# 06-4035-cv

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

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.*

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

## BRIEF FOR PLAINTIFFS-APPELLEES


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## CORPORATE DISCLOSURE STATEMENT

Plaintiffs Alliance for Open Society International and Pathfinder International have no parent corporations and do not issue stock, so there are no publicly held companies holding 10% or more of their stock.

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## REQUEST FOR ORAL ARGUMENT

Plaintiffs Alliance for Open Society International and Pathfinder International respectfully request oral argument.

## THE ORDER APPEALED FROM

This proceeding consists of an appeal from a Decision and Order of the U.S. District Court for the Southern District of New York (Victor Marrero, J.), issued on May 9, 2006, JA 516, which held that Plaintiffs Alliance for Open Society International ("AOSI") and Pathfinder International ("Pathfinder") are entitled to a preliminary injunction because their First Amendment rights are violated by a requirement that they adopt a policy "explicitly opposing prostitution" in order to obtain federal funds to fight HIV/AIDS internationally. 22 U.S.C. § 7631(f) ("the Policy Requirement"). The court ruled that the Policy Requirement is not narrowly tailored to further Congress's goals, applies a viewpoint discriminatory speech restriction to Plaintiffs' private funds, compels them to engage in speech, and causes them irreparable injury. JA 628-29, 632-33. On June 29, 2006, the District Court issued a Preliminary Injunction Order, barring Defendants from using the Policy Requirement as a basis for action against Plaintiffs AOSI and Pathfinder. JA 635. This Order has not been stayed.

The district court also rejected Plaintiffs' argument that the Policy Requirement should be construed as requiring a statement opposing harms associated with prostitution, and also as allowing funding recipients to use their *private* funding to engage in the speech and activities they believe most effectively reduce harms associated with prostitution and HIV/AIDS. JA 545-71. Because Defendants had conceded that Plaintiff Open Society Institute ("OSI") is not subject to the Policy Requirement, the court also denied OSI's motion for a preliminary injunction. JA 629-32.

## JURISDICTIONAL STATEMENT

The District Court possessed subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1)

## ISSUES PRESENTED

1. Is the First Amendment violated by Defendants' implementation of the Policy Requirement, 22 U.S.C. § 7631(f), to require Plaintiffs to adopt a policy opposing prostitution, and to bar them from using their private funds to engage in privately funded speech Defendants view as insufficiently opposing prostitution?

The District Court ruled in the affirmative on this issue.

2. In light of the plain meaning of the text, Congressional intent, and canons of statutory construction, should the Policy Requirement, 22 U.S.C. § 7631(f), together with the Federal Funds Restriction, 22 U.S.C. § 7631(e), be construed to: a) require a statement opposing prostitution, while permitting a statement that what is opposed are harms associated with it, and b) bar the use of *federal* funds to discuss or advocate the practice or decriminalization of prostitution, while leaving private partners free to use their *private* funds to advocate and use the techniques they believe most effectively reduce harms associated with prostitution and HIV/AIDS?

The District Court ruled in the negative on this issue.

## STATEMENT OF THE CASE

On September 23, 2005, Plaintiffs AOSI and OSI filed a Complaint challenging the implementation by the U.S. Agency for International Development ("USAID") and its Administrator[1] of the Policy Requirement, 22 U.S.C. § 7631(f), which obligates them to adopt a policy "explicitly opposing prostitution" in order to obtain federal funds to fight HIV/AIDS internationally. JA 540.[2] On September 28, 2005, those Plaintiffs sought a preliminary injunction against Defendants

[1] Plaintiffs have no objection to Defendants' request that the current USAID Administrator be substituted for Andrew Natsios.

[2] Plaintiffs do not challenge an additional requirement that they adopt an organizational policy opposing sex trafficking. 22 U.S.C. § 7631(f).

USAID and its Administrator, supported by sworn declarations describing the effects of the Policy Requirement on AOSI and OSI, on other recipients of funding from Defendants, and on the fight against HIV/AIDS. JA 46-335.

On October 12, 2005, AOSI and OSI sought a temporary restraining order barring enforcement of the Policy Requirement in connection with a conference on sexual rights and health they planned to co-sponsor that month in New York. JA 244 ¶ 53; JA 540. On October 14, 2005, the parties entered into a standstill agreement providing that, until the pending motions were decided, "AOSI would continue to comply with its understanding of the Policy Requirement in good faith, and USAID agreed to provide at least two weeks notice prior to taking any action to redress any perceived violation of the Act." JA 540.

On December 5, 2005, Plaintiffs AOSI and OSI, together with Pathfinder International ("Pathfinder"), filed an Amended Complaint, naming Pathfinder as a new Plaintiff. The Amended Complaint also named four new Defendants: 1) U.S. Centers for Disease Control ("CDC"); 2) CDC Director Julie Louise Gerberding; 3) U.S. Department of Health and Human Services ("HHS");[3] and 4) HHS Secretary Michael O. Leavitt. JA 336. On December 7, 2005, Pathfinder sought a preliminary injunction. JA 360. In support of its motion, Pathfinder provided a

[3] Defendant CDC is an operating agency of Defendant HHS.

sworn declaration describing how it was affected by the Policy Requirement, and adopted the legal arguments put forward by AOSI and OSI. JA 541.

On January 4, 2006, Defendants filed papers opposing Plaintiffs' preliminary injunction motions. Defendants filed an attorney declaration identifying various attached documents but did not provide sworn declarations disputing the facts put forward by Plaintiffs. JA 373.

On January 9, 2006, Pathfinder entered into standstill agreements with Defendants similar to the agreement previously entered into between Plaintiffs AOSI and OSI and Defendants Natsios and USAID.

On April 13, 2006, the District Court heard oral argument, and on May 9, 2006 it issued the ruling that is the subject of this appeal. Defendants filed their Notice of Appeal on August 25, 2006. On November 13, 2006, this Court granted Plaintiffs' motion on consent seeking expedited oral argument.

## STATEMENT OF FACTS

### I. Plaintiffs' Work to Combat HIV

Plaintiffs Pathfinder and AOSI (collectively "Plaintiffs") are U.S.-based non-profit organizations engaged in the worldwide effort to halt the spread of HIV/AIDS. Massachusetts-based Pathfinder provides access to quality family planning and reproductive health services, including HIV/AIDS prevention, in over 20 countries throughout Africa, Latin America, Asia, and the Near East. JA 364-

65 ¶ 4. New York-based AOSI provides HIV/AIDS prevention services and promotes public health and economic, legal and social reform in the former Soviet republics of Central Asia. JA 232 ¶ 5, 233 ¶ 9. Plaintiffs conduct this work in part with funding from the U.S. government, and in part with funding from non-U.S. government sources ("private funds"). Pathfinder, for example, receives funding from several United Nations agencies; the World Bank; the governments of Sweden, Canada, and the Netherlands; and numerous foundations, corporations and individual donors. JA 365 ¶ 5; *see also* JA 232 ¶¶ 4, 6.

With funding from Defendants under the U.S. Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 ("AIDS Leadership Act"), Plaintiffs help some of the most vulnerable populations on the planet. Their work includes: 1) enabling Bangladeshi non-governmental organizations ("NGO's") to "become technically and managerially self-sufficient in the provision of essential health services," 2) "assist[ing] the Government of Mozambique . . . and USAID/Mozambique" in increasing use of child survival and reproductive health services, 3) expanding community home-based care activities for people living with HIV/AIDS in Tanzania, and 4) stemming the tide of drug use in Central Asia. JA 434; JA 445; JA 491; JA 233-35 ¶¶ 9, 13-18. Plaintiffs provide these services pursuant to cooperative agreements under which they design and coordinate all of their programs' activities. *See* JA 234 ¶ 13, 424 ¶ 3.

Until a year and a half ago, Plaintiffs were able to participate in the federal fight against HIV/AIDS "without compromising their private and independent nature." *See* 22 U.S.C. § 2151u. With their private funds, they delivered services and conducted advocacy in a way that conformed to their missions, which include promoting the public health practices and policies most effective at preventing HIV/AIDS among vulnerable groups such as prostitutes.[4] JA 371-72 ¶ 31, 232 ¶ 5, 243-44 ¶ 53, 416-17 ¶ 3.

## II. The Policy Requirement

Plaintiffs' partnership with Defendants is now jeopardized by the Policy Requirement, which, as implemented by Defendants, both compels speech by requiring Plaintiffs to adopt a policy opposing prostitution and bans speech by barring Plaintiffs from engaging in any privately funded speech that Defendants view as being insufficiently opposed to prostitution. The Policy Requirement has no effect on Plaintiffs' use of government funds, because the Federal Funds Restriction, which Plaintiffs do not challenge, already bars Plaintiffs from using their public funds "to promote or advocate the legalization or practice of prostitution and sex trafficking." 22 U.S.C. § 7631(e).

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[4] Plaintiffs and others in the public health field generally use the terms "sex work" and "sex worker," because the terms "prostitute" and "prostitution" are viewed as stigmatizing by the sex workers whose trust they must gain in order to engage them in the fight against HIV/AIDS. JA 60 ¶ 28. However, because the AIDS Leadership Act uses the latter terms, Plaintiffs do so in this brief.

Although the Policy Requirement was enacted in 2003 as part of the AIDS Leadership Act, for almost two years Defendants chose not to enforce it against U.S.-based organizations, having been warned by the Department of Justice that application of the requirement to such organizations would be unconstitutional. *See* JA 155-56, 143 n.10.

