

08-4917-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

**AMICUS BRIEF ON BEHALF OF AMERICAN HUMANIST
ASSOCIATION AND 24 OTHER PUBLIC HEALTH AND HUMAN
RIGHTS ORGANIZATIONS AND EXPERTS IN SUPPORT OF
PLAINTIFFS-APPELLEES AND OF AFFIRMANCE OF THE
RULING BELOW**

(Amici Listed on Inside Cover)

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All parties have consented to the filing of this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amici curiae submit this corporate disclosure statement: All amici are incorporated or unincorporated nonprofit organizations, or individuals. The amici have no parent corporations, no stock, and no shareholders.

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INTEREST OF AMICI CURIAE

Amici are a diverse assembly of nongovernmental organizations and individuals providing services or conducting research or advocacy related to the global effort to combat HIV/AIDS. Individual statements of interest for each amicus appear in the Appendix. Amici are concerned that the restrictions placed on the speech of private actors by the anti-prostitution pledge undermine overseas efforts to combat the AIDS pandemic. Amici therefore urge affirmance of the district court's order enjoining enforcement of the Leadership Act's anti-prostitution pledge. All parties have consented to the filing of this brief.¹

¹ In accordance with Local Rule 29.1(b), amici make the following disclosure: No party's counsel authored any part of this brief; and no party, party's counsel, or other person contributed money to fund the preparation or submission of this brief.

STATEMENT OF THE CASE

In 2008 an estimated two million people died of AIDS, and another 2.7 million became newly infected with the Human Immunodeficiency Virus (HIV), the virus that causes AIDS.² In total, 33.4 million people are now infected with HIV.³ Because the vast majority of infections are sexually transmitted, the millions of people engaged in sex work worldwide are at heightened risk of contracting HIV.⁴ Nevertheless, less than one percent of global funding for to combat HIV is directed toward sex workers, who suffer from inadequate access to prevention, treatment, and other services.⁵ Moreover, engaging sex workers in HIV prevention efforts is essential to successfully combating the disease because sex workers can, and in many places do, act as powerful protagonists in the promotion of sexual health.⁶ As attested to by United Nations Secretary-General Ban Ki-moon, excluding

² JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (“UNAIDS”), AIDS EPIDEMIC UPDATE 81 (Nov. 2009).

³ *Id.*

⁴ UNAIDS, GUIDANCE NOTE ON HIV AND SEX WORK 2 (Mar. 2009); J. Vandepitte et al., *Estimates of the Number of Female Sex Workers in Different Regions of the World*, 82 SEXUALLY TRANSMITTED INFECTIONS (SUPPLEMENT 3) 18, 20-21 (2006).

⁵ UNAIDS, *supra* note 4, at 2.

⁶ CENTER FOR HEALTH AND GENDER EQUITY (CHANGE), IMPLICATIONS OF U.S. POLICY RESTRICTIONS FOR HIV PROGRAMS AIMED AT COMMERCIAL SEX WORKERS 3 (Aug. 2008); JA 55-56.

sex workers and other marginalized groups from HIV prevention programs is both profoundly unethical and harmful to public health.⁷

The President's Emergency Plan for AIDS Relief (PEPFAR), announced in 2003, was intended to "turn the tide against AIDS."⁸ Congress implemented PEPFAR by enacting the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act" or "the Act"). Pub. L. No. 108-25, 117 Stat. 711 (2003) (codified at 22 U.S.C. § 7601 *et seq.*). The stated purpose of the Leadership Act is to strengthen U.S. leadership in the global fight against HIV/AIDS and to encourage public-private partnerships to contain the pandemic. 22 U.S.C. § 7603. An amendment to the Act, however, prohibits the grant of funds to "any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking," and further prohibits grantees from "promot[ing] or advocat[ing] the legalization or practice of prostitution or sex trafficking." H.R. REP. NO. 108-60 at 15 (2003), *as reprinted in* 2003 U.S.C.C.A.N. 712, 712; 22 U.S.C. § 7631 (e)-(f) ("Policy Requirement" or "Pledge").

As set out in full in the Appellees' briefing, the Policy Requirement violates the free speech guarantees of the First Amendment because it

⁷ Ban Ki-Moon, Secretary General of the United Nations, Address to the International AIDS Conference (Aug. 3, 2008).

⁸ Pres. George W. Bush, State of the Union Address (Jan. 28, 2003).

compels speech, is impermissibly vague, and is viewpoint discriminatory. Appellees' arguments requires no repetition here. Amici instead develop a point not discussed at length by the parties, namely, whether the Policy Requirement regulates government speech or private speech. In Part I of this Brief, Amici submit that the privately funded speech of independent non-governmental organizations (NGOs) is unquestionably private speech, and the harsh regulations imposed by the Pledge are therefore subject to the full array of First Amendment protections, including the application of strict judicial scrutiny.

Part II provides the public health context to this case, examining in particular the damage wrought by the Pledge on global efforts to contain HIV/AIDS. These effects reveal the Government's asserted justification for the speech restriction – preserving the integrity of the government's message as a means of combating HIV/AIDS – to be hollow. Because the justification for the Policy Requirement is not compelling, but in fact irrational, the restriction amounts to an invalid abridgement of free speech guarantees.

ARGUMENT

I. INDEPENDENT NGOS MAINTAIN THEIR FIRST AMENDMENT RIGHT TO SPEAK FREELY ON CONTESTED POLICY MATTERS EVEN WHEN THEY ACCEPT GOVERNMENT FUNDING

In an attempt to insulate the Policy Requirement from traditional First Amendment scrutiny, the Government characterizes as “central” to the Leadership Act a message opposing prostitution. Gov’t Br. 32. The Government further asserts that the Leadership Act enlists NGOs as instruments of the dissemination of that message. *Id.* The Pledge, argues the Government, is necessary to prevent distortion of the message, and to preserve programmatic “integrity.” *Id.* at 30, 32-33. In short, the Government takes the position that the government is “speaking its own message,” even though the speakers are in fact NGOs, and that the necessity of protecting its message justifies curtailing the expressive rights of NGOs at all times and for all purposes. *Id.* at 3, 30-36. In effect, the government suggests that the speech at issue should be treated as if it were governmental, rather than private, speech. This view far exceeds the boundaries of established doctrine, including recent Supreme Court precedent. The Government’s effort to stretch the definition of government speech threatens free expression and should be rejected by this Court.

A. The Government's Mere Provision Of Financial Support For A Speaker Does Not Render All Speech Expressed By The Speaker "Government Speech"

The government frequently provides financial support to forums, institutions, and groups devoted to public discourse. Despite that support, it is well recognized that those engaged in expression within those contexts are not conveying government speech, but are voicing their own views. For example, the government finances communication by private speakers when it creates or subsidizes public forums where individual expression frequently takes place, such as parks or public streets. *See, e.g., Niemotko v. Maryland*, 340 U.S. 268 (1951); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). Despite the subsidy, "the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).

