec. H3579 (May 1, 2003) 11, 12

H.R. Rep. 108-60 (Apr. 7, 2003) 9

Miscellaneous

Remarks on Signing the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 39 Weekly Comp. Pres. Docs. 663 (May 27, 2003) 8

Restatement (Third) of Foreign Relations Law § 221 14

68 Fed. Reg. 37,3701 (June 23, 2003) 16

69 Fed. Reg. 43, 421 (July 23, 2004) 16

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4035-cv

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, and PATHFINDER INTERNATIONAL,

Plaintiffs-Appellees,

—v. —

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ANDREW NATSIOS*, in his official capacity as Administrator of the 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, and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.

---

* Ambassador Randall Tobias, who succeeded Andrew Natsios as Administrator of the United States Agency for International Development, should be substituted for Andrew Natsios pursuant to Fed. R. App. P. 43(c)(2).

BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

Defendants-Appellants the United States Agency for International Development ("USAID") and its Administrator; the United States Department of Health and Human Services ("DHHS") and its Secretary; and the United States Centers for Disease Control and Prevention ("CDC"; collectively, with DHHS, "HHS") and its Director (collectively, "Defendants") appeal from a preliminary injunction (the "Preliminary Injunction"), issued by the United States District Court for the Southern District of New York (Honorable Victor Marrero) (JA 635-640),* that was based on the district court's earlier decision and order (the "Decision"), dated May 9, 2006 (JA 516-634).

Plaintiffs Alliance for Open Society International, Inc. ("AOSI") and Pathfinder International ("Pathfinder") are non-governmental organizations that receive funding from the United States Government (the "Government") under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act")**, a statute designed to

---

* References to the joint appendix of the parties appear herein as "JA __," with relevant page numbers inserted.

** Pub.L. No. 108-25, 117 Stat. 711, codified at 22 U.S.C. §§ 7601-7682.

combat HIV/AIDS abroad, particularly in developing countries.* In enacting the Leadership Act, Congress expressly found that prostitution and sex trafficking are causes of and factors in the spread of HIV/AIDS and that, as such, it should be the policy of the United States to eradicate these deadly practices. 22 U.S.C. § 7601(23). Congress developed a strategy requiring that the Government's message that HIV/AIDS behavioral risks should be reduced, and prostitution and sex trafficking eradicated, be a priority in all prevention efforts. 22 U.S.C. § 7611(a)(4). Consistent with Congress's findings and strategy, the Leadership Act provides that none of its funds may be used to "promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. § 7631(e). To further ensure that the Government's organizational partners will not undermine its efforts to eradicate these harmful practices, the Leadership Act also provides that, except for limited exceptions, all funding recipients must have a "policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. § 7631(f) (the "funding condition").

In granting the Preliminary Injunction, the district court held that the funding condition likely violated AOSI's and Pathfinder's First Amendment rights by improperly restricting their privately-funded speech on an entity-wide basis, and compelling them to adopt the Government's message. The district court further found

---

* A third plaintiff Open Society Institute ("OSI") does not receive funding under the Leadership Act, and its motion for a preliminary injunction was not granted. Thus, OSI's challenge is not the subject of this appeal.

that the funding condition was not narrowly tailored to fit Congress's intent and thus did not satisfy a heightened scrutiny standard of review.

The district court erred in granting the Preliminary Injunction. Under the Spending Clause, Congress has broad authority to set conditions on its spending programs where, as here, the conditions are germane to the governmental goals, advance the general welfare, and provide clear notice to the funding recipients. The funding condition is germane to Congress's efforts to stamp out prostitution and sex trafficking—two factors in the spread of HIV/AIDS—and to promote Congress's chosen message to eradicate these behavioral risks for HIV/AIDS. The funding condition ensures that organizations acting in partnership with the United States are similarly committed to the eradication of these practices, and that the Government's message and program to fight HIV/AIDS are not compromised. Indeed, in the international forum where the United States leads the fight against HIV/AIDS, the Government has a heightened interest in not risking distortion of its message through its association with organizations expressing a contrary policy. Furthermore, the funding condition is designed to advance the general welfare by reducing the spread of HIV/AIDS and the behaviors that cause it. Finally, the funding condition provides clear notice to potential recipients of the consequences of accepting government funds.

The district court erred in holding that the funding condition is subject to heightened scrutiny, rather than a more deferential standard of review that is consistent with the proper exercise of Congress's power under the

Spending Clause. The Supreme Court has recognized that the constitutional limitations on Congress under its spending authority are less exacting than those on its power to regulate directly. Where organizations, such as AOSI and Pathfinder, provide public services pursuant to contract, grant or agreement, they function in the capacity of a government contractor, and their First Amendment rights are subject to a balancing of interests test. Here, the Government has an interest in protecting the efficacy and integrity of its fight against HIV/AIDS from being undermined by its partner organizations, and in promoting its chosen message that prostitution and sex trafficking should be eradicated as part of that fight. That Government interest far outweighs any interest of AOSI and Pathfinder, which voluntarily chose to receive funds under the Leadership Act despite being aware of the funding condition.

Moreover, even assuming *arguendo* that heightened scrutiny should govern the evaluation of the funding condition, the district court erred in its application of that standard. In finding that the funding condition is not narrowly drawn, the district court erroneously relied upon the fact that a handful of organizations are exempt from the funding condition. None of the four exempted organizations, however, is remotely similarly situated to AOSI or Pathfinder: three are public international organizations in which the United States participates pursuant to treaty or international agreement, and one is a research institute directly funded by Congress. None of those globally recognized entities is likely to be considered by the public to be a representative of the United States. Contrary to the district court's conclusion, neither a purported

segregation of activities that are funded under the Leadership Act from privately-funded conduct, nor disclaimers stating that certain activities are privately funded, would adequately protect the Government from having its programmatic message of eradicating prostitution and sex trafficking undermined by AOSI's or Pathfinder's directly inconsistent speech.

The district court's conclusion that the Leadership Act improperly restricts privately-funded speech is at odds both with Supreme Court precedent upholding conditions attached to selective spending programs that have restricted privately-funded speech and with the deference that should be accorded to the Government's assessment of its interests as a purveyor of public goods and services. Moreover, as the district court acknowledged, the Supreme Court cases finding unconstitutionally compelled speech did not involve such spending conditions that the organizations were free to accept or reject by not seeking funding. Significantly, the Supreme Court has also recognized that, where the Government enacts a program, not to facilitate speech, but to convey its own message—here, that prostitution and sex trafficking should be eradicated as a cause of HIV/AIDS—Congress may attach conditions that protect against distortion of that message. As the Government and funding recipients here work together as partners under the Leadership Act to combat HIV/AIDS, the requirement that recipients have a policy opposing prostitution and sex trafficking, and that they not engage in contrary conduct with private funds, is appropriately measured to serve the goals of the Leadership Act and avoid distortion of Congress's message.

Jurisdictional Statement

The district court had jurisdiction over the plaintiffs' claims under 28 U.S.C. § 1331. This Court has appellate jurisdiction to review the district court's interlocutory decision pursuant to 28 U.S.C. § 1292(a)(1).

Issue Presented for Review

Whether the district court erred in holding that the funding condition likely violated AOSI's and Pathfinder's First Amendment rights where the condition is germane to Congress's goal of eradicating prostitution and sex trafficking as part of the worldwide fight against HIV/AIDS, it advances the general welfare, potential funding recipients had clear notice of the condition, and the Government's interest in ensuring that its partner organizations do not undermine Congress's message outweighs any interest of AOSI or Pathfinder.

Statement of the Case

Plaintiffs AOSI and OSI sued USAID, alleging that, *inter alia*, the funding condition violates the First Amendment. Pathfinder subsequently joined the action raising similar allegations against USAID and adding DHHS and CDC as defendants. AOSI and OSI together moved for both a temporary restraining order and a preliminary injunction, while Pathfinder moved separately for a preliminary injunction. The district court granted the preliminary injunction motions of AOSI and Pathfinder on their as-applied First Amendment challenges and preliminarily enjoined the

Government from enforcing the funding condition against them.