This changed in September 2004, when the Justice Department reversed course to opine that "reasonable arguments" exist to support the constitutionality of the Policy Requirement as applied to domestic non-profit organizations. JA 155. Accordingly, in May 2005 Defendants began requiring U.S. organizations receiving AIDS Leadership Act funding to comply with the requirement. JA 383, 386, 390-91.

## III. Legislative Background

In his 2003 State of the Union Address, President Bush recognized the "severe and urgent crisis" posed by the HIV/AIDS epidemic abroad and requested that Congress commit $15 billion over five years to "turn the tide against AIDS." Pres. George W. Bush, *State of the Union Address*, Jan. 28, 2003.[5] In response, Congress passed the AIDS Leadership Act, which contains the Policy Requirement. The Act's overriding purpose is to "strengthen United States leadership and the effectiveness of the United States response" to HIV/AIDS,

[5] This document is available at http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html.

tuberculosis, and malaria internationally. 22 U.S.C. § 7603; *see also* H.R. Rep. No. 108-60, at 23 (Apr. 7, 2003). The Act provides for increased resources to accomplish that goal, and calls on the President to establish a five-year, global strategy to fight HIV/AIDS. 22 U.S.C. §§ 7603(1), 7611.

The legislative history of the Policy Requirement is sparse. It was introduced as an amendment by Representative Christopher Smith during a House Committee on International Relations mark-up session. *See* U.S. Leadership Against HIV/AIDS, Tuberculosis, & Malaria Act of 2003: *Markup Before the Committee on International Relations, House of Representatives*, 108th Cong. 148-149 (Apr. 2, 2003) ("AIDS Leadership Markup").[6] Neither the House nor the Senate held hearings in connection with the adoption of the Policy Requirement or the AIDS Leadership Act more broadly.[7] *See* H.R. Rep. No. 108-60, at 27. The House Committee on International Relations did not provide any rationale for the Policy Requirement in its report on the bill. *Id.*

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[6] This document is available at http://commdocs.house.gov/ committees/intlrel/ hfa86302.000/hfa86302_0f.htm.

[7] The hearings Defendants cite were not conducted in connection with the AIDS Leadership Act, and were conducted by committees that neither marked up the Act nor added the Policy Requirement. *See* Defs.' Br. at 10-13 (citing hearings before the Senate Subcommittee on East Asian and Pacific Affairs of the Committee on Foreign Relations and the House Subcommittee on Human Rights and Wellness). One was even conducted after the Act's May 2003 passage, *see id.* at 11-12 (citing hearing held Oct. 29, 2003), which doubly disqualifies it as legislative history. *See N.Y.C. Health & Hosps. Corp. v. Perales*, 954 F.2d 854, 861 (2d Cir. 1992).

Rep. Smith put forward two different rationales for the amendment.[8] First, he said organizations with a different ideological approach to prostitution than his should not receive funding:

> Although this comes as a shock to most Americans, in other parts of the world many officials in both government and the private sector who work on these issues feel that legalizing prostitution and focusing primarily on safe sex for victims of trafficking who are being raped ever day is a solution. Some actually look at prostitution as a worker's rights issue, and believe it is a legitimate form of employment. … The issue that is before us today is whether or not we will provide money to organizations that seek the legalization of prostitution and also enable the traffickers, and stand side by side with the traffickers and, regrettably, enable them to enslave these women, whether or not we will provide the money to them.

AIDS Leadership Act Markup, *supra*, at 144-45. Then, after being challenged by Rep. Howard Berman regarding the purpose of the amendment, he said that he wanted to ensure that when groups provide services to prostitutes using federal funding, they do not leave the impression that they are endorsing prostitution, stating:

> the money provided in the bill would help women who perhaps are in a brothel, through condom distribution

[8] A statement by a single member of Congress not contained in either the Congressional Record or the Committee report is of limited weight in construing legislative intent. *Cf. Becton, Dickinson & Co. v. FDA*, 589 F.2d 1175, 1182 n.6 (2d Cir. 1978). Nonetheless, Plaintiffs discuss Rep. Smith's statement because the District Court did. JA 559 n.23.

> within that venue. But we are asking that organizations that seek to provide that kind of assistance make it clear that they are not trying to legalize prostitution . . . which is obviously a heinous practice.

*Id.* at 166.

The latter rationale was echoed by then-Senate Majority Leader Bill Frist, in a colloquy with Senator Patrick Leahy. Senator Leahy warned:

> There are organizations who work directly with commercial sex workers and women who have been the victims of trafficking, to educate them about HIV/AIDS, to counsel them to get tested, to help them escape if they are being held against their will, and to provide them with condoms to protect themselves from infection. This work is not easy. It can also be dangerous. It requires a relationship of trust between the organizations and the women who need protection.
>
> I am concerned that this provision, which requires such organizations to explicitly oppose prostitution and sex trafficking, could impede their effectiveness. In fact, some or many of these organizations may refuse to condemn the behavior of the women who[se] trust they need in order to convince them to protect themselves against HIV. I would ask the Majority Leader how we can avoid that result, because we need to be able to support these organizations.

149 Cong. Rec. S6457 (daily ed. May 15, 2003).[9] Senate Majority Leader Frist responded:

> I agree that these organizations who work with prostitutes and women who are the victims of trafficking play an important role in preventing the spread of HIV/AIDS. We need to support these organizations,

[9] The entire colloquy is reproduced at JA 556-57.

> because HIV transmission through this type of behavior is widespread in many parts of the world. At the same time, we do not want to condone, either directly or indirectly, prostitution or sex trafficking. Both are abhorrent.
>
> I believe the answer is to include a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women. Such a statement, as part of the contract or grant agreement, would satisfy the intent of this provision.

*Id.*

## IV. Implementation of the Policy Requirement

The contours of the Policy Requirement are extremely unclear, although Plaintiffs have repeatedly sought clarification. JA 236-39 ¶¶ 24-36. With respect to the requirement's speech compulsion aspect, Defendants have issued no regulations explaining what constitutes a "policy" sufficient to comply with the Policy Requirement. They have not indicated whether they agree with the interpretation put forward by Majority Leader Frist.

With respect to the requirement's speech ban, Defendants assert they may scrutinize recipients' privately funded speech and activities to ensure they are sufficiently opposed to prostitution. *See*, *e.g.*, Defs.' Br. at 24. USAID has asserted in a fax to Plaintiff AOSI that "advocating for the legalization of prostitution" or "organizing or unionizing prostitutes for the purpose of advocating

for the legalization of prostitution" would violate the Policy Requirement. JA 389. Neither in the letter, nor anywhere else, has USAID indicated whether other activities would violate the Policy Requirement, too. HHS has not indicated whether it agrees with USAID's interpretation.

Members of Congress have asserted even greater authority to punish AIDS Leadership Act grantees for their privately funded speech and activities. For example, Rep. Mark Souder claims privately funded support of and collaboration with groups that seek to change laws that criminalize prostitutes violates the Policy Requirement. JA 399-405. Rep. Souder and twenty-seven other members of Congress also label AIDS Leadership Act grantees "pro-prostitution" for advocating collective action by prostitutes to reduce stigma in furtherance of HIV prevention. JA 179.

## V. The Policy Requirement Restricts Plaintiffs' Privately Funded Speech and HIV Prevention Work.

Solely in order to ensure that they can continue their work fighting HIV/AIDS, Plaintiffs have adopted policies to comply with the Policy Requirement. JA 240-42 ¶¶ 41-43, 45; JA 368 ¶¶ 17, 18. The compelled adoption of a policy statement marks a stark departure from their normal operations. As an organization operating in many countries, each with its own culture and legal system, Pathfinder takes policy positions only after careful study and deliberation, based on its own experience promoting access to health care in the developing

world. JA 368-69 ¶ 20. AOSI does not regularly take organizational policy positions and is prohibited by its principles of governance from accepting funding that restricts its speech and stigmatizes marginalized groups. JA 244-45 ¶¶ 56, 58.

Plaintiffs' sworn, uncontested declarations establish that the Policy Requirement directly undermines their work and advocacy efforts.

**A. The Public Health Context**

With their private funds, Plaintiffs seek to promote proven public health methods to prevent the spread of HIV, particularly among socially marginalized groups such as prostitutes. However, the Policy Requirement prohibits them from using private funds to engage in – or even discuss the value of – many such prevention methods.

An HIV/AIDS epidemic often is concentrated initially among prostitutes, drug users, and other vulnerable populations. When public health officials are able to stop the spread of HIV among those groups, they can stop the epidemic from becoming more generalized in the rest of the population. JA 55-56 ¶¶ 17-18. It is essential to approach prostitutes and others at high risk for HIV infection in a non-judgmental manner, in order to establish a trusting relationship with them and engage them in HIV prevention efforts. JA 58 ¶ 24. USAID and others recognize that many of the most successful efforts at fighting the spread of HIV/AIDS

involve organizing prostitutes and working cooperatively with their organizations. JA 58-62 ¶¶ 24-27, 30-31; JA 63-70, ¶¶ 35, 39-43, 45-48, 54; JA 229-30.