Similarly, when the government funds an entire enterprise, such as a public university, it cannot micromanage scholarly research and expression. Scholars simply could not function if the government were permitted to veto every word they uttered or position they took. *See Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967) (holding that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom"); *Sweezy v. New Hampshire*, 354 U.S. 234,

261 (1957) (Frankfurter, J., concurring) (warning against the “grave harm resulting from governmental intrusion into the intellectual life of a university”).

The same protections apply where the grantees are private organizations ordinarily understood to speak on their own behalf. In *Legal Services Corp. v. Velazquez*, the Supreme Court held that the government could not condition legal services funding on an organization’s agreement to refrain from advising clients concerning the constitutionality of welfare statutes. 531 U.S. 533, 544 (2001). The Court rejected such conditions, finding that the subsidy did not reduce legal services lawyers to government agents required to espouse the government’s views. Instead, “the program presume[d] that private, nongovernmental speech [wa]s necessary, and a substantial restriction [wa]s placed upon that speech.” *Id.*

The restriction on speech here is similar to the conditions reversed in *Velazquez*. The Leadership Act contemplates the enlistment of many private speakers of differing viewpoints in the effort to combat the global HIV/AIDS epidemic. See 22 U.S.C. §§ 7601 (18) & (22)(F), 7603 (4), 7621, 7654 (b)(7). The statute specifically describes the “sustainment and promotion” of such partnerships as a “priority element” of the national policy on HIV/AIDS. *Id.* § 7621 (b)(1). Congress, moreover, called for “the

expansion of private sector efforts and expanding public-private sector partnerships to combat HIV/AIDS.” *Id.* § 7603(4). In short, the funding program established by the Leadership Act strongly resembles that at issue in *Velazquez*, in that the necessity of private, nongovernmental speech is presumed.

Despite this similarity, the Government suggests that the Policy Requirement is acceptable because “Congress chose to enlist the recipients of Leadership Act funding to disseminate its message.” Gov’t Br. at 32. The Government further asserts that ““when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”” *Id.* at 33 (quoting *Rosenberger*, 515 U.S. at 833).

While it is true that the government “has the right to speak for itself ... [and] is entitled to say what it wishes,” *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009) (internal quotation marks and citations omitted), it is not the case that government may insulate viewpoint-based speech restrictions from serious First Amendment scrutiny simply by labeling the targeted expression “government speech.” “[C]ourts must apply categories such as ‘government speech’ ... with an eye towards their purpose – lest we turn ‘free speech’ doctrine into a jurisprudence of labels.” *Id.* at 1140 (Breyer, J., concurring). As this Court noted, “[n]ot all speech by

a government agent is ‘government speech’ subject to ... lenient [First Amendment] analysis.” *Latino Officers Ass’n, N.Y. v. City of N.Y.*, 196 F.3d 458, 468 (2d Cir. 1999). Accepting the Government’s argument here would negate that important proposition.

Although the government speech doctrine is relatively new, two limitations to its application have emerged. First, to qualify as government speech, the government must both fund the speaker or the expressive enterprise and exercise editorial control over the entire message. Second, it must be that a reasonable observer would recognize the grantee as speaking on behalf of the government such that the government can be held accountable for the message. *See Pleasant Grove City*, 129 S. Ct. 1125; *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).⁹ Applying these conditions to the Policy Requirement reveals that the government speech doctrine is inapplicable. The Pledge is therefore subject to traditional First Amendment scrutiny, under which neither compelled speech nor viewpoint-based restrictions can stand.

⁹ Several circuit courts have devised multi-factor tests to determine whether government speech is at issue. *See, e.g., Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008); *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002); *but see Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006). This brief discusses only the criteria identified by the Supreme Court.

B. Speech By Independent NGOs Is Not Government Speech When It Does Not Involve The Use Of Government Funds And Government Officials Do Not Control The Speech's Content

Supreme Court precedent demonstrates how the foregoing principles are to be applied. In *Johanns*, the Court held federally-created campaigns promoting consumption of beef to be government speech largely because “[t]he message of the promotional campaigns [wa]s effectively controlled by the Federal Government itself.” *Id.* at 553-54, 560. Congress and the Secretary of Agriculture determined the “overarching message,” specified the contents of the campaigns, and delegated responsibility for details of the messages to “an entity whose members [we]re answerable to the Secretary (and in some cases appointed by him as well).” *Id.* at 561. Government officials also “participate[d] in the open meetings at which proposals [we]re developed,” and the Secretary “exercise[d] final approval authority over every word used in every promotional campaign.” *Id.* In short, “[t]he message set out in the beef promotions [wa]s from beginning to end the message established by the Federal Government.” *Id.* at 560.

Similarly, in *Pleasant Grove City*, the Court found a monument erected in a municipal park to be government speech because “[g]overnments have long used monuments to speak to the public,” and “[p]ublic parks are often closely identified in the public mind with the

government unit that owns the land.” 129 S.Ct. at 1125, 1132-33. Because “the City ha[d] ‘effectively controlled’ the messages sent by the monuments in the Park by exercising ‘final approval authority’ over their selection,” the monuments represented government speech. *Id.* at 1134 (quoting *Johanns*, 544 U.S. at 560-61). These cases demonstrate that to appropriately be treated as government speech, the entire body of speech at issue must fall under substantial government control. The government may not, as suggested here, simply declare speech to be its own where the vast majority of the affected expression is not government controlled, nor even government funded.

Applying these standards, it is clear that independent NGOs combating HIV/AIDS are not uttering government speech simply because they accept Leadership Act funds. The NGOs receive funding, not just from the government, but from a wide range of other sources, such as foundations and private donors. Government officials, moreover, do not dictate the content of NGO speech as they did the speech in *Johanns*. And in contrast to *Pleasant Grove City*, when an NGO speaks without reference to the Leadership Act, no reasonable observer would attribute the speech to the government. Furthermore, NGOs accepting Leadership Act funds engage in an enormous range of activities – such as providing AIDS treatment and

conducting scientific research – outside of the purview of the Policy Requirement. In sum, the speech targeted by the Pledge is private speech, and to treat it as government speech would extend Supreme Court doctrine far beyond sensible boundaries.

C. The Policy Requirement Conflicts With The Government Speech Doctrine Because It Undermines Political Accountability By Quashing Dissent On A Matter Of Public Concern

The Supreme Court has made clear that accountability to the public is a crucial measure of whether speech should be deemed governmental and therefore treated outside traditional First Amendment standards. “When the government speaks . . . to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.” *Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). That is, government speech draws relaxed First Amendment scrutiny because political controls ensure that the official position accords with the will of the electorate; otherwise, that government may be voted out of office. *See Johanns*, 544 U.S. at 563 (“political safeguards” set government speech “apart from private messages”); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring). These values are of paramount importance when a regulation targets speech on controversial policy matters because “expression on public

issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455 (1980)). They are not diminished in the government funding context because “even in the provision of subsidies, the Government may not ‘ai[m] at the suppression of dangerous ideas,’” *NEA v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983)). By limiting public debate in such a way that the government’s hand is hidden from the public, the Pledge undermines political accountability and is at odds with Supreme Court authority.