Statement of Facts

A. The Legislative Background

The Leadership Act was enacted to address the global epidemic of HIV/AIDS, which Congress found had infected more than 65 million people worldwide since its onset, killing over 25 million and leaving more than 14 million orphaned children, mostly in poor and developing countries. *See* 22 U.S.C. §§ 7601(2), (3)(A). As of 2003, HIV/AIDS was the fourth-highest cause of death across the globe, characterized by the President as "one of the most urgent needs of the modern world." JA 375-378 (Remarks on Signing the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Presidential Remarks")), 39 Weekly Comp. Pres. Docs. 663 (May 27, 2003). Congress recognized that the spread of HIV/AIDS is a 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, by virtue of the impact of HIV/AIDS on peacekeeping forces. *See* 22 U.S.C. §§ 7601(3)(A), (4)-(10).

The Leadership Act is the primary component of the United States' "[e]mergency [p]lan" to fight HIV/AIDS abroad, authorizing $15 billion over five years to be appropriated to a comprehensive and integrated strategy to combat HIV/AIDS. *See* 22 U.S.C. § 7611(a); Presidential Remarks, 39 Weekly Comp. Pres. Docs. 663. One cornerstone of that strategy is the prevention

of the transmission of HIV/AIDS, with particular emphasis on the reduction of behavioral risks. *See* H.R. Rep. No. 108-60, at 26 (Apr. 7, 2003) (bill "stresses the importance of behavior change . . . as the foundation of efforts to fight AIDS"). Specifically, 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 promoting abstinence from sexual activity and substance abuse, encouraging monogamy and faithfulness, promoting the effective use of condoms, and eradicating prostitution, the sex trade, rape, sexual assault and sexual exploitation of women and children." 22 U.S.C. § 7611(a)(4); *see also* 22 U.S.C. § 2151b-2(d)(1)(A) (directing that HIV/AIDS funding be used for educational programs and efforts to "help[] individuals avoid behaviors that place them at risk of HIV infection," including "casual sexual partnering" and "sexual violence and coercion").*

Congress expressly found in enacting the Leadership Act 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

---

* In prioritizing the reduction of behavioral risks for HIV/AIDS, Congress invoked the success of the HIV/AIDS programs implemented by Uganda between 1991 and 2000. *See* 22 U.S.C. § 7601(20). Uganda had urged citizens to abstain from premarital sex, to be faithful to sexual partners, and to use condoms. *See id.* § 7601(20)(C). Congress directed that similar messages be promoted to combat HIV/AIDS worldwide. *See* 22 U.S.C. § 7611(a)(4); 22 U.S.C. § 2151b-2(d)(1)(A).

epidemic." 22 U.S.C. § 7601(23). In Cambodia, for example, Congress found that "as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast Asia." *Id.* Congress also heard that, among female prostitutes in certain areas of Thailand and India, the rates of HIV/AIDS infection are even higher, (*see* S. Hrg. 108-105, "Trafficking in Women and Children in East Asia and Beyond: A Review of U.S. Policy," Hearing before Subcommittee on East Asian and Pacific Affairs of Senate Committee on Foreign Relations, 108th Cong., 1st Sess. 18 (Apr. 9, 2003) (Sen. Brownback)), and that the existence of prostitution fuels the demand for international sex trafficking of women and children—another global scourge that Congress sought to eradicate.* *See* S. Hrg. 108-105, at 19 (Hon. John R. Miller, Director, Office to Monitor and Combat Trafficking in Persons, State Department)

---

* In enacting the Trafficking Victims Protection Act, Congress sought to eliminate the global criminal trade in persons, in which at least 700,000 individuals are trafficked each year into forced prostitution and other forms of modern-day slavery. *See* 22 U.S.C. § 7101(a), (b)(1)-(3), (8). Like the Leadership Act, the Trafficking Victims Protection Act prohibits the use of federal funding under the Act "to promote, support, or advocate the legalization or practice of prostitution," and further provides that federal funding to rescue and assist the victims of severe forms of trafficking will be provided only to organizations that certify that they do not "promote, support, or advocate the legalization or practice of prostitution." 22 U.S.C. § 7110(g)(1)-(2).

("[T]here wouldn't be sex trafficking without prostitution.").

For those subject to sexual victimization, including through prostitution and sex trafficking, education-based methods of combating the disease, such as campaigns to promote abstinence, monogamy, and condom use, do not protect fully against the transmission of HIV/AIDS. 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).

Thus, in congressional 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 sexually trafficked to countries where they were "beaten, raped, [and] infected with HIV/AIDS so that organized crime" could profit. S. Hrg. 108-105, at 4 (testimony of Hon. John R. Miller, Director, Office to Monitor and Combat Trafficking in Persons, State Department). There were reports that young children were being "targeted as sexual partners in order to reduce the risk of contracting HIV/AIDS," and that "instances of child rape are being committed by individuals who believe that sex with a virgin will cure them from HIV/AIDS." H.R. Hrg. 108-137, The Ongoing Tragedy of International Slavery and Human Trafficking: An Overview, Hearing before Subcommittee on Human Rights and Wellness, House Committee on Government Reform, at 96 (Oct. 29, 2003) (testimony of M. Mattar, The Protection Project, Johns Hopkins University School of Advanced International Studies); *see also* 149 Cong. Rec. H3579,

H3600 (May 1, 2003) (Rep. Crowley, describing in floor debate on Leadership Act accounts of "babies [being] raped in South Africa to cure [the rapists] of AIDS").* Congress heard testimony that 80% of trafficking victims in South Asia who were rescued by non-governmental organizations were HIV-positive. *See* H.R. Hrg. 108-137, at 102 (testimony of S. Cohn, Anti-Trafficking, International Justice Mission). For the children and women subjected to sexual violence, awareness about the risks of HIV/AIDS could not prevent an early and painful death from involuntary exposure. *See* S. Hrg. 108-105, at 29 (testimony of G. Haugen, President, International Justice Mission) (noting that educational programs did not assist "the millions of victims of commercial sexual exploitation who are forcibly infected with the HIV virus").

In enacting the Leadership Act, Congress was guided by the President's National Security Directive relating to trafficking in persons. (*See* JA 379-380 (Press Release, Trafficking in Persons National Security Presidential Directive, Feb. 25, 2003)).** The

---

* USAID similarly concluded, in a February 2003 strategy report on trafficking in persons, that "[e]pidemics of sexually transmitted diseases . . ., including HIV/AIDS, have increased the demand for child prostitutes, who are believed to be less likely to be infected." USAID, Trafficking In Persons: The USAID Strategy for Response, at 6 (Feb. 2003) (reprinted at www.usaid.gov/our_work/cross-cutting_programs/wid/pubs/pd-abx-358-final.pdf).

** The text of the National Security Directive is classified.

President determined that "[p]rostitution and related activities, which are inherently harmful and dehumanizing, contribute to the phenomenon of trafficking in persons, as does sex tourism, which is an estimated $1 billion per year business worldwide." *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.*

Finally, prior to enactment of the Leadership Act, Congress heard testimony that non-governmental organizations funded by the Government were advocating the legalization of prostitution in Russia and the weakening of legal prohibitions on sex trafficking. *See* S. Hrg. 108-105, at 35-36 (testimony by Dr. Donna M. Hughes, Professor and Chair in Women's Studies, University of Rhode Island). Congress also heard testimony that organizations that had been funded by the United States Government to conduct condom-distribution programs were working directly with pimps and sex traffickers who forced women and children into prostitution—while taking no steps to rescue those victims or to alert appropriate authorities of their abuse and enslavement. *See id.* at 21 (testimony of Dr. Hughes).