When prostitutes are threatened with high fines, arrest or other violence, they go underground, avoiding doctors, outreach workers, and others who want to provide them with the education, condoms, and other tools they need to avoid becoming infected and infecting others. Consequently, in some regions, successful HIV prevention efforts necessitate advocating for a change in the legal and policy environment surrounding prostitution. JA 56-57 ¶ 20; JA 58-59 ¶ 25; JA 61-62 ¶¶ 31-32; JA 63-64 ¶¶ 35-36; JA 69 ¶ 52. For this reason, the World Health Organization and the United Nations have called for reducing or removing criminal penalties against prostitutes. JA 58-59 ¶ 25. Similarly, in Brazil, which has one of the world's most successful HIV prevention programs, prostitution is decriminalized and prostitutes are treated as "essential partners" in the fight against HIV/AIDS. JA 56-57 ¶ 20; JA 135 ¶ 6.

**B. Harm to Pathfinder**

In keeping with these public health lessons, Pathfinder engages in privately funded advocacy and programs it believes are critical to fighting HIV/AIDS. Pathfinder believes it complied with the Policy Requirement prior to the District Court's issuance of a preliminary injunction, but it does not know whether Defendants agree, given the vague and confusing nature of the requirement. JA

369 ¶¶ 22, 24. Pathfinder fears Defendants might construe several categories of its privately funded work as violating an overly broad construction of the Policy Requirement.

For example, Pathfinder uses its private funding to engage in policy advocacy within the U.S. on issues including the conditions facing women and their families in developing countries, and how U.S. government policies affect family planning and HIV/AIDS service delivery overseas. Under a broad construction of the Policy Requirement, Pathfinder would be prohibited from freely discussing the lessons of its experience doing HIV/AIDS prevention work in Brazil, because this program included work with local organizations that, as part of their efforts to limit exploitation of prostitutes, have sought to change the legal regime surrounding prostitution. JA 371-72 ¶ 31.

Defendants' construction of the Policy Requirement also prevents Pathfinder from using private funding to resume this work in Brazil, because it involves work with local organizations that seek to change the legal regime surrounding prostitution. JA 371-72 ¶¶ 29-31.

Additionally, adopting HIV-prevention techniques USAID and others have endorsed, Pathfinder uses private funds to organize prostitutes in India so that they can collectively agree to engage in HIV prevention methods, such as using condoms. Like other international development organizations, Pathfinder seeks to

assist the prostitutes in achieving whatever goals the prostitutes themselves identify. Pathfinder fears that Defendants may penalize it should the organizations it has fostered or cooperated with pursue goals that Defendants view as being inconsistent with opposition to prostitution. JA 370 ¶¶ 26-27.

Pathfinder also uses private funds to conduct outreach to brothel owners, pimps and others in India, in an attempt to promote safer sex practices. Although Pathfinder believes that this outreach does not violate the Policy Requirement, it fears that Defendants may construe the Policy Requirement overly broadly to bar this outreach. JA 370-71 ¶ 28.

### C. Harm to AOSI

Adopting a policy "explicitly opposing prostitution" directly undermines AOSI's mission, which includes promoting public health and contributing to debate in the U.S. and internationally regarding the best practices for achieving effective human rights and health reforms. JA 232 ¶ 5. The October 2005 conference AOSI was able to co-sponsor and attend only because of its standstill agreement with Defendants brought together domestic and international groups, including some working with prostitutes and working on human trafficking, to discuss key policy issues, including the legal frameworks surrounding prostitution. JA 243-44 ¶¶ 53-54; JA 311 ¶ 30. AOSI planned a follow-up conference to be held after the issuance of the District Court's decision. JA 416-17 ¶ 3.

### D. Harm to Others

Plaintiffs' assessment of the Policy Requirement's interference with their ability to use the most effective methods to fight HIV/AIDS is confirmed by the experience of the Brazilian government and other highly respected U.S. and foreign NGO's which, because of such interference, have refused to adopt a policy opposing prostitution and lost AIDS Leadership Act funding. JA 134 ¶ 3; JA 135-36 ¶¶ 5-8; JA 47-48 ¶¶ 9-10. One such organization is DKT International, a U.S. non-profit that has partnered with USAID to distribute condoms internationally, which has obtained an injunction against enforcement of the Policy Requirement. *DKT Int'l v. USAID*, 435 F. Supp. 2d 5 (D.D.C. 2006).[10] CARE, International Rescue Committee, Save the Children and other eminent U.S. NGO's still receiving AIDS Leadership Act funding also have documented how the Policy Requirement interferes with their ability to fight HIV/AIDS. JA 303-04, JA 289-90 ¶ 16.

## <u>STANDARD OF REVIEW ON APPEAL</u>

This Court reviews the grant or denial of a preliminary injunction for abuse of discretion. *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 511 (2d Cir. 2005). This "is one of the most deferential standards of review; it recognizes

[10] The government's appeal of the injunction is before the U.S. Court of Appeals for the D.C. Circuit, which will hear oral argument January 11, 2006.

that the district court, which is intimately familiar with the nuances of the case, is in a far better position to make certain decisions than is an appellate court, which must work from a cold record." *In re Bolar Pharm. Co., Inc., Sec. Litig.*, 966 F.2d 731, 732 (2d Cir. 1992). Nevertheless, "[a] district court necessarily abuses its discretion if its conclusions are based on an erroneous determination of law . . . [or] on a clearly erroneous assessment of the evidence." *Matthew Bender & Co., Inc. v. West Pub. Co.*, 240 F.3d 116, 121 (2d Cir. 2001) (citations & quotation marks omitted).

## **SUMMARY OF ARGUMENT**

By implementing the Policy Requirement both to require funding recipients to adopt an organizational policy opposing prostitution, and to bar them from using private funds to discuss and use the most effective means to fight HIV/AIDS, Defendants are engaging in an unprecedented intrusion into First Amendment rights. The total ban on organizations using private funds to engage in speech from a perspective other than that of the government is per se unconstitutional under the line of unconstitutional conditions cases requiring the government to allow an alternative channel for restricted speech. The requirement that organizations adopt as their own the government's viewpoint on a controversial issue is per se

unconstitutional under the line of cases barring the government from compelling recipients of government benefits to speak.

Even if the Policy Requirement were not per se unconstitutional, it would be subject to at least heightened scrutiny, which it fails. The only interest Defendants advance that Congress actually considered is the patently illegitimate interest in defunding organizations whose approach to treating HIV/AIDS differs from that of Defendants. Moreover, exceptions for similarly situated organizations, and the existence of equally effective, less restrictive means of advancing Defendants' alleged interests, demonstrate that the Policy Requirement is not adequately tailored to any of those interests and is, therefore, unconstitutional.

The Court should reject Defendants' attempts to shoehorn this case into either the employer-employee context discussed in *Pickering v. Board of Education*, 391 U.S. 563 (1968), or the federal-state context discussed in *South Dakota v. Dole*, 483 U.S. 203 (1987). Neither context fits here, and application of either would overturn decades of settled Supreme Court precedent.

In the alternative, if the Court determines that issuing a preliminary injunction on First Amendment grounds was an abuse of discretion, it should construe the Policy Requirement as requiring a statement opposing harms associated with prostitution, while allowing the grantee to use its private funds to advocate and use the methods most effective at fighting HIV/AIDS. This

interpretation is supported by the plain language of the statute, canons of statutory construction, and the legislative history. If this Court adopts this reading of the Policy Requirement, it must uphold the preliminary injunction, because Defendants are applying the requirement in a contrary manner.

# ARGUMENT

## I. The Court Should Uphold the Preliminary Injunction on First Amendment Grounds.

Defendants' implementation of the Policy Requirement involves an unprecedented and impermissible intrusion onto Plaintiffs' First Amendment rights. Defendants have not and cannot point to any previous attempt to: a) use government funding to compel independent non-profit organizations to use their own funding to espouse a government-mandated approach to a highly controversial issue, and b) bar those organizations from using their private funds to debate alternative approaches. This far-reaching speech restriction is unconstitutional under both the unconstitutional conditions and compelled speech doctrines.

### A. A Flat Ban on the Use of Private Funds for Speech Is Unconstitutional.

Applying the First Amendment to spending enactments, the Supreme Court has repeatedly held that while the federal government has wide latitude to determine how public money should be spent, funding conditions that limit a recipient's ability to engage in privately funded speech must afford the recipient an

alternative channel for speech. *See Rust v. Sullivan*, 500 U.S. 173, 196-97 (1991); *FCC v. League of Women Voters*, 468 U.S. 364, 400-01 (1984); *Regan v. Taxation With Representation*, 461 U.S. 540, 544-46 (1983); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 232-33 (2d Cir. 2006), *petition for reh'g en banc pending*; *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 766 (2d Cir. 1999), *aff'd on other grounds*, 531 U.S. 533 (2001). In the sole instance in which the Supreme Court has been confronted with an entity-wide restriction on the use of private funding by a federal funding recipient, the Court struck it down, ruling that a congressional ban on the broadcast of editorial opinions by television stations receiving federal subsidies was unconstitutional because it extended even to privately funded broadcasts. *League of Women Voters*, 468 U.S. at 400-01.