The Policy Requirement, moreover, curtails speech by the very entities and individuals best positioned to challenge the government. NGOs receiving Leadership Act funds are “most likely to have informed and definite opinions” about the issues at stake, and are uniquely positioned to challenge existing policy. *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 572 (1968); see *Harman v. City of N.Y.*, 140 F.3d 111, 119 (2d Cir. 1998) (regulating speech by employees of New York City social service agencies undermined First Amendment interests where “[t]he public ha[d] a significant interest in hearing [the plaintiffs’] comments and those of other employees concerning the workings of the city’s social service

agencies”). This sort of speech is critical to ensure government accountability. See *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 771 (2d Cir. 1999) [hereinafter *Velazquez II*] (“Criticism of official policy is the kind of speech that an oppressive government would be most keen to suppress. It is also speech for which liberty must be preserved to guarantee freedom of political choice of the people.”), *aff’d on other grounds*, 531 U.S. 533 (2001).

Where, as here, the government silences opposition to its position on contested issues, it effectively immunizes itself from criticism for its position and undermines the “the right to critici[ze] government or advocate change in governmental policy.” *Velazquez II*, 164 F.3d at 771. By silencing dissenting views, the government casts a “pall of orthodoxy” over contested issues and distorts the marketplace of ideas. *Keyishian*, 385 U.S. at 603. This approach both interferes with “the public’s interest in receiving informed opinion,” *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam), and discourages debate that is “uninhibited, robust and wide-open.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In particular, it undermines “[e]xpression of dissatisfaction with the policies of this country, [which is] situated at the core of our First Amendment values.” *Velazquez II*, 164 F.3d at 771 (quoting *Texas v. Johnson*, 491 U.S. 397, 411

(1989)). In sum, the Government's effort to apply government speech principles to the expression of independent NGOs involves an unprecedented expansion of the government speech doctrine. As private speech is at issue here, strict scrutiny applies to First Amendment review of the Policy Requirement.

II. THE PLEDGE REQUIREMENT IS INVALID BECAUSE IT ADVANCES NO LEGITIMATE GOVERNMENT PURPOSE, INSTEAD IMPOSING ORTHODOXY WITH RESPECT TO A CONTESTED POLICY QUESTION

As set forth above, the fact that the speech in question in this case is private, not governmental, means that the government must support its restriction of the speech by demonstrating that it is narrowly tailored to serve a compelling government interest. *See Rosenberger*, 515 U.S. at 834; *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992). Here, the government asserts that the restriction is necessary to prevent distortion of its intended message promoting the avoidance of risky sexual behavior, which it in turn insists is essential to the achievement of the aims of the Leadership Act. Gov't Br. at 2, 8-9. In fact, the Policy Requirement subverts the Leadership Act's aim of containing the spread of HIV/AIDS and of doing so using proven methods, undertaken by independent NGOs.¹⁰ Although enforcement of the Pledge

¹⁰ The legislative purpose of the Act is discussed in section II.C. of this Brief.

against nearly all U.S.-based NGOs has been enjoined, the restriction remains active against the foreign subgrantees who carry out much of the Leadership Act's implementation. It has unequivocally compromised their effectiveness and damaged public health. In other words, it does not in any account serve the asserted interest, but is instead utterly dysfunctional to the goals of the Leadership Act.

A. The Policy Requirement Has Measurably Impeded Efforts To Stop The Spread Of HIV/AIDS

Previously effective, and in some cases internationally lauded, anti-AIDS programs have lost funding, and have shut down or reduced their programs, as a direct result of the Policy Requirement.¹¹ Such programs include HIV prevention initiatives; clinical services for sex workers; the distribution of condoms, lubricant, and other HIV prevention tools; peer education regarding safer sex practices; and campaigns to end violence against sex workers.¹² In turn, the destructive effects of the Pledge are felt by sex workers to whom local organizations previously provided the knowledge and tools necessary to stay alive. For example, in Mali, one of

¹¹ CHRISTINA ALFIREV, HUMAN TRAFFICKING, HIV/AIDS, AND THE SEX SECTOR: CONFERENCE REPORT 5 (Mar. 18, 2009).

¹² *Id.*; Melissa Ditmore & Dan Allman, A Case Story Analysis of the Implementation of PEPFAR's Anti-Prostitution Pledge and Its Implications for Successful HIV Prevention among Organizations Working with Sex Workers, Presentation at International AIDS Conference (July 22, 2010).

the poorest countries in the world, and a place where over a third of sex workers are living with HIV, the Pledge has resulted in a condom shortage and price increases, making it difficult for women in sex work to obtain condoms.¹³ This has almost certainly exacerbated the Malian AIDS epidemic.¹⁴ In Cambodia, young men engaged in sex work reported that when they requested sexual health information from a clinic funded by the Leadership Act through the United States Agency for International Development (USAID), doctors and counselors simply refused to answer their questions on the grounds that “It’s against the USAID anti-prostitution policy.”¹⁵

The Policy Requirement has also directly diminished the use of some of the most effective HIV prevention strategies available.¹⁶ For example, drop-in centers, providing a variety of services to sex workers such as health information and condom distribution, as well as educational access and training in alternative occupations, are recognized as a successful method to

¹³ TAKING THE PLEDGE: THE USAID PEPFAR CLAUSE, SEX WORK, & HIV PREVENTION (Erin Siegal/Network of Sex Work Projects 2006) (interview with Awa Dembele) *available at* <http://blip.tv/file/181155> [hereinafter TAKING THE PLEDGE]; UNAIDS, REPORT ON THE GLOBAL AIDS EPIDEMIC 43 (Aug. 2008).

¹⁴ UNAIDS, *supra* note 13, at 51.

¹⁵ TAKING THE PLEDGE, *supra* note 13 (interview with Andrew Hunter).

¹⁶ CHANGE, *supra* note 6, at 3.

combat the spread of AIDS.¹⁷ As a result of the Pledge, however, the Bangladeshi organization Durjoy Nari Shangho, which had been recognized by UNAIDS as providing an “[e]xcellent example[] of community organized HIV-prevention programming,” was defunded by its parent organization, causing the closure of sixteen of twenty drop-in centers.¹⁸ Until then, the centers had provided sex workers a place to sleep, bathe, educate one another about effective HIV prevention.¹⁹ The previously high rate of condom distribution at the centers dropped by more than half, from 73,000 condoms a month to 30,000.²⁰ In short, “since the closings [of drop-in centers] there is less access, so sex workers are not using as many condoms.”²¹

A similar project in Cambodia, initiated by Doctors Without Borders, provided health care to women sex workers, including treatment for sexually transmitted infections, as well as condoms and workshops on matters such as

¹⁷ *Id.*

¹⁸ UNAIDS, *supra* note 4 at 4; TAKING THE PLEDGE, *supra* note 13 (interview with Hazera Bagum).