In light of the testimony presented, and congressional findings on the links between prostitution, sex trafficking, and HIV/AIDS, Congress chose to impose two specific limitations on HIV/AIDS programs funded by the Government, to ensure the efficacy and integrity of those programs and to increase the likelihood that those programs would make the

reduction of behavioral risks a priority of prevention efforts, *see* 22 U.S.C. § 7611(a)(4). First, under 22 U.S.C. § 7631(e), no funds made available to carry out the Leadership Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking."* Second, under 22 U.S.C. § 7631(f) as originally enacted, 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." This latter restriction—the funding condition at issue here—was subsequently amended to exclude a small number of organizations, all of which save one are public international organizations of which the United States is a member.** *See* Pub. L. No. 108-

---

* The statute explicitly notes that the restriction does not bar the use of federal funding to provide "palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides." 22 U.S.C. § 7631(e).

** An international organization is an entity that is created by treaty or international agreement, and is composed primarily or exclusively of sovereign States. *See generally* Restatement (Third) of Foreign Relations Law § 221. The World Health Organization (a United Nations agency); other United Nations agencies; and the Global Fund to Fight AIDS, Tuberculosis and Malaria, three of the exempted organizations, are public international organizations in which the United States participates pursuant to treaty or international agreement. *See* 22 U.S.C. § 288 Note; Exec. Order

199, § 595(3). The only other exempted entity, International AIDS Vaccine Initiative, is a non-governmental organization directly funded by Congress to conduct clinical research to develop a vaccine for HIV/AIDS. (*See* JA 407-408; 22 U.S.C. § 2222(l)).

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 private, non-governmental organizations, as well as through public international organizations and other entities. *See* 22 U.S.C. §§ 7611(a)(5), (7), 7621. Significantly, Congress found that public-private partnerships were "critical" to the success of the international community's efforts to combat HIV/AIDS and other infectious diseases. 22 U.S.C. § 7621(a)(4); *see also* 22 U.S.C. § 7601(21) (finding that the magnitude of the HIV/AIDS crisis demands public and private partnerships).

USAID and HHS provide HIV/AIDS programs and services funded under the Leadership Act through cooperative agreements, grants and contracts with non-governmental organizations. *See generally* 22 C.F.R. Part 226 (USAID funding); 45 C.F.R. Part 74 (HHS funding). In entering into cooperative agreements—the type of funding relationships with USAID and HHS at

---

13,395, 71 Fed. Reg. 3,203 (2006).

issue here*—the agencies determine the nature and scope of the program they wish to fund, issue a public request describing the programs or services that they seek to offer through a partner organization, and solicit proposals from non-governmental organizations to provide those programs or services. *See* 69 Fed. Reg. 43,421, 43,423-5 (July 20, 2004); 68 Fed. Reg. 37,370-01, 79 (June 23, 2003). The agencies subsequently review the proposals and select organizations to receive funding to implement the HIV/AIDS services and programs, setting out the programs and services that each organization is being funded to implement, as well as agreed-on mechanisms for Government supervision and control of the performance of the agreement. *Id.* (JA 419-423).

Under the terms of their agreements with AOSI and Pathfinder, USAID and HHS are substantially involved in the implementation of programs and services. *See* 22 C.F.R. § 226.11(a); 45 C.F.R. § 74.11. The governmental agencies retain the authority to approve work plans describing the specific activities to be carried out under the operative agreements; to review and approve the key personnel implementing the program; and to monitor progress toward the program's strategic objectives. (*See, e.g.,* JA 421, 444, 475); *See* 45 C.F.R. § 74.25; 69 Fed. Reg. 43,422.

---

* AOSI receives direct funding under the Leadership Act through a cooperative agreement with USAID (JA 416-423), and Pathfinder receives such funding through cooperative agreements with USAID and HHS (JA 424-487).

Both USAID and HHS have implemented 22 U.S.C. § 7631(e) and (f) by requiring that all cooperative agreements, grants or contracts with the agencies to provide HIV/AIDS programs or services include a provision recognizing that "[t]he United States Government is opposed to prostitution and related activities"; that no funds provided thereunder may be used to "promote or advocate the legalization or practice or prostitution or sex trafficking"; 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. (*See* JA 381-388 (USAID Acquisition & Assistance Policy Directive (AAPD) 05-04, at 5)); JA 390-391 (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 receiving funds is required to certify in writing that the recipient complies with the conditions on the use of government funds and the funding condition. (JA 386 (AAPD 05-04, at 6); JA 391 (70 F.R. 29,760)).

C. District Court Proceedings

1. Plaintiffs' Complaint and Motions for a Preliminary Injunction and a Temporary Restraining Order

On September 23, 2005, AOSI and OSI filed their original complaint in the United District Court for the Southern District of New York against USAID (JA 16-31), amending it on December 5, 2005, to join Pathfinder as an additional plaintiff and DHHS and

CDC as additional defendants. (JA 336-359). Plaintiffs challenge, on statutory and constitutional grounds, the funding condition requiring a policy explicitly opposing prostitution. (JA 357-358).*

OSI is a U.S.-based foundation that established AOSI as a separately incorporated not-for-profit organization. (JA 337-338). AOSI and USAID are parties to a cooperative agreement under which AOSI receives over $16 million in 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 from USAID, AOSI signed a certification on August 3, 2005, affirming its compliance with the requirement that it have a policy explicitly opposing prostitution. (JA 352). Like AOSI, Pathfinder is a U.S.-based non-profit organization. (JA 339). It receives funding under the Leadership Act from both USAID and HHS. (*Id.*). In July 2005, Pathfinder adopted a policy explicitly opposing prostitution in

---

* Plaintiffs do 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, nor do they challenge the requirement that an organization have a policy explicitly opposing sex trafficking. (JA 342). It bears emphasis that Congress heard extensive testimony that prostitution fuels the growth of sex trafficking, and that Congress linked the two practices in determining that they should be eradicated to combat the spread of HIV/AIDS. *See supra* at 9-12.

** OSI does not receive any funding under the Leadership Act.

order to continue receiving funds under the Leadership Act. (JA 353).

On September 28, 2005, AOSI and OSI moved for a preliminary injunction against USAID, and on October 12, 2005, they moved for a temporary restraining order. (JA 5, 6, 33-35). On December 7, 2005, Pathfinder submitted a separate motion for a preliminary injunction against USAID and HHS. (JA 360-63). Defendants opposed both motions.

2. The District Court's Decision Granting the Preliminary Injunction

The district court granted AOSI and Pathfinder's motions for preliminary injunctions solely on their as-applied challenge to the Government's implementation of the funding condition. (JA 543-545). The district court recognized that Congress enacted the Leadership Act under its spending powers, and that Congress has broad authority to define the limitations of its program. Nonetheless, the district court held that the funding condition that AOSI and Pathfinder adopt a policy explicitly opposing prostitution likely violated their 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, 571-575, 629-630).*

---

* The district court also held that the Government's interpretation of the funding condition was reasonable, and that OSI did not have standing to assert its constitutional challenge to the condition. (JA 569, 629-632). Plaintiffs have not appealed those

Though acknowledging the "murky borderlines between Congress's Spending Clause power and the unconstitutional conditions doctrine," and that Defendants had "summon[ed] germane authority to bolster" their contention that a minimal scrutiny test should be applied to the funding condition (JA 578-580), the district court applied a heightened scrutiny standard of review and found that the condition was not narrowly drawn. (JA 608-617). The district court explicitly rejected the application of strict scrutiny because the condition was not a direct regulation of speech. (JA 608).

The district court recognized the Government's interest in clearly communicating its message, particularly in the field of international relations, where the Government speaks with both its words and its associations. (JA 604-608). Nevertheless, the district court concluded that a more deferential review was not appropriate, because it believed that the nation's foreign policy interests were not the primary governmental focus of the Leadership Act. (JA 606).

Despite noting that the Government can take legitimate and appropriate steps to ensure that its message is not garbled and distorted by a funding recipient, (JA 620, *citing Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001)), the district court held that the condition was not narrowly tailored to meet those interests, relying substantially on the fact that the condition carves out four organizations from its ambit. (JA 611-616). The district court, furthermore, held that the Government could preserve the clarity of its

---

holdings.

message by requiring that recipients of government funding segregate and account for their government-financed activities separately from those privately conducted, and by requiring disclaimers that a particular project was privately-funded. (*Id.*). Finally, the district court found that the Government did not show why permitting funding recipients to refrain entirely from taking a position with respect to prostitution would undermine the Government's message.* (JA 616).