In two other cases, the Supreme Court has upheld speech restrictions on federal grantees, but only because the government allowed the grantees an alternative avenue for the exercise of speech. In *Regan v. Taxation With Representation*, the Supreme Court's ruling that Congress could prohibit lobbying by 501(c)(3) groups that Congress exempts from federal taxation was contingent on the fact that Congress allowed the groups to lobby through closely affiliated, legally separate 501(c)(4) groups. 461 U.S. at 544-46; *see also League of Women Voters*, 468 U.S. at 400-01 (explaining *Regan*'s holding in these terms). Then, in *Rust v. Sullivan*, the Court upheld restrictions on the ability of organizations

receiving funds under the federal Title X program to conduct abortions, but only because Congress permitted the grantees to use their private funding to engage in the prohibited activities in a separate physical location. 500 U.S. at 196. The Court's holding relied on its observation that the regulations at issue "do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities." *Id; see also Rumsfeld v. Forum for Academic & Inst'l Rights* ("FAIR"), 547 U.S. ___, 126 S. Ct. 1297, 1310 (2006) (upholding Solomon Amendment requiring that universities allow military to recruit on campus in order to receive federal funding, but only because regulated conduct was not speech and because "nothing in the Solomon Amendment restricts what the law schools may say about the military's policies").[11]

Like the Supreme Court, when the Second Circuit has upheld speech restrictions on federal grantees, it has made clear that the grantees must be allowed to use their private funding free of restrictions that would preclude private speech.

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[11] Defendants attempt to distinguish *League of Women Voters*, *Regan* and *Rust*, arguing that in the funding programs challenged in those cases "the Government did not seek to transmit a message." Defs.' Br. at 48-49. As discussed below, Plaintiffs are not paid to transmit an anti-prostitution message. *See* discussion *supra* § I.C.4.a. Moreover, Defendants mischaracterize *Rust*, which the Court has made clear involved the disbursement of "public funds to private entities to convey a governmental message." *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Likewise, in *FAIR*, the purpose of the funding restriction was to require organizations to "accommodat[e] the [government]'s message." 126 S. Ct. at 1309.

In *Planned Parenthood Federation of America v. Agency for International Development*, 915 F.2d 59 (2d Cir. 1990), the Second Circuit rejected a challenge by U.S. non-profits to a federal requirement that foreign groups receiving federal funding refrain from pursuing abortion-related activities. *See id.* at 65. In stark contrast to the Policy Requirement, the U.S. groups were not covered by the restriction. Thus, noted the court, the U.S. groups could "continue to participate as a conduit for AID funds that are restricted to non-abortion activities while maintaining with [their] own funds abortion-related activities in the same countries." *Id.* at 64; *see also Ctr. for Reproductive Law & Policy v. Bush*, 304 F.3d 183, 190 (2d Cir. 2002) (rejecting on same grounds second challenge to same requirement).

In *Velazquez v. Legal Services Corp.* and *Brooklyn Legal Services Corp. v. Legal Services. Corp.*, the Circuit was confronted with a challenge by non-profit recipients of federal legal services funding to a federal regulation permitting them to engage in a variety of constitutionally protected activities only through legally and physically separate entities that received no federal funding. *See Velazquez*, 164 F.3d at 761-62. Notably, the regulation at issue was issued after a federal court in California struck down as unconstitutional an earlier version of the regulation which, like the Policy Requirement at issue here, placed an absolute bar on grantees using their private funds to engage in the restricted activities. *Id.* at

761. Although the Circuit rejected the facial challenge to the subsequent regulation, which permitted grantees to use private money free of the restrictions under some circumstances, it ruled that the plaintiffs would eventually prevail if they could show that the restriction left them without adequate alternative avenues to exercise their constitutional rights. *Id.* at 767; *Brooklyn Legal Servs. Corp.*, 462 F.3d at 232.

These binding precedents make clear that Congress may not require aid organizations based in the United States to refrain from raising and spending private funds to advocate policies that the current government opposes, as a condition of continuing to participate in foreign aid programs. In violation of this clear principle, Defendants have left no alternative avenue for grantees to use private funds to engage in speech.[12]

Defendants strain to portray *United States v. American Library Association*, 539 U.S. 194 (2003) (plurality op.) ("*ALA*"), as holding that the government may impose blanket bans on the ability of funding recipients to engage in speech. Defs.' Br. at 47. However, the Policy Requirement's blanket prohibition cannot be equated with the easily disabled internet filtering requirement upheld there. In fact, the various opinions issued in *ALA* make clear that at least five members of

[12] Defendants are wrong that the ability of Plaintiff OSI to speak free of the Policy Requirement demonstrates that the requirement provides adequate alternative channels for speech for AOSI. AOSI does not control OSI and so cannot speak through it. JA 305-06 ¶¶ 4, 8.

the Court – and probably nine – would have invalidated the filtering restriction as a violation of the First Amendment if, as here, the burden imposed on speech were more than *de minimis*.[13]

Nor can Defendants take solace from the holding of *Buckley v. Valeo*, 424 U.S. 1 (1976), that Congress may condition the grant of public financing for candidates on the candidate agreeing to limits on expenditures. *See* Defs.' Br. at 47. As a three-judge court sitting in this Circuit has explained, that restriction is "necessary to the effectiveness of a program which furthers significant state interests" in ensuring the integrity of elections, *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 2d 280, 285-86 (S.D.N.Y. 1980), *aff'd*, 445 U.S. 955 (1980) (per curiam), a standard the Policy Requirement cannot meet. [14]

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[13] As the narrowest majority view, Justice Kennedy's opinion was controlling. *See Marks v. United States*, 430 U.S. 188, 193 (1977). He held that if filtering proved burdensome "in any significant degree," it would fail First Amendment scrutiny. *See* 539 U.S. at 214-15 (Kennedy, J., concurring). Justice Breyer's concurrence, and even the plurality opinion on which Defendants rely, similarly upheld the requirement because it imposed only a minimal burden on library patrons. *Id.* at 209 (plurality opinion), 220 (Breyer, J., concurring).

[14] Defendants also are wrong that the Policy Requirement resembles antidiscrimination, affirmative action or union speech restrictions on companies doing business with the government. *See* Defs.' Br. at 44 n*. Antidiscrimination provisions do not compel speech, and they are supported by a compelling government interest in eradicating discrimination. *See United States v. Fordice*, 505 U.S. 717, 732 (1992). Some requirements that government contractors notify employees about unionization rights have been upheld specifically because, unlike the Policy Requirement, they apply only to government-funded work. *See, e.g.*, *Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1096 (9th Cir. 2006) (en banc). Moreover, such requirements are distinguishable because, as the case cited by

### B. The Government May Not Compel Beneficiaries of Government Programs to Parrot the Government's Views.

The obligation to "oppose prostitution" is even more offensive to the First Amendment than were the private money restrictions in *League of Women Voters*, *Regan*, *Rust*, and *Velazquez*, because here Plaintiffs are required to affirmatively adopt the government's viewpoint in order to obtain federal funding. The Supreme Court has made clear that government may not compel an individual or corporation to pledge allegiance to the government's viewpoint on a contested moral or political issue in order to receive a government benefit. Last term, in *FAIR*, the Supreme Court upheld the Solomon Amendment – which requires universities to afford equal access to military recruiters or lose their federal funding – but only because it regulates conduct, not speech, and because it allows schools to voice their disagreement with the military recruitment policy. 126 S. Ct. at 1307-08. The Court noted that "[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse." *Id.* at 1308; *see also Rust*, 500 U.S. at 200 (upholding restrictions on speech by recipient of federal funding, but only because funding recipient is not required "to represent as his own any opinion that he does not in fact hold" and because funding recipient remains free to make clear that the forbidden speech "is simply beyond the scope of the

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Defendants acknowledges, employers' speech rights are diminished in the labor context. *See UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003).

program").[15] In sharp contrast, the Policy Requirement requires Plaintiffs to endorse the government's approach to prostitution and prohibits them from expressing any disagreement with that approach.

The Supreme Court repeatedly has struck down government attempts to similarly compel adoption of the government's views as a condition of participating in a government program. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Supreme Court refused to permit West Virginia to compel dissenting schoolchildren to salute the flag in order to receive a public school education, warning: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642; *see also Speiser v. Randall*, 357 U.S. 513, 529 (1958) (California could not require veterans to declare that they did not advocate the forcible overthrow of the government in order to receive tax exemption); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241-242 (1977) (Michigan could not require dissenting public employees to support union political activities with which they disagreed); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (New Hampshire could not require display of license plates bearing the motto "Live Free or Die" in order to drive on the public highway); *Bd.*

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[15] *Rust* and *FAIR* demonstrate that, contrary to the Defendants' insistence, Defs.' Br. at 52, the government may not use its funding power to compel speech.

*of County Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996) (county could not cancel trash hauling contract because of contractor's criticism); *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001) (even in commercial speech context, government cannot require participants in a government-sponsored agricultural program to support generic (as opposed to branded) mushroom advertising); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 332 (1866) (government could not require ex-rebels to disavow Confederate sympathies before being permitted to preach); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 381 (1867) (government could not require ex-rebels to disavow Confederate sympathies before being admitted to the bar). If government cannot compel dissenting children to salute the flag as a condition of attending a public school, or dissenting veterans to promise not to advocate the forcible overthrow of the government as a condition of receiving a property tax exemption, or dissenting mushroom growers to endorse the principle that branded mushrooms are roughly equivalent to generic mushrooms as a condition of participating in a government agricultural program, surely Congress cannot compel dissenting international aid organizations to advocate criminalization and condemnation of prostitution as a condition of participating in government aid programs.