¹⁹ TAKING THE PLEDGE, *supra* note 13 (interview with Hazera Bagum).

²⁰ AMERICAN UNIV. WASHINGTON COLL. OF LAW & CTR. FOR HEALTH AND GENDER EQUITY, HUMAN TRAFFICKING (AMERICAN UNIV.), HIV/AIDS, AND THE SEX SECTOR 15 (Mar. 18, 2009) (unpublished report on file with the ACLU).

²¹ TAKING THE PLEDGE, *supra* note 13 (interview with Hazera Bagum).

the proper use of a female condom.²² The program showed initial promise in the form of increased female condom use and attempts by sex workers to persuade clients to use condoms.²³ But although Cambodia has the severest HIV epidemic in the region, the program was forced to close because of pressure to avoid being seen to promote sex work, combined with other factors.²⁴ As a result, painstaking efforts to build community among sex workers dissolved, the women dispersed, and some became street-based sex workers, suffering increased vulnerability to HIV infection.²⁵

The Pledge has especially undercut programs that had addressed AIDS through the collective empowerment of women in sex work. Such programs are proven to sharply reduced the HIV vulnerability of sex workers by enabling them to assert control over their working environments and insist on safer sex.²⁶ They include peer education on topics such as HIV transmission and how to negotiate with clients reluctant to use a condom, as well as the organization of sex workers into collectives to help the workers

²² See Joanna Busza, *Having the Rug Pulled from Under Your Feet: One Project's Experience of the US Policy Reversal on Sex Work*, 21 HEALTH POLICY & PLANNING 329, 330 (2006).

²³ *Id.*

²⁴ *Id.* at 331.

²⁵ Joanna Busza, *Caught in Ideological Crossfire: One Tale of Prostitution, Politicians and the Pandemic*, in GENDER AND HIV/AIDS 103, 106, 113 (Jelke Boesten & Nana K. Poku eds., 2009).

²⁶ *Id.* at 104, 110-11.

enforce condom use, thereby protecting both the workers and their clients from HIV exposure.²⁷ The Policy Requirement has struck directly at these programs. For example, the Women’s Network for Unity, a Cambodian sex workers’ union, was abandoned by former allies who feared running afoul of the Pledge.²⁸ Consequently, “[t]he new USAID policy forces sex workers to face difficult situations such as violence, rape, and extortion from police, clients and gangs. We sex workers are forced to conduct business in insecure places.”²⁹

Faced with the Pledge, other organizations have declined funding as inconsistent with their principles and effective functioning. In India, for example, the internationally recognized organization SANGRAM refused USAID funding because of the Pledge.³⁰ SANGRAM had hitherto helped sex workers enforce safe sex practices, and distributed 350,000 condoms every month.³¹ Similarly, a program assisting Burmese and other migrants to Thailand refused USAID funds as contrary to human rights principles, commenting, “We believe in the principle of protection of every worker,

²⁷ *Id.* at 104; JA 60-61.

²⁸ TAKING THE PLEDGE, *supra* note 13 (interview with Pick Sokchea).

²⁹ *Id.*

³⁰ TAKING THE PLEDGE, *supra* note 13 (interview with Meena Seshu); Human Rights Watch, Human Rights Watch to Honor Leading Indian AIDS Advocate, Nov. 7, 2002; UNAIDS, LIST OF MEMBERS: GLOBAL REFERENCE GROUP ON HIV/AIDS AND HUMAN RIGHTS.

³¹ CHANGE, *supra* note 6, at 3.

[including] women workers.”³² A Cambodian organization that had previously protected sex workers’ health and safety declined USAID funds because adherence to the Pledge would have stymied the effectiveness of its efforts, and had no option but to substantially downscale its operations, reducing its ability to reach sex workers.³³ Similarly, a U.S.-based NGO operating in Vietnam lost funding for a program estimated to have prevented more than 85,000 cases of HIV infection.³⁴

For its part, the BBC World Service Trust had been awarded four million dollars in U.S. funding for a media program to educate Tanzanians about HIV/AIDS.³⁵ Although the program would have involved no direct work with individuals in the sex sector, but would merely have portrayed sex workers in a non-judgmental manner, the BBC’s attempts to negotiate with USAID concerning the Pledge failed, and it was compelled to turn down the funding and suspend the program.³⁶ In Brazil, both a sex workers’ organization and the Brazilian government declined USAID funding rather than accept the Pledge; the workers’ organization obtained only partial

³² TAKING THE PLEDGE, *supra* note 13 (interview with Pranam Somwong).

³³ JA 47-48.

³⁴ AMERICAN UNIV., *supra* note 20, at 20.

³⁵ Nellie Bristol, *US Anti-Prostitution Pledge Decried “Unconstitutional”*, THE LANCET, July 2006 at 17; SIECUS, *BBC Rejects U.S. AIDS Money Over Ideological Restrictions* (Feb. 2006).

³⁶ SIECUS, *supra* note 35.

replacement funding from the government.³⁷ Other organizations facing the Pledge have entirely abandoned anti-AIDS programming directed at sex workers, or limited the scope of their programs, and yet others have shifted from prevention to the provision of care after individuals are already infected with HIV.³⁸ In each case, the United States has lost a valuable ally in the fight against AIDS, and the suffering of women and men around the world has multiplied.

B. The Policy Requirement Has Ended Partnerships And Blocked The Free Flow Of Information Necessary For An Effective Response To HIV

The Policy Requirement not only directly heightens the danger to individuals in sex work; it has destroyed decades-old NGO partnerships between U.S. and overseas NGOs, and among foreign NGOs, and has blocked the sharing of knowledge concerning effective public health strategies. For example, a major NGO funder of overseas humanitarian work, including HIV prevention work, stated that because of the Pledge, it “will not consider developing any privately funded work that removes barriers to health care for sex workers or vulnerable populations that engage

³⁷ TAKING THE PLEDGE, *supra* note 13 (interview with Gabriela Leite); Maurice I. Middleberg, *The Anti-Prostitution Policy in the US HIV/AIDS Program*, 9 HEALTH AND HUMAN RIGHTS 3, 6 (2006).

³⁸ CHANGE, *supra* note 6, at 5.

in transactional sex for survival.”³⁹ As described by another NGO, “The policy limits agencies from using the strongest available partners,” reducing their access to key populations in the fight against AIDS.⁴⁰ The chilling effect caused by the vagueness of the Policy Requirement magnifies the damage it inflicts.⁴¹ Uncertainty regarding the scope of the Pledge is “paralyzing” those working in the field to fight AIDS.⁴² In this climate of fear, organizations refusing to sign the Pledge have become isolated from larger NGOs and major donors.⁴³ In Thailand, for example, former allies severed their ties with a local organization that had earned international acclaim as an innovator in the fight against AIDS.⁴⁴

The Pledge has also stifled frank scientific and policy discussions among the world’s HIV/AIDS experts, preventing the sharing of best practices and other essential information, as well as distorting the marketplace of ideas. Organizations and their field workers have been forced to engage in severe self-censorship, clearing their websites of reference to sex workers and their rights, and avoiding media coverage for

³⁹ JA 898.