Summary of the Argument

Under the Spending Clause, Congress has wide latitude to attach conditions to the receipt of federal assistance to further its policy objectives and transmit its chosen message. Such conditions are not considered under the same exacting level of scrutiny as direct regulation, but are permissible provided: they are germane to the purposes of the program; they serve to further the general welfare; and they provide clear notice to potential participants of the conditions. The funding condition here, which limits funding to organizations that adopt a policy explicitly opposing prostitution and sex trafficking, satisfies each of these criteria.

The funding condition is highly germane to ensuring the effective implementation of the Government's strategy to fight HIV/AIDS. Congress expressly found that prostitution and sex trafficking are causes of and

---

* The district court also found that AOSI and Pathfinder had sufficiently demonstrated irreparable harm absent the injunction. (JA 632-633).

factors in the spread of HIV/AIDS abroad. Congress reasonably determined that the Government's efforts to stamp out HIV/AIDS would be most successful if HIV/AIDS services are provided by partner organizations that have policies opposing these two underlying causes of the spread of the disease, and that do not engage in actions undermining the Government's strategy. The funding condition advances the Government's interest under the Leadership Act in promoting its message to reduce HIV/AIDS behavioral risks, and eradicate prostitution and sex trafficking.

The funding condition is also germane to the Government's substantial interest, as a global leader in the campaign against HIV/AIDS, in dissociating itself from organizations that promote or tolerate practices that our Government has condemned and wants to eradicate. The condition is particularly germane to the Government's foreign policy abroad, where the Constitution gives the political branches substantial discretion. As the Government speaks in the international arena not only with its words but also with its actions, associations, and representatives, the funding condition ensures that contrary views on prostitution and sex trafficking will not be attributed to the United States.

In addition to satisfying the germaneness requirement, the Leadership Act provides clear notice to potential funding recipients of the conditions on accepting government funds, and seeks to further the general welfare by reducing the spread of HIV/AIDS and preventing conduct that undermines that goal.

In holding that the funding condition was likely unconstitutional, the district court erred in applying a

heightened scrutiny standard and failing adequately to consider the interests of the Government. The constitutional limitations on Congress when exercising its spending powers are less exacting than those on its authority to regulate directly. Where the Government hires a third party to provide public services, restrictions that affect the private speech of the participating entity are subject to a First Amendment balancing test, which weighs the Government's interest as the purveyor of public goods and services against the interest of its contractor or employee in speaking as a citizen on a matter of public importance. Under this test, the Government may condition contractor status on compliance with expression-related limitations to prevent undermining of the efficacy of the services being funded.

Here, the Government has a strong interest in ensuring that Congress's chosen message—that prostitution and sex trafficking should be eradicated—is communicated as effectively as possible, and that organizations funded by the Government to provide HIV/AIDS services across the globe do not undermine the Government's efforts or associate the Government internationally with a position supporting prostitution or sex trafficking. Moreover, the Government has a strong interest in requiring that funding recipients affirmatively state that they are opposed to such conduct, to ensure that the Government chooses a partner in the fight against HIV/AIDS that is most likely to convey effectively Congress's message and that will not engage in contradictory conduct. The Government's promotion of its message that prostitution and sex trafficking should be eradicated, *see* 22 U.S.C. § 7611(a)(4), is less likely to be advanced

by an organization that has refused to commit to that objective. The requirement that an organization receiving funding have a policy explicitly opposing prostitution and sex trafficking does not unconstitutionally compel speech, as the organization is free to accept or reject the funding condition. In short, the Government's interests outweigh the interests of AOSI and Pathfinder to engage in private speech that is hostile to the goals of the statute, particularly where AOSI and Pathfinder voluntarily chose to receive funding under the Leadership Act.

Indeed, the Government interests in support of the funding condition are so substantial that the funding condition would satisfy a heightened scrutiny test—although the district court erred in holding that such a standard applied. The funding condition is implemented in a narrowly tailored manner. Neither program segregation nor disclaimers, as the district court erroneously suggested, would prevent funding recipients from undermining the Government's objectives by engaging in conduct inconsistent with the goal of eradicating prostitution and sex trafficking. While the district court relied heavily upon the fact that four organizations were excluded from the reach of the funding condition, none of those organizations is similarly situated to AOSI or Pathfinder, and they do not present the same risks to the Government's interests. Accordingly, the funding condition survives both a balancing of interests test and heightened scrutiny, and is a permissible exercise of the Spending Clause.

ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING A PRELIMINARY INJUNCTION TO AOSI AND PATHFINDER

A. Standard of Review

This Court reviews the district court's grant of a preliminary injunction for an abuse of discretion, but reviews *de novo* the district court's conclusions of law in connection with that grant. *See Connecticut Department of Environmental Protection v. OSHA*, 356 F.3d 226, 230 (2d Cir. 2004) (reversing in part grant of preliminary injunction); *Disabled American Veterans v. United States Department of Veteran Affairs*, 962 F.2d 136, 140 (2d Cir. 1992) (holding that legislative enactment satisfied the rational basis test, and vacating preliminary injunction).

Preliminary injunctive relief, such as that requested by AOSI and Pathfinder, is an "extraordinary" and "drastic" measure that should be sparingly exercised. *Borey v. National Union Fire Ins. Co. of Pittsburgh v. Martin*, 934 F.2d 30, 33-34 (2d Cir. 1991). Further, where as here, a party seeks a preliminary injunction enjoining the enforcement of governmental rules, the party's burden is increased. *Velazquez v. Legal Services Corp.*, 164 F.3d 757, 763 (2d Cir. 1999). The movant must demonstrate both "(1) that it will suffer irreparable harm and (2) that it is likely to succeed on the merits." *New York City Environmental Justice Alliance v. Giuliani,* 214 F.3d 65, 68 (2d Cir. 2000).

B. The Funding Condition Does Not Violate AOSI's or Pathfinder's First Amendment Rights

1. The Spending Clause Permits Congress to Attach Conditions Upon the Receipt of Federal Funds

Congress has the power under the Spending Clause "to 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) (quotation marks omitted); U.S. Constitution, Art. 1, § 8, cl. 1. Notably, the constitutional limitations on Congress's exercise of the spending power "are less exacting than those on its authority to regulate directly." *Dole*, 483 U.S. at 209; *see also New York v. United States*, 505 U.S. 144, 166-167 (1992); *United States v. Butler*, 297 U.S. 1, 66 (1936) (Congress's exercise of spending power is "not limited by the direct grants of legislative power found in the Constitution"). 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 206-207.

The Government does not lose its power to set conditions on a government funding program simply because those conditions implicate expressive activity. In *Rust v. Sullivan*, for example, the Supreme Court upheld federal restrictions under which a family-planning program that received Title X funding could not provide abortion counseling or a referral to abortion

services. 500 U.S. 173, 179-181, 192-193. The Supreme Court held that there was "no question but that the statutory prohibition," as applied to the plaintiffs, "is constitutional." *Id.* at 192-193. As the *Rust* 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.

Similarly, in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), the Supreme Court upheld a restriction on political lobbying by § 501(c)(3) non-profit organizations, *i.e.*, organizations whose operations are subsidized by the federal government by virtue of the tax-deductibility of private contributions. *Id.* at 551. 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 non[-]profit organizations undertake to promote the public welfare." *Id.* at 544.