Citing *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1988), Defendants assert that the Policy Requirement passes constitutional scrutiny so

long as it is not designed to "drive certain ideas or viewpoints from the marketplace." Defs.' Br. at 52-53. In *Finley*, the Court upheld the constitutionality of a guideline that advised, but did not require, the National Endowment for the Arts to consider "general standards of decency and respect for the diverse beliefs and values of the American public" when making grants. The Court specifically left the door open for future challenges if it could be shown that these criteria were used to exclude artists with particular points of view. 524 U.S. at 590 (internal quotation marks omitted). If Defendants are correct in their interpretation of the Policy Requirement, then it is exactly the sort of viewpoint-based mandate the *Finley* Court said would fail constitutional muster.

### C. In the Alternative, Even if the Policy Requirement Were Not Per Se Unconstitutional, It Would Be Subject to at Least Heightened Scrutiny, Which It Fails.

#### 1. The District Court Was Correct to Apply Heightened Scrutiny.

Even if this Court determines that the Policy Requirement is not unconstitutional per se, it is clear from both the unconstitutional conditions and compelled speech lines of cases that the Policy Requirement is subject at least to heightened scrutiny, and perhaps even to strict scrutiny. When the government imposes an absolute bar on the ability of its grantees to use their private funding to engage in speech, and compels grantees to parrot government policy as a condition of receiving government funding, those conditions must be at least narrowly

tailored to furthering a substantial government interest. *See League of Women Voters*, 468 U.S. at 380 (applying heightened scrutiny to funding restrictions affecting use of private funding, and declining to apply strict scrutiny only because the case involved radio broadcasting, over which the government exercises significant control); *Wooley*, 430 U.S. at 716 (inquiring "whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates"); *cf. Brooklyn Legal Servs. Corp.*, 462 F.3d at 232-33 (even when funding restrictions affecting use of private funding afford an alternative avenue for expression, the restrictions may not "substantially or unduly burden[ ] the ability to create the alternative").

It is Defendants' burden to show that the Policy Requirement promotes a substantial governmental interest in a manner that restricts no more speech than is necessary. *See Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). To do so, Defendants must present evidence that the harm Congress sought to avoid is real and that the means chosen would avoid that harm. *See League of Women Voters*, 468 U.S. at 393. Courts have an independent duty when First Amendment rights are at stake "to assure that, in formulating its judgments, Congress has drawn reasonable inferences *based on substantial evidence*." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666 (1994) (emphasis added). Thus, "[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must

do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way." *Id.* at 664 (internal quotation marks and citation omitted).[16] Furthermore, even when Congress makes findings as to its means and ends, "'[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.'" *League of Women Voters*, 469 U.S. at 387 n.18 (quoting *Landmark Commc'ns., Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978)).

Defendants are wrong that the existence of a government interest in using federal funds to communicate a particular viewpoint would render heightened scrutiny inapplicable. Defs.' Br. at 48. For one thing, there is no evidence that Congress intended Plaintiffs' federal funds to be used to communicate an anti-prostitution message, and in fact Plaintiffs' federal funds are not used in such a manner. *See* discussion *infra* § I.C.4.a. Even if such an interest did underly the Policy Requirement, however, heightened scrutiny would still apply, and the

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[16] Defendants are wrong that *Turner* and *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), require deference to Congress here. *See* Defs.' Br. at 31, 32. As in *Turner*, the Court in *National Treasury* noted an "obligation to defer to *considered* congressional judgments about matters such as appearances of impropriety" when evaluating the constitutionality of a prohibition on certain speech, but found that such deference did not apply when there was little evidence in the record to suggest that the benefits of the prohibition were anything but speculative. *See* 513 U.S. at 476-77 (emphasis added). Because Congress considered no evidence regarding the need for the Policy Requirement, *Turner* and *National Treasury* demonstrate that no deference is due here.

interest would merely be taken into account in applying heightened scrutiny. *See Rust*, 500 U.S. at 193, 195 n.4 (applying narrow tailoring analysis to restrictions on speech federal funding recipients could engage in with private funding, even though one goal of the federal funding was to "to encourage family planning").[17]

### 2. The Policy Requirement Substantially Impinges on Plaintiffs' First Amendment Rights.

The undisputed fact, which Defendants ignore, is that the Policy Requirement affects speech inside the United States, directed at the U.S. government and at other audiences. *See* JA 607-08; *see also* discussion *supra* at Statement of Facts §§ V.B, V.C. Accordingly, the Policy Requirement restricts expression at the core of the First Amendment – "the facilitation of full and frank discussion in the shaping of policy and the unobstructed transmission of the people's views to those charged with decision making." *Velez v. Levy*, 401 F.3d 75, 98 (2d Cir. 2005).

The Policy Requirement also affects Plaintiffs' speech outside the United States. *See* discussion *supra* at Statement of Facts §§ V.B, V.C. Defendants are incorrect in their unsupported assertions that U.S. citizens "have no First Amendment right to petition a foreign government," and that "the First Amendment is not aimed at protecting communications that take place in foreign

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[17] Plaintiffs explain below in section I.C why Defendants are wrong that the Policy Requirement is subject either to a balancing test set forth in *Pickering v. Board of Education* or to a germaneness test set forth in *South Dakota v. Dole*.

countries, with foreign nationals." *See* Defs.' Br. at 42. As the Supreme Court has made clear:

> The United States is entirely a creature of the Constitution . . . . When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

*Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality op.); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). U.S.-based organizations like Plaintiffs, and the U.S. citizens who comprise them, certainly are within the "class of persons who are part of [the] national community" protected by the Bill of Rights. *Id.* at 265.

That NGO's are the restricted speakers renders the Policy Requirement particularly offensive to the First Amendment. The District Court correctly found that NGO's such as Plaintiffs play a critical role "in presenting issues of concern to governmental officials, as well as contributing to public debate on contested social issues, in influencing the course of public policy as well as in enhancing core public values and safeguarding them from government abuse." JA 597-98. Unfettered expression by NGO's furthers the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Given the ever-increasing federal interest in partnering with NGO's, were the government able to

require all partners to parrot its ideology as a condition of that partnership, the result would be a world in which most other voices were stifled. The restricted speech concerns an issue of the utmost importance to society – the most effective method to prevent HIV/AIDS. It is, consequently, essential to ensuring the robust debate on important issues so central to the First Amendment.

#### 3. Co-opting Private Funds to Express Moral Disapproval Is Not a Legitimate Government Interest.

Defendants insist, and the Policy Requirement's sponsor claimed, that the aim of the Policy Requirement is to withhold funding from groups whose views Congress morally condemned. *See* Defs.' Br. at 43; discussion *supra* at Statement of Facts, § III.[18] If this is the requirement's true purpose, then it must fail constitutional scrutiny, because denying funding to organizations that disagree with the government on a controversial matter of public concern is not a legitimate government interest. *See Baird v. State Bar of Ariz.*, 401 U.S. 1, 7 (1971) (holding that "a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes"); *Wooley*, 430 U.S. at 717 ("where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First

[18] Although the sponsor also articulated an interest in ensuring groups using federal funds to work with prostitutes are not perceived as supporting prostitution, *see* discussion *supra* Statement of Facts § III, that interest is incompatible with an interpretation of the Policy Requirement as restricting the use of private funds.

Amendment right to avoid becoming the courier for such message"); *Cullen v. Fliegner*, 18 F.3d 96, 104 (2d Cir. 1994) (holding government lacks legitimate interest in discouraging exercise of constitutionally protected rights).

#### 4. There Is No Evidence That the Policy Requirement Was Intended to, or Does, Avoid Any Other Harms.

Defendants claim the Policy Requirement is justified by three additional interests: (1) preserving the efficacy of HIV/AIDS programs, (2) dissociating Defendants in the public mind in foreign countries from organizations that might promote or tolerate practices that Congress opposes, and (3) ensuring that organizations receiving public funds are accountable in their provision of publicly funded programs. Defs.' Br. at 23, 32, 33. However, Defendants have presented, and Congress considered, no evidence that any of these dangers actually exist or would be avoided by the Policy Requirement. A rationale that Congress itself never considered or intended cannot justify the Policy Requirement. *See Bartnicki v. Vopper*, 532 U.S. 514, 530-31 (2001) (rejecting government rationale for speech-restricting regulation when there was no evidence that Congress viewed the regulation as a response to the proffered harm).

The District Court did not find that any of these dangers exist or would be avoided by the Policy Requirement, and this Court should not either. Defendants' supposition that these harms would occur is undermined by the complete lack of evidence that any of them did occur during the two years that the Plaintiffs and all

other U.S.-based AIDS Leadership Act grantees operated free of the Policy Requirement. The total lack of evidence for these harms provides sufficient basis for invalidating the Policy Requirement. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822-23 (2000) (holding government must present "more than anecdote and supposition" to sustain speech restriction); *Bartnicki*, 532 U.S. at 532 n.18 (noting government must present more than speculation even to justify restricting commercial speech).

As Plaintiffs discuss below, there are additional reasons to reject these rationales.