⁴⁰ CHANGE, *supra* note 6, at 4.

⁴¹ *Id.* at 4-5.

⁴² *Id.* at 5.

⁴³ *Id.*

⁴⁴ TAKING THE PLEDGE, *supra* note 13 (interview with Arpha Nota).

fear of accusations of promoting sex work.⁴⁵ Subjects rendered taboo by the Pledge include: effective HIV prevention strategies, the relationship between HIV and sex work, the need for greater condom distribution, the role of male clients of sex workers in HIV transmission, and sex workers' vulnerability to rights violations by government officials and others.⁴⁶

Forms of expression impacted by the ban range from congressional testimony to discussions at conferences and other meetings, media statements, printed publications, and internet materials.⁴⁷ “In interviews conducted by the Global Health Council, NGOs describe a pattern of self-censorship, including avoiding discussing the [Policy Requirement] in public, hesitating to join public meetings and internet mailing lists concerning sex work, and, in one case, shutting down a website and a magazine.”⁴⁸ For example, even with a preliminary injunction in place, CARE, a recognized leader in the fight against AIDS, “has often declined to share what it has learned regarding HIV prevention strategies at conferences both in the United States ... and abroad.”⁴⁹ Under the Pledge, government control over public discourse extends even to speakers' choice of words: A

⁴⁵ CHANGE, *supra* note 6, at 5.

⁴⁶ JA 746, 748-49, 850.

⁴⁷ JA 243-44, 711-12, 713, 746-49, 850, 882-83, 898.

⁴⁸ Middleberg, *supra* note 37, at 8.

⁴⁹ JA 882-83.

USAID official urged a grantee to use the pejorative term “prostitute” over “sex work,” or “sex worker,” which, it was asserted, could be deemed to imply an acceptance of sex work as a legitimate form of labor.⁵⁰

The severe impediments that the Pledge presents to HIV prevention efforts thus encompass both speech and action by private parties, threatening effective prevention programs, fragmenting the prevention community, and suppressing discussion of how to stop the spread of HIV/AIDS. The end result is almost certainly that women and men in sex work have been subjected to needless violence and suffering, and have become infected with HIV when they otherwise could have avoided infection.⁵¹

**C. By Undermining Global Efforts To Contain HIV/AIDS,
The Policy Requirement Thwarts The Purpose Of The
Leadership Act**

The Government rests its defense of the Policy Requirement on its assertion that Congress intended to achieve “behavioral change,” through the dissemination of a message opposing sex work, and that the Pledge is necessary to protect from distortion “a message promoting behavioral change and avoidance of risky behaviors—and, specifically, the eradication of prostitution and sex trafficking.” Gov’t Br. at 2, 8-9. The Government maintains that spreading this message is a “centerpiece” of the Leadership

⁵⁰ JA 243.

⁵¹ JA 48.

Act. *Id.* at 2. In reality, the purpose of the Leadership Act is not the dissemination of a message but reducing the spread of AIDS, as measured by concrete, including numerical, standards, and as achieved through evidence-based measures implemented by NGOs. *United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”) (internal quotation marks and citations omitted). Even the Act’s subsidiary goals of reducing behavioral risks and addressing sex work are not as the Government portrays them, and they too are frustrated, not advanced, by the Pledge.

The central objective of the Leadership Act is the amelioration of the global AIDS pandemic by means of a “comprehensive” and “integrated” response encompassing prevention, treatment, and palliative care, as well as care for orphans and vulnerable children. 22 U.S.C. §§ 7601 (21), (26), (27), (30), (39)(B), (D). The Act specifically incorporates the Presidential emergency AIDS plan, which lays out numerical goals: preventing seven million new HIV infections, treating at least two million people living with HIV/AIDS, and providing “humane care” for millions of others, including AIDS orphans. 22 U.S.C. § 7601 (25); *see also* 22 U.S.C. § 7611 (a)(4)

(setting additional numerical goals). The bulk of the activities mandated to achieve these goals consist not of conveying any message but of tangible work such as diagnosis of HIV cases and the provision of antiretroviral therapies, 22 U.S.C. §§ 7601 (22) (26), (27), (30), 7612(a), 7672; research into new HIV drugs, including a vaccine and microbicide, 22 U.S.C. §§ 7624, 7631 (a); and the building of health care infrastructure 22 U.S.C. §§ 7601 (21)(B), (38), 7623. In other words, the purpose of the Leadership Act is not to convey a governmental message but rather to fuel concrete action in pursuit of a defined goal.

Congress further commanded that all of the activities undertaken through the Leadership Act respond to “evidence-based improvements and innovations in the prevention” of HIV/AIDS. 22 U.S.C. §§ 7611 (a)(2)(C); see also 22 U.S.C. §§ 7623 (a)(2)(D) (declaring it to be U.S. policy to support foreign governments’ delivery of “evidence-based services” in an effective and efficient manner). Research findings and HIV/AIDS experts in the U.S. and abroad, including the defendant government agencies, repeatedly confirm that engaging sex workers and promoting their rights, not shunning them, are best practices against the spread of HIV.⁵² In fact,

⁵² INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, PEPFAR IMPLEMENTATION: PROGRESS AND PROMISE 88 (2007); UNAIDS, SEX WORK AND HIV/AIDS: UNAIDS TECHNICAL UPDATE 14 (June 2002); CENTERS

Congress specifically stated its goal of “increas[ing] the participation of at-risk populations in programs designed to encourage behavioral and social change and reduce the stigma associated with HIV/AIDS.” 22 U.S.C. § 7601 (21). Congress intended prevention and treatment efforts to be “targeted particularly toward those most at risk of acquiring HIV infection.” 22 § U.S.C. 7611 (a)(11). The Act also calls for “provid[ing] and shar[ing] best practices for combating HIV/AIDS with health professionals,” in contrast to the suppression of such sharing resulting directly from the Policy Requirement. 22 U.S.C. § 7611(a)(4)(H). In short, Congress intended to create not a propaganda campaign but a comprehensive and evidence-based worldwide effort against HIV, including, not ignoring, key groups at heightened risk of infection.

The Leadership Act also recognizes repeatedly the active involvement of NGO partners as critical to the achievement of its objectives. 22 U.S.C. §§ 7601 (18), (22)(F), 7621 (a), 7654 (b)(7). The “sustainment and promotion” of such partnerships is identified as a “priority element” of the U.S. strategy to combat AIDS. 22 U.S.C. § 7621 (b)(1); *see also* 22 U.S.C.