2. The Funding Condition Is Permissible Under the Spending Clause

Under the analysis applicable to the Spending Clause, a restriction on funding is permissible if it is germane to the purposes of the spending program, serves to further the general welfare, and provides clear notice to potential funding recipients of the consequences of their participation. *Dole*, 483 U.S. at

207-208 & n.3.* The funding condition here satisfies all three of these requirements.**

a. The Funding Condition Is Germane to the Government's HIV/AIDS Program

The funding condition plainly is germane to the purpose of the Government's program to combat the HIV/AIDS pandemic. Congress specifically directed that promoting its chosen message about "the reduction of HIV/AIDS behavioral risks," including the eradication of prostitution and sex trafficking, "*shall be a priority* of all prevention efforts in terms of funding, educational messages, and activities." 22 U.S.C. § 7611(a)(4) (emphasis added). Congress found that prostitution and sex trafficking are causes of the transmission of HIV/AIDS, and that they undermine the efficacy of education-based methods of reducing behavioral risks,

---

* Congress is also prohibited from exercising its spending power to induce a funding recipient to engage in conduct, such as state-sponsored racial discrimination, that would itself violate the Constitution. *See Dole*, 483 U.S. at 210. Here, the funding recipients are private organizations, which are free to adopt organizational policies opposing the practices of prostitution and sex trafficking.

** While the Government contends that it has provided clear notice to AOSI and Pathfinder, it is not clear whether the same notice considerations applicable to the State recipients of funding in *Dole* would apply to private parties such as the plaintiffs in this case. *See Dole*, 483 U.S. at 207.

which cannot protect the victims of sexual violence from exposure to HIV/AIDS. *See* 22 U.S.C. § 7601(23). In funding HIV/AIDS prevention activities under the Leadership Act, therefore, Congress sought to advance its chosen message about the eradication of these two causes of the disease. *See id; see also* 22 U.S.C. § 2151b-2(d)(1)(A); 22 U.S.C. § 7101(b)(2), (11), (22).

The Government has a substantial interest as a purveyor of public services in ensuring that organizations hired to provide HIV/AIDS programs and services on its behalf do so as effectively as possible. When the Government partners with organizations to provide HIV/AIDS programs and services with the goal of advancing the message that prostitution and sex trafficking should be eradicated, Congress can reasonably insist that those organizations not simultaneously reduce the programs' efficacy by supporting or advocating the very same practices in their privately-funded activities. The funding condition is highly germane to ensuring that organizations hired to carry out the Government's HIV/AIDS program do so effectively, without undercutting the Government's message and the overall goals of the statute to eradicate prostitution and sex trafficking. *See National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 670 (1989) (noting Customs Service's "compelling interest" in preventing its anti-drug efforts from being undermined by officers' "indifference to the Service's basic mission" or "active complicity" in drug trade).

The Government's interest in protecting the efficacy of its HIV/AIDS programs and services would not be adequately served by permitting its partner organizations to remain neutral about prostitution and

sex trafficking. Congress determined that a priority of HIV/AIDS prevention efforts funded under the Leadership Act should be the promotion of the Government's view that behavioral risks should be reduced, including the eradication of prostitution and sex trafficking. *See* 22 U.S.C. §§ 7611(a)(4). Congress could reasonably determine that the Government's efforts to stamp out prostitution and sex trafficking would be most effective if programs and services to prevent HIV/AIDS are offered through organizations that have adopted policies opposing two underlying causes of HIV/AIDS. If the Government's own partner organizations—organizations that serve as the public face for the Government worldwide—are unwilling to adopt policies opposing prostitution and sex trafficking, despite accepting U.S. funding intended to promote Congress's goal of eradicating these practices, there is a substantial likelihood that the Government's goals and message will not be effectively conveyed. The Government may make viewpoint-based funding decisions where it provides funding to private entities to transmit a governmental message, and the Government has a strong interest in the effective communication of its chosen message. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (recognizing that, when government pays private speakers "to promote a governmental message," it "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee" (quotation marks omitted)).* Further, absent

---

* In contrast, where the Government establishes a Spending Clause program to fund *private* speech, under which the funding recipient, rather than the

an organization-wide policy affirmatively opposing prostitution and sex trafficking, the Government can have no assurance that employees of the partner organization will not advocate an opposing viewpoint in the organization's privately-funded activities, thereby undermining the Government's chosen message and program.

In enacting the Leadership Act and related legislation on human trafficking, Congress also determined that public acceptance of, and the failure of societies to provide women with protection against, high risk behavior such as prostitution and sex trafficking will encourage the spread of those practices and the harms they cause, including forced exposure to HIV/AIDS. *See* 22 U.S.C. § 7601(3)(B), (23); 22 U.S.C. § 7101(b)(2). An organization's failure explicitly to oppose prostitution and sex trafficking would increase the difficulty in stamping out these practices, rescuing victimized women and children, and halting the spread of HIV/AIDS and other infectious diseases. Congress reasonably concluded that eradicating prostitution and sex trafficking requires that partner organizations explicitly oppose those harmful practices—a judgment that is entitled to substantial deference by this Court. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-666 (1994) (plurality op.) (noting that Congress's "predictive judgments" in the First Amendment context

---

Government, selects the viewpoint to be expressed, the Government may lack a legitimate interest in imposing a viewpoint-based restriction. *See Velazquez*, 531 U.S. at 542; *FCC v. League of Women Voters*, 468 U.S. 364, 388-393 (1984).

are "entitled to substantial deference"); *id.* at 671 (Stevens, J., concurring) (Congress's findings "merit special respect" from the Court).

The funding condition is not only germane to the effective promotion of Congress's chosen message, it is also highly germane to the Government's substantial interest in dissociating itself in the public mind in foreign countries from organizations that might promote or tolerate practices that Congress opposes. *See, e.g.*, *United States v. National Treasury Employees Union*, 513 U.S. 454, 476 (1995) (recognizing courts' "obligation to defer to considered congressional judgments about matters such as appearances of impropriety"). The Leadership Act provides funding for prevention efforts, primarily in developing countries, intended to stop the spread of HIV/AIDS, in part through promotion of the Government's objective that behavioral risks for the disease be reduced and the practices of prostitution and sex trafficking eradicated. If funded organizations are free to espouse opposite views to the same target audiences, so long as the communications take place outside the context of the funded program, there is a substantial risk that the organizations' contrary views could be linked to the Government. Foreign audiences are not likely to recognize that an organization espousing such contrary views is speaking in its private rather than its official capacity.

Contrary to the district court's position that the focus of the Leadership Act was not the nation's foreign policy interests (JA 606), the programs and services funded under the Leadership Act are vital to the Government's foreign policy. *See* 22 U.S.C.

§§ 7601(3)(A), (4)-(10) (emphasizing foreign relations aspects of Leadership Act, included that "HIV/AIDS poses a serious security issue for the international community"); 22 U.S.C. § 2151b-2(a)-(b). The services funded under the Leadership Act primarily are provided abroad, where the threat of HIV/AIDS is greatest. The successful implementation of the nation's foreign policy is an interest of the highest order, and our Constitution confers broad latitude on the Government in the field of foreign affairs. *See Haig v. Agee*, 453 U.S. 280, 292, 307-308 (1981). In this regard, there is a special need for organizations or individuals that serve as representatives of our Government abroad not to undermine the Government's mission. *See DKT Memorial Fund, Inc. v. Agency for International Development*, 887 F.2d 275, 290-291 (D.C. Cir. 1989) (in foreign affairs, the government speaks "not only with its words and its funds, but also with its associations"); *Palestine Information Office v. Schultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (holding that, in applying constitutional scrutiny, court must give particular deference to political branches' evaluation of our interests in the realm of foreign relations and selection of means to further those interests).

Finally, the Government has a legitimate interest under the Spending Clause in ensuring that organizations are publicly accountable in their provision of Government-funded programs and services. Under the Leadership Act, the funded programs and services take place around the globe, and serve vulnerable and hard-to-reach populations who are unlikely to complain publicly of any impropriety. By adopting a rule that the Government will enter into partnerships only with those organizations that have a

policy opposing prostitution and sex trafficking, the United States secures greater assurance of compliance abroad with the use restrictions of the Leadership Act, *see* 22 U.S.C. § 7631(e), and gives each person working with a partner organization clear notice of the organization's obligation not to promote or advocate prostitution or sex trafficking.