**a. Defendants Have Not Established That AIDS Leadership Act Programs Will Be Undermined Without The Policy Requirement.**

There is no evidence supporting Defendants' assertion that Congress viewed the Policy Requirement as a means to maintaining effective anti-HIV/AIDS programs. *See* Defs.' Br. at 28-32. Congress did find a connection between prostitution and HIV/AIDS. But nothing in the AIDS Leadership Act or in its legislative history suggests Congress thought stifling debate over which approach to prostitution is most effective in preventing HIV/AIDS, and this Court should not so find. *See Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Ltd.*, 188 F.3d 31, 37 (2d Cir. 1999) (refusing to reach a factual issue on which the district court made no findings). Nor is there

anything to suggest that Congress believed allowing private partners to remain silent about which approach is best would increase the prevalence of HIV/AIDS.

Defendants also claim that the Policy Requirement ensures Plaintiffs do not undermine a message they are paid to propound opposing prostitution or supporting its criminalization. Defs.' Br. at 29. However, the Federal Funds Restriction does not require Plaintiffs to espouse such a message, and their cooperative agreements with Defendants do not either. Consequently, when Plaintiffs do use their AIDS Leadership Act funding to interact with prostitutes, Plaintiffs do not take a judgmental attitude toward them. *See, e.g.*, JA 235 ¶ 17; JA 245 ¶ 57; JA 365 ¶ 4; JA 370 ¶¶ 25-26.

Furthermore, Plaintiffs do not seek to advocate the practice of prostitution. Rather, they seek the freedom to discuss and use the most effective techniques to fight HIV/AIDS, including empowering prostitutes to protect their own health and exercise their human rights; approaching them in a non-judgmental manner; reducing violence against them by police, clients and others; and, possibly, reducing criminal sanctions on prostitutes when those sanctions compromise public health and the prostitutes' well-being. This does not conflict with any of their federally funded work.

But even if they were, there would be no justification for requiring Plaintiffs to use their private funds to espouse that message. The government lacks any

legitimate interest in using its public funding either to coopt the use of private funds to espouse a government message, or to prevent critics from using private funds to put forth a different message. *See Rosenberger*, 515 U.S. at 830 ("ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts" (internal quotation marks omitted)); *Whitney v. Calif.*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (holding that the remedy for speech with which the government disagrees is "more speech, not enforced silence").

**b. Defendants Have Not Established That Foreign Listeners Will Believe Privately Funded Speech Represents Government Policy.**

Defendants also fail to show that the Policy Requirement would prevent confusion abroad as to U.S. policy regarding prostitution. Defendants argue, "Foreign audiences are not likely to recognize that an organization espousing . . . contrary views is speaking in its private rather than its official capacity." Defs.' Br. at 32. Defendants do not, however, indicate that Plaintiffs have an "official capacity" in which they can voice U.S. policy.

Moreover, USAID itself acknowledges that "[b]eneficiaries of U.S. aid receive billions of dollars in foreign assistance every year in the form of grants and cooperative agreements, often *with little or no awareness that the assistance is provided by the American people through USAID*." 70 Fed. Reg. 50,183-01,

50,184 (Aug. 26, 2005) (emphasis added). If foreign aid recipients are unaware that the U.S. government is involved with grantees' publicly funded speech, there is little chance that they will mistake grantees' *privately funded* speech for U.S. policy. USAID's remedy for the lack of awareness – requiring that "all programs, projects, activities, public communications, and commodities . . . partially or fully funded by a USAID . . . be marked appropriately overseas with the USAID [logo]," 22 C.F.R. § 226.91(a), also will help recipients recognize which of a grantees activities are private funded, because they will not carry the USAID logo.

USAID's regulation of funding to faith-based organizations also suggests that the feared impression of endorsement is unrealistic. *See* 69 Fed. Reg. 61,716-01 (Oct. 20, 2004). To comply with the Establishment Clause, the government must ensure faith-based groups not convey the impression that the government endorses their privately funded religious speech. *See, e.g.*, *Rosenberger*, 515 U.S. at 841-42; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993). Recognizing this obligation, USAID mandates that religious organizations that receive grants must "ensure that inherently religious activities are separate in time or location from USAID-funded services," but explicitly permits them to continue their "religious expression" with non-U.S. funding. 69 Fed. Reg. at 61,718. According to USAID, this separation is sufficient to avoid an unconstitutional endorsement of religion. *See id.*

Defendants are incorrect that this Court should defer to their speculative rationale because this case concerns foreign relations. Defs.' Br. at 32. This Court has an independent duty to consider the constitutionality of legislation even where foreign policy may be implicated. *Lamont v. Woods*, 948 F.2d 825, 840 (2d Cir. 1991); *Planned Parenthood Fed'n of Am. v. AID*, 838 F.2d 649, 655-56 (2d Cir. 1988). Moreover, as the District Court found, Congress did not make any determination that foreign policy interests required imposition of the Policy Requirement.[19] *See* JA 606. Thus, Defendants' post-enactment supposition that the Policy Requirement furthers substantial foreign policy interests is not entitled to deference. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (refusing to defer to an executive agency's unsupported interpretation that amounted to a mere litigating position).[20]

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[19] There is no evidence Congress based the Policy Requirement on the Congressional findings cited by Defendants that HIV/AIDS affects economic systems, social structures, and international security. *See* Defs.' Br. at 33. Nor is there any evidence that Congress had access to, much less considered, the classified National Security Directive Defendants assert justifies the Policy Requirement. *Id.* at 12-13.

[20] *DKT Memorial Fund v. Agency for International Development*, 887 F.2d 275 (D.C. Cir. 1989), on which Defendants rely for the proposition that "there is a special need for organizations or individuals that serve as representatives of our Government abroad not to undermine the Government's mission," Defs.' Br. at 33, is distinguishable because it addressed restrictions on the activities of foreign NGO's outside of the U.S., and had nothing to do with the activities of U.S. entities working inside the U.S. *See* 887 F.2d at 290. Moreover, in this Circuit, First Amendment protections apply to the privately funded speech of domestic organizations participating in a foreign aid program. *See Planned Parenthood v.*

### c. Defendants Have Not Established That Grantees With Different Views on Prostitution Cannot Be Trusted to Abide by Restrictions on The Use of Public Funds.

Defendants' final rationale is that "[b]y adopting a rule that the Government will enter into partnerships only with those organizations that have a policy opposing prostitution . . . , the United States secures greater assurance of compliance abroad" with the Federal Funds Restriction. Defs.' Br. at 33-34. This argument relies on an assumption that only like-minded organizations can be trusted to adhere to their legal obligations. The Supreme Court has soundly rejected similar government claims that a predisposition to break the law can be assumed based on adherence to particular ideological views. *See, e.g.*, *Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967); *Kent v. Dulles*, 357 U.S. 116, 130 (1958).

Defendants also imply they cannot permit grantees to use their private funds to engage in any activities that cannot be conducted with public funds, because grantees cannot be trusted to keep their privately funded and publicly funded activities separate. Of course, Congress did not make any such finding, and there is no evidence of problems during the two years that Defendants refrained from enforcing the Policy Requirement. Moreover, Defendants have resoundingly

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*Agency for Int'l Dev.*, 915 F.2d at 64 (reviewing constitutionality of same statute at issue in *DKT Memorial*).

rejected the notion that such restrictions are needed to ensure public funds are not used for activities outside the scope of a federal program. *See* 69 Fed. Reg. at 61,721 ("[USAID] believes that faith-based organizations, like other recipients of USAID funds, fully understand the restrictions on the funding they receive, including the restriction that inherently religious activities cannot be undertaken with direct Federal funding and must remain separate from Federally funded activities."); *id.* at 61,718 (same). If religious organizations can be trusted to keep publicly funded and privately funded activities separate, surely public health organizations can too.

#### 5. The Policy Requirement Is Not Adequately Tailored to the Interests Asserted.

As the District Court recognized, a total ban on protected speech normally cannot be considered narrowly tailored. *See* JA 614. Nor can a requirement that an organization adopt the government's views as its institutional policy – and does not even permit silence – be considered narrowly tailored. Moreover, as Plaintiffs discuss below, the exceptions in the Policy Requirement and the presence of more narrowly drawn means to achieve Congress's purported goals demonstrate that the Policy Requirement burdens substantially more speech than necessary.