FOR DISEASE CONTROL AND PREVENTION, HIV PREVENTION STRATEGIC PLAN THROUGH 2005 23 (Jan. 2001) (stigmatization of vulnerable groups “profoundly affect[s] prevention effort[s]” worldwide); U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, LEADING THE WAY: USAID RESPONDS TO HIV/AIDS – 1997-2000 11 (Sept. 2001).

§§ 7601 (18), 7654 (b)(7). Similarly, the Act directs that “the expansion of private sector efforts and expanding public-private sector partnerships to combat HIV/AIDS” be encouraged 22 U.S.C. § 7603. As described above, the Pledge has not encouraged such partnerships but rather discouraged and in some cases ended them, and even those NGOs continuing to accept U.S. funding are rendered less effective by a policy rejecting the very communities with which they work.

The billions in public funds distributed through the Leadership Act are thus intended to reduce the spread of HIV through effective, evidence-based NGO activities, including those targeting people vulnerable to HIV infection. Rather than protecting the integrity of the Act’s programs, the Policy Requirement impairs them, showing itself to be at odds with both the overriding purpose of the Leadership Act, and the Act’s recognition of the need for effective partnership with NGOs.⁵³

Asserting that the reduction of “behavioral risks” is central to the Leadership Act, the Government strains to link this aim to the Policy Requirement’s effective ban on NGO work on behalf of people in the sex sector. *E.g.* Gov’t Br. 7-9. The government and some of its sources further

⁵³ Indeed, if program integrity were truly the goal, it could have been accomplished more effectively through far less restrictive means, such as disclaimers. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 391-92 (1984).

conflate “prostitution” with “sex trafficking.” *Id.* at 7-8. The error of this view has been thoroughly documented.⁵⁴ In reality, barring NGOs from working with sex workers or even discussing the legal status of sex work is wholly unrelated to reducing unsafe sexual behaviors, whether among sex workers or the general population. The meaning of “behavioral risks” and its variants as employed in the Act furthermore contradict the Government’s reading, and even to the extent that reducing behavioral risks and addressing sex work could be understood as subsidiary legislative aims, they – like the primary aim of containing the AIDS pandemic – are frustrated rather than advanced by the Policy Requirement.

The program of “behavioral risk” reduction set out in the Leadership Act is sharply at odds with the Government’s portrayal, and with the Policy Requirement. The behavior change that is in fact sought by the Leadership Act consists of voluntary, population-wide adoption of one or more healthy sexual practices from among several listed in the Act. 22 U.S.C. § 7601

(20)(D). Such practices include the now-familiar “ABC” formula:

abstinence from sex, having sex with a single partner (“be faithful”), and the

⁵⁴ See e.g., Melissa Ditmore, *Sex Work, Trafficking and HIV: How Development Is Compromising Sex Workers’ Human Rights*, in DEVELOPMENT WITH A BODY: SEXUALITY, HUMAN RIGHTS, AND DEVELOPMENT 54, 55-56 (Andrea Cornwall, Sonia Correa & Susan Jolly eds., 2008); Kate Butcher, *Confusion Between Prostitution and Sex Trafficking*, THE LANCET, June 2003.

use of condoms; other encouraged practices include delayed sexual debut and the avoidance of substance abuse. 22 U.S.C. §§ 7601 (22)(E); 7601(35) (findings accompanying 2008 reauthorization); 7611 (a)(12); 7611 (b)(2)(K) (reporting requirement).⁵⁵ There is no logical link between these recommendations and an NGO speech restriction concerning sex workers.

The Policy Requirement is similarly unsupported by the few Leadership Act provisions concerning sex work. Among its findings, the Act states: “Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic.” 22 U.S.C. § 7601(23). The Act references two means by which this eradication is to be accomplished: “supporting comprehensive programs to promote alternative livelihoods, safety, and social reintegration strategies for commercial sex workers and their families,” 22 U.S.C. § 7611 (a)(12)(H), and “educating men and boys about the risks of procuring sex commercially and the need to end violent behavior toward women and girls.” 22 U.S.C. § 7611 (a)(12)(F). Both

⁵⁵ Other prescriptions not explicitly labeled as behavioral changes such included male circumcision, the avoidance of blood exposure, and the reduction of alcohol abuse. 22 U.S.C. §§ 7611 (a)(14)(A), (D), (21)(B).

provisions self-evidently embody concern for sex workers’ safety and freedom from violence, and counsel engaging, not shunning, sex workers and their clients.

The language of the Leadership Act is consistent with public health experts’ understanding of the complex social and economic causes of sex work and at odds with the view, implicit in the Policy Requirement, that sex workers are to be spurned and morally condemned.⁵⁶ Given that the Pledge is at odds with both the Act and sound science, it is unsurprising that, in practice, “[t]he antiprostitution loyalty oath has done nothing to reduce the numbers of women and men who, for economic or other reasons, engage in commercial sex work.”⁵⁷ Instead, it merely exposes sex workers, their clients, and their clients’ other sexual partners to an increased danger of HIV infection.⁵⁸ The government’s purported interest in enforcing the Policy Requirement – that of advancing the Act’s overriding purpose or some subset of its aims – is therefore wholly unsupported. In reality, the Pledge is dysfunctional to the Leadership Act’s mission of combating the HIV/AIDS

⁵⁶ See e.g. Busza, *supra* note 25, at 104 (describing the evolution of views regarding sex work); JA 62-63.

⁵⁷ SCOTT H. EVERTZ, HOW IDEOLOGY TRUMPED SCIENCE: WHY PEPFAR HAS FAILED TO MEET ITS POTENTIAL 33 (Center for American Progress & The Council for Global Equality Jan. 2010).

⁵⁸ *Id.*; ALFIREV, *supra* note 11, at 5 (finding that “the pledge increased the vulnerability of sex workers by preventing them from accessing vital care.”).

epidemic. As such, the Pledge can hardly be said to advance a compelling interest sufficient to withstand constitutional scrutiny, but is instead irrational and illegitimate.

CONCLUSION

For the reasons set forth above and in the Appellees' brief, the decision of the district court should be affirmed.

Date: September 15, 2010

Respectfully submitted,

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REQUIREMENTS**

1. This brief contains 6,978 words, excluding the Appendix and the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), and consequently complies with Federal Rule of Appellate Procedure 29(d).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word (part of the MS Office 2003 package) in Times New Roman 14-point font.

/s/ Lenora M. Lapidus_____

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APPENDIX
Statements of Interest of Amici Curiae

A. ORGANIZATIONS

1. AMERICAN HUMANIST ASSOCIATION

The American Humanist Association (AHA) is a nationwide, nonprofit humanist organization, dedicated to raising public awareness and acceptance of humanism, and advancing humanist values. The AHA focuses on defending religious liberty and protecting the fundamental rights of every individual. The AHA views access to healthcare and freedom of expression as fundamental rights. Through its Feminist Caucus, founded in 1977, the AHA specifically works to protect and expand gender equality, reproductive freedom, and access to reproductive healthcare.