The district court also erroneously held that the strength of the government's representational, associational, and reputational interests was undermined by the exclusion from the funding condition of the World Health Organization (an agency of the United Nations); other United Nations agencies; the Global Fund to Fight AIDS, Tuberculosis, and Malaria; and the International AIDS Vaccine Initiative. (JA 612-614, 624). The court failed to recognize that the exempted organizations are not similarly-situated to non-governmental organizations such as AOSI and Pathfinder. 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, *i.e.*, organizations made up primarily or exclusively of sovereign States, which are granted special status under international and domestic law. *See generally* 22 U.S.C. § 288. The terms of the United States Government's 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

Government, or to have their views or actions attributed to the United States Government.

The fourth organization excluded from the funding condition, the International AIDS Vaccine Initiative (the "Vaccine Initiative"), is a non-governmental organization, the focus of which is the development and implementation of a vaccine to prevent infection with HIV/AIDS. (JA 407-408). Congress specifically dedicated funding for the Vaccine Initiative's work developing a vaccine over several years leading up to enactment of the Leadership Act. *See, e.g.,* Pub. L. No. 106-429, App. 1900A-5 (2000); Pub. L. No. 106-264, § 112(a) (2000); Pub. L. No. 107-115, Title II (2002). Given the Vaccine Initiative's scientific research and development focus, there is little risk that 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. *See, e.g., Regan v. Taxation With Representation*, 461 U.S. 540, 547-548 (1983) (upholding statutory restriction on lobbying by 501(c)(3) organizations despite its exclusion of veterans' organizations).

Contrary to the district court's conclusion (JA 611-616), the funding condition is carefully tailored to the governmental interest sought to be protected. This is demonstrated not only by the four specific exclusions from the funding condition but also by the textual limitation of the condition to a "group or organization" that receives funding, 22 U.S.C. § 7631(f). If a group or organization is independent from the funding recipient, with the consequence of adequate assurance that the organization or group would not be perceived as

associated with the Government and would not have its views attributed to the Government, then the group or organization would not, under the plain language of the statute, be subject to the funding condition.* By limiting the funding condition in this manner, Congress ensured that the condition is truly germane to the successful implementation of its funding program, and protected against its over-broad application.

b. The Funding Condition Advances the General Welfare and Provides Clear Notice to Potential Funding Recipients of the Consequences of Accepting Federal Funds

The funding condition also furthers the general welfare and affords clear notice to potential funding recipients of the conditions associated with these funds.

First, the funding condition furthers the general welfare. The purpose of the funding condition is not to suppress opposing viewpoints in the domestic marketplace of ideas, but to encourage conduct by the Government's partners abroad in opposition to prostitution and sex trafficking, and to ensure that organizations funded to carry out the Government's program are committed to the program's goals, and to not undermining one of its central messages. As in *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950), the challenged statutory provision, within the

---

* Indeed, because the Government has construed the funding condition to apply solely to recipients of funding under the Act, the district court denied OSI's claim for relief. (JA 629-632).

context of the initiative to fight HIV/AIDS, "regulates harmful conduct which Congress has determined is carried on by persons who may be identified" by their speech or expression. *Id.* at 396. To the extent that the "general welfare" requirement is judicially enforceable, *cf. Dole*, 483 U.S. at 207 n.2, the goal of reducing exposure to an increased risk of contracting HIV/AIDS is clearly in pursuit of the general welfare.

In addition, the funding condition gives clear, advance notice to organizations seeking funding to provide HIV/AIDS programs and services under the Leadership Act that organizations are eligible for funding only if they have a policy opposing prostitution and sex trafficking. As part of its prevention efforts, the Government prioritizes the promotion of the Government's chosen message that behavioral risks for the disease should be reduced, and prostitution and sex trafficking eradicated. 22 U.S.C. § 7611(a)(4). Moreover, the requirement that an organization have a policy explicitly opposing prostitution and sex trafficking has been applied on a purely prospective basis, and any organization that does not have such a policy or wish to adopt one is free not to participate in the government funding program. As the Supreme Court explained in *Rust*, the Court has "never held that the Government violates the First Amendment simply by offering that choice." 500 U.S. at 199 n.5; *see also DKT Memorial Fund Ltd. v. AID*, 887 F.2d 275, 287-288 (D.C. Cir. 1989) (rejecting First Amendment challenge where funding was denied to foreign organizations promoting abortion, and concluding that there is a fundamental difference between the government imposing penalties on speech and its decision not to subsidize the exercise of First Amendment rights).

3. The Funding Condition Is Not an Unconstitutional Condition

a. The District Court Should Have Applied a More Deferential Balancing of Interests Test to a Restriction Relating to the Provision of Government Services

Although recognizing that the constitutional limitations on Congress when exercising its spending powers are less exacting than those on its authority to regulate directly (JA 574), the district court erroneously applied a form of heightened scrutiny requiring that the condition be narrowly drawn, and held that the condition did not satisfy that standard.* (JA 608-616). In the context of the Leadership Act's spending clause program, the district court should have applied a more deferential standard, taking into greater account the vital government interests and foreign policy objectives at stake here.

The underlying purpose of the Leadership Act is to fund private organizations to provide HIV/AIDS prevention services to the public worldwide on behalf of the Government. The Supreme Court has repeatedly held that the government may, consistent with the First Amendment, restrict the privately-funded speech of those working on the government's behalf in order to protect the efficiency and integrity of public services. At most, such restrictions are subject to a balancing of

---

* The district court, however, properly rejected the application of strict scrutiny to the funding condition. (JA 608).

interests, which weighs decisively in favor of the funding condition.

The Supreme Court recognized in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), that "there would be little chance for the efficient provision of public services" if the government in its capacity as employer did not have "a significant degree of control over [its] employees' words and actions." *Id.* at 1958. The government's interests in this regard encompass not only regulation of speech taken in an official capacity (over which the First Amendment poses *no* limit to the government's restriction or control), but also to private speech or conduct unrelated to the provision of government services, if it threatens the government's ability "to operate efficiently and effectively." *Id.*

Notably, the Government has significantly greater latitude to restrict the speech of those hired to provide government services than it possesses over the speech of the general public—even if both types of speech pose the same threat to the Government's operations. *See Garcetti*, 126 S. Ct. at 1958 (government has "broader discretion" to restrict employee speech "that has some potential to affect the entity's operations"). Likewise, the Supreme Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 676 (1996) (quotation marks and citation omitted).*

---

* As a plurality of the Supreme Court explained in *Waters v. Churchill*, 511 U.S. 661 (1994), the

Indeed, the Government's authority to regulate the speech of those hired to provide public services encompasses regulation of private contractors that act on its behalf. *See Umbehr*, 518 U.S. at 674. Although the relevant considerations may differ slightly, *see Umbehr*, 518 U.S. at 676-677, a similar analysis applies to restrictions on the speech of both government employees and government contractors. Under this First Amendment analysis, the Government's funding-condition restriction of the "private" speech of an organization funded to provide services on the Government's behalf is subject to a balancing test, which weighs " 'the interests of the [contracting organization], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs . . . .' " *City of San Diego v. Roe*, 543 U.S. 77, 81 (2004) (quoting *Pickering v. Board of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)). Where the speech of a government contractor threatens the efficacy of the public program it has been hired to provide, that speech may permissibly be restricted by the Government. *See Umbehr*, 518 U.S. at 678 (recognizing government's "interests as a public

---

government's "extra power" in this context "comes from the nature of the government's mission as employer." *Id.* at 674. When government agencies, "charged by law with doing particular tasks," hire employees to carry out those tasks "as effectively and efficiently as possible," the agencies "must have some power to restrain" any employee who "begins to do or say things that detract from the agency's effective operation." *Id.* at 674-675.

service provider" and "contractor"); *Garcetti*, 126 S. Ct. at 1958 (noting that government employees' private speech may be restricted if it "contravene[s] governmental policies or impair[s] the proper performance of governmental functions").