#### a. The Policy Requirement's Exceptions Demonstrate That It Is Not Adequately Tailored.

The Global Fund to Fight AIDS, Tuberculosis and Malaria ("Global Fund"); the World Health Organization; other United Nations agencies; and the International AIDS Vaccine Initiative ("IAVI"), all receive substantial AIDS Leadership Act funds free of the Policy Requirement. 22 U.S.C. § 7631(f) (exempting organizations); H.R. Rep. No. 109-265, at 81-83 (2005) (Conf. Rep.) (appropriating $450 million to Global Fund and $29 million to IAVI for fiscal year 2006). There is no legislative history explaining these exemptions. As the District Court found, some of these organizations "have recognized advocacy for the reduction or removal of penalties imposed on prostitution, so that such penalties do not interfere with outreach efforts by driving this population underground, as among the best practices in HIV prevention." JA 613. If the expression of these views would cause any of the harms that Defendants speculate the Policy Requirement is intended to avoid, Congress would not have exempted these organizations from the Policy Requirement's reach. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (holding exemptions from a speech regulation "may diminish the credibility of the government's rationale for restricting speech in the first place"); *Bery v. City of N.Y.*, 97 F.3d 689, 698 (2d Cir. 1996) ("[T]he City's

licensing exceptions for veterans and vendors of written material call into question the City's argument that the regulation is narrowly tailored.").[21]

Defendants are wrong as a factual matter that, because all of these organizations save one are international organizations of which the United States is a member, any attempt to force them to comply with the Policy Requirement would necessitate multilateral negotiations.[22] Defendants do not identify any agreement that would require renegotiation in order to subject these organizations to the Policy Requirement. *See* Defs.' Br. at 34-35. Moreover, without entering into multilateral negotiations Congress has in the past cut funding to U.N. agencies based on a view that such funding would distort a Congressional message. *See Population Inst. v. McPherson*, 797 F.2d 1062, 1064 (D.C. Cir. 1986) (discussing withholding of $10 million earmarked for the U.N. Fund for Population Activities). Indeed, in the same appropriations bill that amended the Policy Requirement to

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[21] Defendants are wrong that because in *Regan v. Taxation With Representation* the Supreme Court held that a challenge to a statute limiting lobbying by tax-exempt non-profit organizations survived equal protection review even though veterans' organizations were exempted, the Policy Requirement survives heightened scrutiny. *See* Defs.' Br. at 35. The language to which Defendants point concerns the ability of the government to refuse to subsidize lobbying. Of course, Congress has far more latitude in conditioning its funds on an agreement not to use *federal funding* for speech than it has in conditioning its funds on an agreement not to use *private funding* for speech. *See* discussion *supra* § I.A.

[22] Defendants also provide no evidence permitting this Court to make a factual finding that, as Defendants maintain, international organizations are not likely to be mistaken for representatives of the United States. *See* Defs.' Br. at 34.

exempt various international organizations, Congress provided that none of those organizations can receive HIV/AIDS-relief funding if the President determines that they "support[] or participate[] in the management of a program of coercive abortion or involuntary sterilization." Consol. Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, 146; H.R. Rep. No. 108-41, at 144 (2003) (Conf. Rep.).

This Court should decline Defendants' invitation to find that IAVI, like Plaintiffs a U.S.-based NGO, is so unlikely to engage in speech that contradicts Defendants' message that it is unnecessary to subject it to the Policy Requirement. *See id.* at 35. There is no evidence that Congress considered the likelihood that IAVI would engage in such speech. Moreover, although the District Court made no finding on this issue, the record demonstrates that IAVI does in fact engage in advocacy on HIV/AIDS issues. *See* JA 408; JA 410.

#### b. The Existence of Equally Effective, Less Burdensome Restrictions Demonstrate That the Policy Requirement Is Not Adequately Tailored.

As previously discussed, the Policy Requirement simply does not further any legitimate government interests in connection with Defendants' first goal – furthering the fight against HIV/AIDS. As to Defendants' second goal – ensuring that foreign listeners do not mistake Plaintiffs' privately funded speech for the government's – the government has ample mechanisms short of compelled speech and a ban on counter-speech to achieve such a goal. For example, Defendants

could require Plaintiffs to issue disclaimers when they speak with their non-government funds. *See League of Women Voters*, 468 U.S. at 395 (holding that a ban on editorializing by public broadcasting stations was not adequately tailored to ensuring audiences understood the editorials did not represent the government's views, because disclaimers would suffice). Or, Defendants could require Plaintiffs to adopt the time or space separation Defendants find adequate to ensure the privately funded religious speech of its grantees overseas is not attributed to the U.S. *See* discussion *supra* § I.C.4.B. Finally, Defendants provide no evidence that their third goal – ensuring grantees comply with the Federal Funds Restriction – cannot be satisfied through their existing, rigorous compliance measures, which include frequent, detailed reporting by grantees, 22 C.F.R. § 226.51, and significant monetary and penal sanctions for noncompliance, *id.* § 226.62; 18 U.S.C. § 1001; 31 U.S.C. § 3729.

The existence of these equally effective methods demonstrates that the flat ban burdens substantially more speech than necessary and is unconstitutional.

### D. Neither *Pickering* Nor *Dole* Requires a Lesser Level of Scrutiny.

In an attempt to erase several decades of Supreme Court and Second Circuit unconstitutional conditions jurisprudence, Defendants propose two different levels of scrutiny to apply to the Policy Requirement: a balancing test set forth in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and a germaneness test set forth in

*South Dakota v. Dole*, 483 U.S. 203 (1987). *See* Defs.' Br. at 26-28, 38-45. Application of either test would require this Court to ignore the holding of the Supreme Court in *League of Women Voters* and its progeny that heightened scrutiny applies to restrictions requiring government grantees to use their private funds to espouse a government ideology. *See* discussion *supra* § I.C.1.

There is no reason to do so, because since *Pickering* and *Dole* were issued, the Supreme Court and this Court have not adopted those standards in cases regarding such restrictions. *See Regan*, 461 U.S. 540 (postdating *Pickering*); *League of Women Voters*, 468 U.S. at 380 (same); *Rust*, 500 U.S. 173; *Velazquez*, 164 F.3d 757 (postdating *Pickering* and *Dole*); *Brooklyn Legal Servs. Corp.*, 462 F.3d 219 (same).[23] Moreover, as discussed below, both decisions involve distinguishable circumstances – the application of restrictions to the speech of government employees, not grantees (*Pickering*), and the application of restrictions to the non-speech activities of the states (*Dole*).

**1. *Pickering***

Defendants assert, for the first time, that the Plaintiff NGO's are essentially government employees, and that funding-related governmental restrictions on their privately funded speech are subject to the balancing test for restrictions on

[23] Moreover, *Dole*, which was issued after *League of Women Voters* and *Regan*, does not purport to overturn the unconstitutional conditions doctrine set forth in those cases.

government employee speech set forth in *Pickering*. This Court should decline to consider this argument because appellate courts do not consider arguments raised for the first time on appeal, unless the elements of the claim were fully set forth below and there is no need for additional fact finding.[24] *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994). Defendants' new theory was not even hinted at in the briefs below. Moreover, the theory depends on the assertion of facts Plaintiffs did not have a chance to challenge below. These include whether, although Plaintiffs have entered into cooperative agreements, not contracts, with Defendants, Plaintiffs nonetheless "function[ ] in the capacity of a contractor, providing services to the public on behalf of the Government and as part of a governmental program." Defs.' Br. at 41 n*. To properly refute this claim, Plaintiffs would need to present evidence regarding the significant ways in which their publicly funded work differs from that of contractors or employees.[25] Consequently, this Court should not consider Defendants' *Pickering* argument.

Even if this Court chooses to consider the *Pickering* argument, Defendants' position that a balancing test applies here is meritless. While government has a

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[24] The Court can also entertain the argument if doing so is necessary to avoid manifest injustice. Defendants do not contend this exception applies.

[25] For example, contractors may not use affix their own logos to documents they produce with USAID funding, while groups with cooperative agreements may, 70 Fed. Reg. 50,183-01, 50,186, indicating that the latter retain their separate identity even when they are using USAID funding.

strong interest in controlling the speech of its employees, particularly those authorized to speak on its behalf, it has a much weaker interest in controlling the speech of NGO's receiving government grants. The Supreme Court has discussed the spectrum of unconstitutional conditions precedents:

> from government employees, whose close relationship with the government requires a balancing of important free speech and governmental interests, to claimants for tax exemptions, users of public facilities, and recipients of small government subsidies, who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing.

*Umbehr*, 518 U.S. at 680 (internal citations omitted). Speech restrictions on the former are subject to *Pickering* balancing, while those on the latter are subject to the more stringent review set forth in *League of Women Voters* and its progeny. *Id.* at 679-80; *see also League of Women Voters*, 468 U.S. at 401 n.27 (decisions upholding the constitutionality of the Hatch Act, which prohibits government employees from participating in political campaigns, are inapplicable to speech rights of NGO's receiving government funding).[26]

[26] *League of Women Voters*, 468 U.S. at 401 n.27, also distinguishes as inapplicable to the speech rights of "independent" NGO's receiving government grants the case of *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO*, 413 U.S. 548 (1973), which Defendants rely on for the proposition that "the Government has an interest in requiring that entities hired to implement its policy do not simultaneously act to undermine it." *See* Defs.' Br. at 43-44. The other cases Defendants cite for that proposition are similarly inapplicable. *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (concerning

These decisions are grounded in the reality that government employees and non-profits receiving government grants are differently situated with respect to their ability to speak on behalf of the government. Government employees work on government premises; often wear government uniforms; and represent the state in interactions with the public and the media. Often, their authority is enhanced by access to confidential government information, and by benefits such as diplomatic immunity. *See Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006) ("Public employees . . . often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.").

In contrast, Plaintiffs and other NGO's receiving government grants work in private facilities, do not wear uniforms, and interact with the public as representatives of independent organizations, not as representatives of the U.S. government. Indeed, often they are required to make clear that they are *not* speaking on behalf of the government. *See, e.g.*, 22 C.F.R. § 226.91 (requiring organizations with cooperative agreements with USAID to use a disclaimer on public communications funded but not approved by USAID). Often, it is precisely because the government wants certain work to be performed by entities with an appearance of independence that the government operates through grants to NGO's

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free speech rights of deputy constable); *Garcetti*, 126 S. Ct. at 1957 (concerning free speech rights of District Attorney with ability to affect government policy).

rather than through its own employees. *See, e.g.*, *id.* § 226.91(h) (exempting NGO's receiving USAID funding from requirement that they identify the project as USAID-funded when "independence or neutrality is an inherent aspect of the program and materials" or "data or findings must be seen as independent"); 22 U.S.C. § 2151u (addressing importance of partnering with NGO's that retain "their private and independent nature"). As the D.C. Circuit explained, "In a grant program the federal government gets the advantage of services rendered by someone who is doing his own thing, his own autonomous thing. It is not the same as a government operation in disguise . . . ." *Forsham v. Califano*, 587 F.2d 1128, 1138 (D.C. Cir. 1978), *aff'd*, 445 U.S. 169 (1980).