2. AMERICAN JEWISH WORLD SERVICE

American Jewish World Service (AJWS) is an international development organization dedicated to alleviating poverty, hunger and disease among the people of the developing world regardless of race, religion or nationality. AJWS believes that if we are to make progress fighting poverty and the global AIDS pandemic, we must protect the human rights of vulnerable populations, including sex workers; participate in national and international advocacy campaigns to uphold these rights; and support education and health programs that address sex workers' needs. We are concerned about the "anti-prostitution pledge" requirement of the Leadership Act for numerous reasons, among them: it inaccurately conflates sex trafficking with prostitution; it discounts the concept of individual agency; it obstructs the implementation of effective prevention; and it does nothing to address the stigma and discrimination that further marginalizes sex workers and increases their vulnerability to HIV/AIDS.

3. THE CANADIAN HARM REDUCTION NETWORK

The Canadian Harm Reduction Network (CHRN) was founded in 1999 (1) to provide a vehicle for Harm Reduction activists, supporters and workers, drug users, and drug user organizations

to discuss their needs and issues, share information, support one another, advocate for their rights and catalyse the development of effective Harm Reduction practices; and (2) to influence the direction of drug law and policy. CHRN believes that health- and justice-related organisations must be free to provide people engaged in sex work with the information, services, support and supplies they need in order to achieve and maintain health, and that policies and practices which require organisations to repudiate sex work in order to receive funding undermine their ability to provide vital harm reduction services necessary for the health and well being of sex workers.

4. **THE CENTER FOR HEALTH AND GENDER EQUITY**

The Center for Health and Gender Equity (CHANGE) is a U.S.-based non-governmental organization whose mission is to ensure that U.S. international policies and programs promote sexual and reproductive health within a human rights framework for women and girls worldwide. CHANGE believes that every individual has the right to basic information, technologies, and services needed to enjoy a healthy and safe sexual and reproductive life free from coercion and preventable illness. Through research and field visits, we have witnessed the negative impact the policy in question has on the health and rights of sex workers, endangering their lives and slowing the fight against HIV and AIDS.

5. **CENTER FOR REPRODUCTIVE RIGHTS**

The Center for Reproductive Rights (CRR) is a global human rights organization that uses constitutional and international law to secure women's reproductive health and rights. With programs in the United States, Africa, Asia, East Central Europe, and Latin America and the Caribbean, CRR combines U.S. and international legal advocacy and is a global leader in using constitutional, comparative and international human rights law to advance women's access to quality reproductive healthcare. CRR has worked on cases, fact-finding reports, publications and legal reform efforts in over fifty countries.

6. **THE CENTER FOR WOMEN POLICY STUDIES**
The Center for Women Policy Studies was founded in 1972 with a mission to shape public policy to improve women's lives. A hallmark of the Center's work is the multiethnic feminist lens through which all issues affecting women and girls are viewed. In all of its work, the Center looks at the combined impact of gender, race, ethnicity, class, age, disability, and sexual orientation. The Center represents the interests of women around the world whose access to information, health services and social services is impeded by U.S. funding restrictions on NGOs, as well as women-centered programs and organizations affected by the restrictions.

7. **THE CENTER FOR WOMEN'S GLOBAL LEADERSHIP**
The Center for Women's Global Leadership (CWGL), based at Rutgers University, is an international organization dedicated to developing and facilitating women's leadership for women's human rights and social justice worldwide. CWGL works from a human rights perspective with an emphasis on violence against women, sexual and reproductive health and socio-economic well-being. CWGL has long played a role in examining the points of intersection between violence against women and HIV/AIDS.

8. **CHICAGO RECOVERY ALLIANCE**
For twenty years, Chicago Recovery Alliance (CRA) has reached tens of thousands of people using drugs within the sex industry to assist in the reduction of drug- and sex-related harm of all kinds. It is crucial to our work to treat people with the utmost respect and dignity. CRA firmly supports the removal of any restriction keeping people from receiving life-saving assistance. CRA has learned over two decades that such restrictions serve only to drive people most in need of assistance away from help and toward sickness and premature death while doing nothing to separate them from risky behavior.

9. **COMMUNITY HIV/AIDS MOBILIZATION PROJECT**

The Community HIV/AIDS Mobilization Project (CHAMP) is a national network building a powerful community-based movement bridging HIV/AIDS, human rights, and struggles for social, racial and economic justice, which we call HIV Prevention Justice. CHAMP mobilizes people living with HIV, community activists, policy advocates, academics and researchers in our country, and links them with allies around the world. Policies which affect HIV prevention provision across the globe therefore are of concern to us because they affect our work.

10. **THE FOUNDATION FOR INTEGRATIVE AIDS RESEARCH**

The Foundation for Integrative AIDS Research (FIAR) is a non-profit organization focusing on treatment and prevention of HIV among at-risk communities. FIAR's primary mission is to sponsor and promote clinical trials of herbal and nutritional treatments for people with HIV, AIDS and/or chronic viral hepatitis. FIAR also brings self-empowering information and HIV prevention technologies to such underserved areas as Nepal, Thailand and Zimbabwe.

11. **GAY MEN'S HEALTH CRISIS**

Gay Men's Health Crisis (GMHC) is a not-for-profit, volunteer-supported and community-based organization committed to reducing the spread of HIV disease; helping people with HIV maintain and improve their health and independence; and keeping the prevention, treatment and cure of HIV an urgent national and local priority. GMHC provides HIV prevention and care services to thousands of people living with or at risk for HIV/AIDS – including sex workers – and advocates for evidence-based, effective prevention and care interventions globally. Because this case implicates the ability of organizations such as GMHC to employ “best practices” in the fight against the spread of HIV/AIDS, its resolution is a matter of significant concern to GMHC and to the people it serves.

12. THE GLOBAL AIDS ALLIANCE

The Global AIDS Alliance (GAA) is a nonprofit organization whose mission is to galvanize the political will and financial resources needed to address the global AIDS crisis and reduce its impacts on poor countries that have been hardest hit by the pandemic. GAA is a leader in shaping AIDS policy discussions and mobilizing campaigns to break through entrenched bureaucratic inaction and speed the pace of the global response to HIV/AIDS. GAA recognizes the need for a holistic perspective of the structural roots of and responses to the HIV/AIDS crisis, and works to prevent stigma and discrimination, protect human rights and ensure access to best practice evidence-based services. Sex workers are among the populations most vulnerable to HIV and play an important role in transmission or prevention thereof.

13. THE GUTTMACHER INSTITUTE

The Guttmacher Institute is an independent, nonprofit corporation that advances sexual and reproductive health in the United States and around the world through an interrelated program of research, policy analysis and public education. The Institute works to protect, expand and equalize access to information, services and rights that will enable women and men to avoid unplanned pregnancies and prevent and treat sexually transmitted infections including HIV. Understanding that the political, cultural and economic power of the United States can have considerable impact on sexual and reproductive health throughout the world, the Institute places a high priority on monitoring and analyzing the effects of U.S. policy on women and men in other countries.