In this case, the funding condition applies to organizations that are funded by the Government to provide HIV/AIDS programs and services on its behalf, and are thus properly characterized for First Amendment purposes as government contractors.* In requiring the adoption of an organization-wide policy, the funding condition limits the speech and expression of an organization's "private" speech, *i.e.*, speech undertaken with private rather than government funding, and outside the organization's capacity as a contractor for the Government. At most, therefore, the speech is entitled to the First Amendment protection afforded by the *Pickering* balancing test.

As discussed *supra*, the Government has a substantial interest in protecting against distortion of, or interference with, the Government's chosen message by organizations hired to provide programs or services

---

* As stated *supra*, organizations receiving funds under the Leadership Act, such as AOSI and Pathfinder, operate pursuant to either a cooperative agreement, grant or contract. In each case, the organization functions in the capacity of a contractor, providing services to the public on behalf of the Government and as part of a governmental program, and any technical difference in the funding mechanism does not affect the applicability of the First Amendment balancing test.

abroad. *See Velazquez*, 531 U.S. at 541 (holding that the Government may take appropriate steps to make sure that its message is not distorted). The Government also has a substantial interest in protecting against its association with organizations that support or are neutral toward the practices of prostitution and sex trafficking, and in ensuring compliance by its partner organizations with statutory restrictions on the use of government funding.

In contrast, private organizations such as AOSI and Pathfinder have no legitimate claim of entitlement to funding where they engage in speech that is contrary to the basic aims of the program in which they have enlisted. In balancing the relative interests, it is significant that programs and activities funded under the Leadership Act are carried out primarily in foreign countries, and directed at foreign nationals and foreign governments. There is no First Amendment right to petition a foreign government, such as by advocating the legalization of prostitution or sex trafficking, nor is the First Amendment aimed at protecting communications that take place in foreign countries, with foreign nationals. Any interest that AOSI or Pathfinder may have in expressive activities that interfere with the Government program under which they have sought funding, and pursuant to which they provide services, is minor, and far outweighed by the compelling interests of the Government.

The district court held that the Government's interest in protecting the efficacy and integrity of its strategy to combat HIV/AIDS would be adequately served by barring the use of government funds to promote or advocate the legalization or practice of

prostitution or sex trafficking. (JA 616). This analysis simply ignores, however, that Congress directed that a priority of prevention efforts funded under the Leadership Act should be the promotion of the message to reduce behavioral risks, including the eradication of prostitution and sex trafficking. *See* 22 U.S.C. § 7611(a)(4) (reduction of HIV/AIDS behavioral risks, including eradication of prostitution and sex trafficking, "shall be a priority of all prevention efforts in terms of funding, educational messages, and activities"). That objective is less likely to be advanced in a program offered through an organization that disagrees with or has refused to commit itself to that policy goal. Furthermore, the district court's analysis ignores the Government's interest in preventing its own partners from conducting programs or activities that serve, directly or indirectly, to undermine the effectiveness of the Government program. The district court's analysis would suggest that the Government could not terminate an organization hired to promote anti-drug messages, on the ground that the organization also promoted the legalization of narcotics in its privately-funded activities. Thus, the district court's analysis ignores that the Government has an interest in requiring that entities hired to implement its policy do not simultaneously act to undermine it. *See, e.g., Garcetti*, 126 S. Ct. at 1957-1958; *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (avoiding interference with "effective functioning of the public employer's enterprise" can be "strong state interest"); *United States*

Civil Serv. Comm'n v. National Ass'n of Letter Carriers AFI-CIO, 413 U.S. 548, 564-566 (1973).*

The Second Circuit also has recognized that a government agency may function more effectively when its employees "publicly support and convey the agency's positions" and that such a government interest can require limitations on speech. *Lewis v. Cowen*, 165 F.3d 154, 165 (2d Cir. 1999). In *Lewis*, a public employee was terminated because he refused to present the agency's program in a "positive manner." *Id.* In holding that the employee's termination did not violate his First Amendment rights, the Court held that the agency's interest in the efficient and effective fulfillment of its mission outweighed any interest of the employee in speaking, or not speaking, on matter of public concern. *Id.*; *see also Hall v. Ford*, 856 F.2d 255, 265 (D.C. Cir.

---

* Indeed, the funding condition applicable to organizations that provide programs and services funded by the Leadership Act is just one of the many restrictions imposed on companies that do business with the United States, ranging from anti-discrimination and affirmative action requirements, to a requirement to notify employees about their unionization rights. Such restrictions, although they have been in force for decades and often apply to all of the contractors' operations, have never been held to impinge those contractors' rights of free speech and expression. Rather, courts have recognized that they further the Government's interests in efficient and effective provision of goods and services. *See, e.g., UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 363-367 (D.C. Cir. 2003).

1988) (holding that the First Amendment did not prohibit the public employer from terminating the employee on the basis of speech reflecting that the employee would not "carry out [the employer's] policy choices vigorously").

So too, here, AOSI's and Pathfinder's objection to the funding condition that they have a policy explicitly opposing prostitution reflects that they have a position on this harmful practice that may undermine the Government's message that such practice should be eradicated. Moreover, the First Amendment does not bar Congress from selecting as foreign representatives of the Government those organizations that, because of their stated commitment to the program's policy goals, are the most likely to communicate vigorously the Government's message in providing services under the Leadership Act.

b. Even if the Heightened Scrutiny Test Applied, the Funding Condition Is Constitutional Because It Is Narrowly Drawn

Even assuming *arguendo* that the district court properly held that the funding condition was subject to a heightened scrutiny test, the funding condition satisfies this standard because it is narrowly drawn. The district court erred in deciding that the condition failed the test because it exempted a limited number of organizations that are not remotely similarly situated to AOSI or Pathfinder. *See supra* at 34-35. On the contrary, Congress narrowly tailored the funding condition by limiting its scope to a "group or organization" that receives funding, 22 U.S.C. § 7631(f),

so that it does not affect any entity that is truly independent from the funded group or organization, thus assuring that the entity's views would not be attributed to the Government and the entity would not be perceived as an associate of the Government. *See supra* at 35-36.

The district court also erroneously concluded that the Government's objective could be achieved by requiring that funding recipients segregate and account for their Government- financed activities from those privately financed, and by issuing disclaimers stating that their conduct is privately-funded. The district court ignored that such requirements would not ensure that (a) the Government's organizational partners will vigorously pursue the Government's program and not undercut it with their private speech; (b) the Government is not associated with those organization's contrary messages; and (c) Government funds will not also be used to engage in contrary messages. *See supra* at 28-34.*

---

* In holding that the funding condition was not narrowly drawn, the district court erroneously applied a least- or less- restrictive means of analysis, essentially requiring that the Government establish a compelling interest for the condition under a strict scrutiny standard. As this Court held, this standard is not appropriate for assessing conditions attached to government spending programs. *See Brooklyn Legal Services Corp. v. Legal Services Corporation*, 462 F.3d 219, 229-230 (2d Cir. 2006). The funding condition satisfies the heightened standard, correctly applied.

c. The District Court Erred in Holding That the Funding Condition Unconstitutionally Restricts AOSI's and Pathfinder's Private Speech and Compels Them to Adopt the Government's Viewpoint

Contrary to the district court's holding, the funding condition is not unconstitutional merely because it applies both to an entity's privately-funded and publicly-funded speech. In *Rust v. Sullivan*, the Supreme Court explicitly rejected the argument that the restriction on speech promoting abortion as a method of family planning was an unconstitutional condition, despite the fact that the restriction applied to all speech within the Title X project, including speech funded by mandatory matching funds that originated from private sources. 500 U.S. at 198-199 & n.5.

Similarly, in *United States v. American Library Ass'n*, 539 U.S. 194, 212-214, 217 (2003), a plurality of the Supreme Court rejected a challenge to a funding condition contained in the Children's Internet Protection Act, which required public libraries receiving funds for internet services to install filtering software on all computers providing such services, even if the computers were not purchased with federal money. Quoting *Rust*, the Supreme Court stated that "within broad limits 'when the Government appropriates public funds to establish a program, it is entitled to define the limits of the program.' " *Id.* at 211; *see also Buckley v. Valeo*, 424 U.S. 1, 57 & n.65, 85-104 (1976) (finding no unconstitutionality in Congress's requirements that federal candidates who chose to accept public financing of their campaigns accept limitations on their private

expenditures); *State of Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 142-143 (1947) (upholding provision of the Hatch Act barring any state or local employee whose primary employment was in connection with an activity "financed in whole or in part" by the federal government from taking an active part in political management or political campaigning).