For these reasons, there is far less risk that Plaintiffs' speech will be attributed to Defendants than that the speech of Defendants' employees will be. Consequently, restrictions on Plaintiffs' speech should be subjected to the more stringent scrutiny set forth in *League of Women Voters* and its progeny, rather than the less rigorous balancing test set forth in *Pickering*.

Moreover, even if this Court were to adopt the Government's argument that grantees are equivalent to governmental employees, the general *Pickering* balancing test would not apply. *United States v. National Treasury Employees Union* ("*NTEU*") differentiates between *ex post* punishment, based on an "analysis of one employee's speech and its impact on that employee's public

responsibilities," of the sort challenged in the cases Defendants cite,[27] and an *ex ante* rule that represents a "wholesale deterrent to a broad category of expression by a massive number of potential speakers," of the sort challenged here. 513 U.S. 454, 466-67 (1995). The former is subject to the *Pickering* balancing test, while the latter is subject to the more stringent *NTEU* balancing test. *See id.* at 466–67; *see also Latino Officers Ass'n v. City of N.Y.*, 196 F.3d 458, 461 (2d Cir. 1999).

Under *NTEU*, the "Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468 (quoting *Pickering,* 391 U.S. at 571). It "must demonstrate that the recited harms are real, not merely conjectural." *Latino Officers Ass'n*, 196 F.3d at 463. It also must demonstrate "that the regulation will in fact alleviate these harms in a direct and material way," *id.* at 463, and that a less restrictive alternative would not suffice. *Harman v. City of N.Y.*, 140 F.3d 111, 124 (2d Cir. 1998). Under *NTEU*, ex ante restrictions on employee speech are invalidated often. *See NTEU*, 513 U.S. at 466-67; *Harman*, 140 F.3d at 123; *Latino Officers Ass'n*, 196 F.3d at 467.

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[27] *See Garcetti*, 126 S. Ct. 1951 (challenge to disciplinary action); *City of San Diego v. Roe*, 543 U.S. 77 (2004) (challenge to firing); *Umbehr*, 518 U.S. 668 (challenge to contract termination); *Waters v. Churchill*, 511 U.S. 661 (1994) (challenge to firing); *Rankin*, 483 U.S. 378 (same); *Pickering*, 391 U.S. 563 (same); *Lewis v. Cowen*, 165 F.3d 154 (2d Cir. 1999) (same); *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988) (same).

The Policy Requirement would be invalidated under this test because of the total absence of any Congressional record supporting any of the Defendants' predictions of harm if the requirement is not enforced. It would also be invalidated because it is not tailored to avoiding those purported harms. *See* discussion *supra* § I.C.5.

**2. *Dole***

Consistent with the Constitution's different treatment of states and citizens, *Dole* applies solely to federal grants to *states*, not to grants to *citizens*. *Dole* concerned a federal statute conditioning federal highway funding on states' decision to fix the drinking age at twenty-one. 483 U.S. at 205. The Court stated that conditional grants to the states are constitutional if they are related to the "general welfare," unambiguous, germane to funded activity, and not in violation of any "other constitutional provisions." *Id.* at 207-08. Applying this rule to the case before it, the Court held that the law fell "within constitutional bounds even if [under the Twenty-First Amendment] Congress may not regulate drinking ages directly." *Id.* at 206.

As previously discussed, the Supreme Court has never applied the *Dole* germaneness standard to speech restrictions on grants to private entities. This is appropriate, because *Dole*'s reasoning is based on the unique relationship between

states and the federal government. 483 U.S. at 210.[28] "[G]iven their constitutional role, the States are not like any other class of recipients of federal aid." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985). States "entered the federal system with their sovereignty intact." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *see also Alden v. Maine*, 527 U.S. 706, 714 (1999).

The "political safeguards of federalism," such as the powerful voice states have in Congress through their equal participation in the Senate, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 & n.11 (1985), permit Congress to use its Spending Clause powers to bypass federalism-based limits on its Article I powers. *See Dole*, 483 U.S. at 210; *Alden*, 527 U.S. at 755. Individuals, on the other hand, are dependent on the courts for protection of their individual rights. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 177 (1803). Accordingly, the Supreme Court has never sanctioned a similar funding-based bypass of the First Amendment rights of non-states, and this Court should not do so here.[29]

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[28] All cases cited by the *Dole* Court in the course of considering the scope of Congress's appropriations power involve the relationship between the federal and state governments. *See* 483 U.S. at 209-10 (citing *Okla. v. Civil Serv. Comm'n*, 330 U.S. 127 (1947)); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 593-98 (1937); *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *United States v. Butler*, 297 U.S. 1 (1936)).

[29] Indeed, while the First Amendment protects citizens' speech, no analogous protection has been clearly extended to states. *See ALA*, 539 U.S. at 210-11.

## II. In the Alternative, the Court Should Uphold the Preliminary Injunction Because Defendants Are Implementing the Policy Requirement Contrary to Congress's Intent.

If the Court determines the District Court abused its discretion by granting a preliminary injunction on First Amendment grounds, it should consider Plaintiffs' alternative argument that Defendants are exceeding their authority by construing the Policy Requirement to preclude prospective private partners from using private funds to question whether decriminalization of prostitution is an effective means of fighting HIV/AIDS.[30] In fact, the plain meaning of the text of the Policy Requirement and Federal Funds Restriction, when read in accordance with Congressional intent and the canons of statutory construction, compels a reading that: (a) requires a statement that the entity opposes prostitution, while permitting the entity to state that what it opposes are harms associated with it, not the prostitutes themselves, and (b) bars the use of *federal* funds to discuss or advocate the practice or decriminalization of prostitution, while leaving private partners free to use their *private* funds to advocate and use the techniques they believe most effectively reduce harms associated with prostitution and HIV/AIDS.[31]

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[30] This claim is properly before this Court because it provides an alternative basis for the District Court's Order. *See Univ. Club v. City of N.Y.*, 842 F.2d 37, 39 (2d Cir. 1988).

[31] "[D]eference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).

This reading accords with Congress's express wish elsewhere in the AIDS Leadership Act to sustain and promote public-private partnerships. *See* 22 U.S.C. §§ 7621(a)(4), (b)(1). Defendants' reading, on the other hand, excludes from those partnerships organizations seeking to explore whether the World Health Organization and United Nations are correct that decriminalization can reduce harms associated with prostitution.

Moreover, if the Policy Requirement barred specific tactics alleged to be inconsistent with the broader goal of opposing prostitution, it would, like the Federal Funds Restriction, prohibit the promotion of the decriminalization and practice of prostitution. This construction is barred by the canons of statutory construction barring courts from interpreting statutory text as superfluous, *cf.* *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S.157, 166 (2004), and providing that "[a] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute," *cf.* *Hamdan v. Rumsfeld*, ___126 S. Ct. 2749, 2765 (2006).

Equally important, Plaintiffs' reading of the Policy Requirement would avoid the First Amendment issue appealed by Defendants, because Plaintiffs do in fact oppose the harms associated with prostitution. Thus, this interpretation is required by the canon of constitutional avoidance. *E.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

While this Court can and should decide this case on the four corners of the statutory text in accordance with these settled canons, the legislative history confirms that Congress meant exactly what it said. During the floor debates, Senator Leahy warned that the requirement might deter social services organizations from partnering with the government. In response, Senate Majority Leader Frist explained that organizations need adopt only a policy opposing the harms associated with prostitution, but not one explicitly opposing decriminalization or other approaches to working with prostitutes to fight HIV/AIDS. *See* discussion *supra* Statement of Facts § III. A statement by Representative Smith, the sponsor of the amendment adding the Policy Requirement, adds force to a view of the Policy Requirement as intending to ensure that grantees' use of federal funds was not construed as providing support for prostitution, and not as intending to affect the use of private funds.[32] *See id.*

The District Court read the Policy Requirement and the Federal Funds Restriction as if they used identical language, thereby enabling the government to limit a partner's ability to advocate decriminalization of prostitution with its own funds. The court explained that the Policy Requirement would be rendered toothless if it were read in accordance with its plain meaning. JA 547-48. The

[32] As discussed above, Rep. Smith also voiced a desire to deny funding to organizations with a different view about how to avoid harms associated with prostitution. If this was his true motivation, it would render the Policy Requirement unconstitutional. *See* discussion *supra* § I.C.3.

consequence of the District Court's solicitude for the statute's breadth causes it to violate the First Amendment. Such an approach veers uncomfortably close to destroying a village in order to save it.

## CONCLUSION

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

Respectfully submitted,

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Dated: December 14, 2006

## ANTI-VIRUS CERTIFICATION

Case Name: Alliance v. U.S. Agency

Docket Number: 06-4035-cv

I, Natasha R. Monell, hereby certify that the Appellee'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 12/14/2006) and found to be VIRUS FREE.

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