14. THE HUMAN RIGHTS CENTER AT THE UNIVERSITY OF CALIFORNIA, BERKELEY

The Human Rights Center at the University of California, Berkeley is an independent research center housed in the Law School that applies scientific methods and innovative technologies to promote human rights and international humanitarian law. We use our research to develop and recommend policy measures to protect vulnerable populations. We provide students and advocates with the skills and tools to

document violations of human rights and to turn this information into effective action.

15. HUMAN RIGHTS WATCH

Human Rights Watch (HRW) was established in 1978 to report on violations of human rights worldwide. HRW's work includes documenting human rights violations that fuel the HIV/AIDS epidemic, and impede access to HIV/AIDS treatment, prevention and care services, as well as conducting advocacy to address such abuses. The proper resolution of this case is therefore a matter of substantial interest to HRW.

16. INSTITUTE OF HUMAN RIGHTS AT EMORY

The Institute of Human Rights (IHR) at Emory seeks to advance the cause of human rights through educational, research and community awareness programs in parallel with the mission of the university. We engage representatives of governmental and non-governmental institutions as well as scholars and practitioners in dialogue about the use of rights based approaches. Our teaching programs include an interdisciplinary graduate certificate in human rights open to graduate students across the university and an undergraduate human rights program currently in development.

17. MADRE

MADRE is an international women's rights organization that works to advance women's human rights by meeting immediate needs and building lasting solutions for communities in crisis. MADRE opposes the anti-prostitution pledge because we believe that sex workers, like all people, are protected under international human rights standards. By denying sex workers the resources and education necessary for HIV prevention, their human rights are effectively being denied as well.

18. NEW YORK HARM REDUCTION EDUCATORS

New York Harm Reduction Educators (NYHRE) is a non-profit organization devoted to promoting the health, safety and well-being of marginalized, low-income persons who use drugs and people who are involved in sex work, their loved ones and their communities. We deliver integrated health and social services

that promote physical, psychological, social and spiritual wellness. We believe that barring sex workers from accessing vital resources and information is plainly impractical and bad for community and public health, as well as unethical and in stark violation of human rights tenets.

19. PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.

Planned Parenthood Federation of America, Inc. (PPFA), a New York not-for profit corporation, is America's oldest and most trusted sexual and reproductive health care advocate and provider. PPFA provides leadership to eighty-seven affiliates that manage approximately 800 medical centers around the country and provide medical services and sexuality education to nearly five million women, men, and teens each year. PPFA and its network of affiliates work with organizations around the world to protect and promote global sexual and reproductive health and rights. This includes efforts to ensure that all women and men have the means to meet their sexual and reproductive health care needs, including the means to prevent the spread of HIV/AIDS.

20. POPULATION ACTION INTERNATIONAL

Population Action International (PAI), is an independent policy advocacy group working to strengthen political and financial support worldwide for population programs grounded in individual rights. Through research and advocacy, PAI seeks to make clear the linkages among population, reproductive health, the environment, and development. At the heart of PAI's mission is its commitment to universal access to family planning and related health services, and to educational and economic opportunities, especially for girls and women. Although PAI is not itself required to adopt an organizational policy opposing prostitution, it nevertheless believes that the requirement is an unconstitutional infringement on the rights and independence of affected organizations' ability to implement programs to prevent the spread of HIV/AIDS based on sound public health practice.

21. THE SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE U.S.

The Sexuality Information and Education Council of the U.S. (SIECUS) has served as a leading national voice for sexuality education, sexual health, and sexual rights for over forty years. SIECUS advocates for the right of all people to accurate information, comprehensive education about sexuality, and sexual health services. SIECUS believes that people engaged in sex work have a right to the information, services, and supplies they need to stay healthy, and that outreach to sex workers is critical to stemming the HIV/AIDS pandemic. SIECUS believes that the policy of requiring a repudiation of sex work in order to receive U.S. funding undermines the ability of organizations to conduct vital harm reduction programs.

22. THE SEX WORKERS PROJECT AT THE URBAN JUSTICE CENTER

The Sex Workers Project (SWP) at the Urban Justice Center protects and promotes the rights of individuals who engage in sex work, whether they do so by choice, circumstance or coercion. SWP has been a leading voice in the U.S. on issues of concern to sex workers and survivors of human trafficking since its founding in 2001. SWP has worked with organizations, service-providers and sex workers that have been harmed by the restrictions on HIV/AIDS funding. SWP believes that all community members, including sex workers, have the right to protect their health through HIV prevention, diagnosis and treatment. SWP is also concerned that the speech of those highly qualified to evaluate different policy approaches to prostitution – organizations fighting the HIV/AIDS epidemic – is restricted by the “anti-prostitution pledge.”

B. INDIVIDUALS

1. SCOTT BURRIS

Scott Burris is a professor of law and co-director of the Center for Health Law, Policy and Practice at Temple University’s Beasley School of Law. His research and intervention work in public health has focused on the effects of laws and law

enforcement practices on the behavior of people engaged in illegal activities, including drug users and sex workers. He has found that engagement and empowerment of people who engage in these activities can substantially aid in the prevention of HIV. The pledge in question in this case makes it difficult if not impossible for prevention organizations to support self-directed organizations and activities among sex workers.

2. **ELIZABETH U. IVY, AKA, URSULA ORELSE**

Elizabeth Ivy is a sex-positive-education and sex-workers'-rights activist, member of The Sex Workers Outreach Project (SWOP)-Chicago, and volunteer for the Chicago Recovery Alliance and the Howard Brown Health Center. Based on her work, Ms. Ivy believes that any law restricting education, welfare and freedom of choice for consensual adults leads only to negative public health outcomes. Sex workers, like all other job-holders, deserve equal rights. Moreover, by disseminating information regarding health and social services, sex workers can take the initiative to care for themselves, their clients, society.

3. **DR. GREG SCOTT**

Dr. Greg Scott is an Associate Professor of Sociology and the Director of the Social Science Research Center at DePaul University in Chicago, Illinois. For more than a decade, Dr. Scott has served as the Director of Research for the Chicago Recovery Alliance, one of the country's largest providers of harm reduction services for injection drug users. Years of research have led Dr. Scott to believe that the anti-prostitution pledge harms sex workers in general and female sex workers in particular. The pledge is also likely to increase the rate of HIV transmission between sex workers and their clients, and thus between clients and their unsuspecting partners, making the bridge to the "general population" more expansive, navigable, and lethal.

CERTIFICATE OF SERVICE

I, Anne Morrison, hereby certify that on September 15, 2010, I caused to be filed with the Clerk of the Court by United Postal Service and via electronic mail the original and five true copies of this Amicus Brief of the American Civil Liberties Union, New York Civil Liberties Union and 25 Other Public Health and Human Rights Organizations and Experts in Support of Plaintiffs-Appellees. Copies of this Brief were also served electronically and via United Postal Service on:

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