Congress's right to condition its funds in a manner that affects private speech is particularly strong where the government program is intended to communicate a particular viewpoint based on Congress's conclusion that such a message impacts the ultimate objectives of the funding program. In such a case, the Government's interest necessarily extends beyond prohibiting the use of government funds for unauthorized purposes. *See generally Rosenberger v. Rector of University of Virginia*, 515 U.S. 819, 833 (1995) (noting that the government has broader latitude to regulate speech when it "disburses public funds to private entities to convey a governmental message").

Likewise, the Supreme Court has repeatedly held that the government may, consistent with the First Amendment, restrict the privately-funded speech of employees or contractors working on the government's behalf, in order to protect the efficiency and integrity of public services, as the funding condition does here. *See supra* at 38-45.

In holding that the funding condition improperly foreclosed AOSI's and Pathfinder's ability to express opposing viewpoints with private funds, the district court relied heavily on cases in which, unlike here, the Government did not seek to transmit a message, and therefore a restriction on speech in non-funded areas

was not necessary to prevent the undermining of the Government's chosen message. (JA 589-596). In those cases, the Supreme Court's holding that the Government "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee," *Rosenberger*, 515 U.S. at 833, simply did not apply.

For example, in *League of Women Voters*, the Supreme Court struck down a condition in the Public Broadcasting Act of 1967, a statute authorizing the provision of assistance to noncommercial radio and television stations to support educational programming, that prohibited the funding of any stations that engaged in editorializing. 468 U.S. at 366. Unlike the Leadership Act, the statute at issue in *League of Women Voters* was designed not to transmit a governmental message, but rather to facilitate private speech through the funding of educational programs and to afford maximum protection *against* interference by the Government. *Id.* at 386-387.

The district court also erred in relying on *Velazquez v. Legal Services Corp.*, 164 F.3d 757 (2d Cir. 1999). *Velazquez* concerned the implementation of a statute that provided funds for legal assistance, under which Congress barred the provision of assistance to entities that engaged in certain conduct, including attempting to reform the welfare system and participating in class actions. *Id.* at 760; *see also Brooklyn Legal Services*, 462 F.3d at 229-230 (considering same rules in as-applied challenge). As in *League of Women Voters*, the holdings of *Velazquez* and *Brooklyn Legal Services* are inapposite because the statutory program in those cases did not seek to transmit a specific governmental message, and

therefore the speech at issue would not interfere with the Government's chosen message. *See Velazquez*, 164 F.3d at 766 (holding that, in establishing program, Congress was "not advancing any particular set of values that might be diluted or distorted if the forbidden speech were permitted."); *see also Velazquez*, 531 U.S. at 542 (program at issue was "designed to facilitate private speech, not to promote a governmental message").*

The Leadership Act creates an entirely different program. Unlike the programs at issue in *Velazquez* and *League of Women Voters*, Congress sought through the Leadership Act to transmit a message that certain behaviors are causes of and factors in the spread of HIV/AIDS and that such behaviors must be reduced or eradicated. 22 U.S.C. § 7601(23). The requirement that funding recipients have a policy explicitly opposing prostitution and sex trafficking and not engage in conduct inconsistent with that policy, even with their private speech, is central to ensuring that these organizations work effectively with the Government to advance the governmental program and that the

---

* With respect to *Rust*, another case relied on by the district court, *see supra* at 26-27, the district court recognized that it concerned a condition that restricted the use of federal funds granted to recipients, and therefore the Supreme Court did not face the issue of whether the Government may condition the grant of funds on a requirement that the entity refrain from engaging in inconsistent speech with private funds. (JA 594, 596).

Government's chosen message is not distorted. *See* 22 U.S.C. § 7611(a)(4).

The funding condition is similar in relevant respects to a policy challenged in *DKT Memorial Fund Ltd. v. AID*, 887 F.2d 275 (D.C. Cir. 1989), providing foreign assistance for family-planning activities but denying funding to any foreign non-governmental organization performing or actively promoting abortion as a method of family planning. *Id.* at 288-290. After holding that the foreign plaintiffs lacked standing to bring a First Amendment challenge, the D.C. Circuit proceeded in "an excess of caution" to consider whether, even assuming the foreign plaintiff's could invoke the First Amendment, their claims would fail on the merits. *Id.* at 285-286. As the D.C. Circuit recognized, there is a fundamental distinction between the Government's punishment of speech, and the Government's decision not to subsidize the exercise of First Amendment rights. 887 F.2d at 287-288. Crucially, the *DKT* Court applied that principle despite the fact that the challenged restriction on foreign organizations applied to all speech and activities, even those undertaken with purely private funds. *Id.* at 290-291.*

---

* In *Planned Parenthood v. Agency for Int'l Development,* 915 F.2d 59 (2d Cir. 1990), this Circuit addressed a challenge to the same condition. As the case was brought by domestic non-governmental organizations, the Second Circuit, unlike the D.C. Circuit, did not consider directly the question as to whether the funding restriction imposed impermissible conditions on the foreign non-governmental organizations. Nevertheless, the Court made clear that

Finally, the funding condition does not impermissibly compel speech, as the district court mistakenly held. (JA 624-628). AOSI and Pathfinder are free to adopt any policy they like, or no policy at all, consistent with the First Amendment on the subject of prostitution. The Leadership Act merely specifies that if such organization choose not to adopt a policy consistent with the federal goal of "eradicating] prostitution"—which is one of the "causes of and factors in" the spread of HIV/AIDS, *see* 22 U.S.C. § 7601(23)—the organization is ineligible for government subsidies aimed at fighting the pandemic. As the Supreme Court has held in the context of a challenge under the Tenth Amendment, there is nothing generally coercive about imposing a condition attached to a grant or subsidy under Congress's broad powers under the Spending Clause. *See Dole*, 483 U.S. at 211 (holding that condition on federal highway funds on state's adoption of minimum drinking age was not coercion; "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties"). As the district court itself acknowledged (JA 626), the cases in which the Supreme Court found compelled speech have not concerned circumstances where Congress has designed a limited program to expend government funds for a particular purpose, and the condition serves that purpose. *See National Endowment for the Arts v. Finley*,

---

the government's decision not to subsidize the exercise of a fundamental right was not subject to strict scrutiny, and held that the agency's implementation of the executive branch's decision to restrict the class of foreign beneficiaries of government funding must be upheld if rationally related to the policy goal. *Id.* at 65.

524 U.S. 569, 587-588 (1998) (absent a threat that the denial of a subsidy would "'drive certain ideas or viewpoints from the marketplace,'" "the Government may allocate ... funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.") (citation omitted).

In short, where the Government funds private organizations to provide particular services, the Government is not required to fund organizations that are not likely to support the Government's program and would distort its message through the organizations' privately-funded speech.

CONCLUSION

The Preliminary Injunction should be vacated, and the Decision should be reversed.

Dated: New York, New York
November 13, 2006

Respectfully submitted,

MICHAEL J. GARCIA,
United States Attorney for the Southern District of New York, Attorney for Defendants-Appellants.

RICHARD E. ROSBERGER,
SEAN H. LANE,
Assistant United States Attorneys, Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for Defendants-Appellants 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 12,540 words in this brief.

MICHAEL J. GARCIA,
United States Attorney for the Southern District of New York

By: RICHARD E. ROSBERGER,
Assistant United States Attorney

ANTI-VIRUS CERTIFICATION

Case Name: Alliance v. USAID

Docket Number: 06-4035-cv

I, Natasha R. Monell, hereby certify that the Appellant's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 11/13/2006) and found to be VIRUS FREE.

_____

Natasha R. Monell, Esq.
Staff Counsel
Record Press, Inc.

Dated: November 13, 2006