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, AND ANDREW S. 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 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 OF *AMICUS CURIAE* INDEPENDENT SECTOR IN SUPPORT OF PLAINTIFFS-APPELLEES

Lawrence S. Lustberg
Megan Lewis*
Melanca D. Clark*
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4500 (tel.)
(973) 639-8341 (fax)
Counsel for Amicus Curiae

* Not admitted in this Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* files the following statement of disclosure: Independent Sector is a nonprofit 501(c)(3) corporation and is not a publicly held company that issues stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Regulations

INTEREST OF AMICUS CURIAE[1]

Proposed Amicus Curiae Independent Sector is the leadership forum for charities, foundations and corporate giving programs committed to advancing the common good in America and around the world. Independent Sector's nonpartisan coalition of approximately 550 organizations leads, strengthens and mobilizes the nonprofit community in order to fulfill its vision of a just and inclusive society and of a healthy democracy of active citizens, effective institutions and vibrant communities. Independent Sector's members include nonprofit organizations that receive both government and philanthropic funding, as well as foundations and corporate philanthropies that donate to nonprofits that also receive some government funding.

Independent Sector is committed to promoting and protecting the independence of the nonprofit community through the rights of advocacy and freedom of speech. Indeed, Independent Sector believes that such independence is critical to productive cooperation between the government, private and nonprofit sectors.

Independent Sector's members -- private, voluntary associations primarily based in the United States -- comprise an essential element of the "third sector," that part of society that is distinct from government and business. On behalf of its members, Independent Sector seeks to advise the Court on the fundamental importance of safeguarding the independence and autonomy of this sector. Such associational autonomy is an animating principle of our constitutional jurisprudence and a foundation upon which our democracy rests. Indeed, the right to associate for the purposes of advocacy or expression on matters of public

[1] All parties have consented to the filing of this brief.

concern is a core tenet of First Amendment jurisprudence, a right which the pledge requirement at issue in this case, 22 U.S.C. § 7631(f), directly contravenes.

Several of Independent Sector's members and/or members' constituent organizations are United States based recipients of Leadership Act funds and are thus directly affected by the pledge requirement and its newly expanded application to domestic organizations. As recipients of Leadership Act funds, Independent Sector's member organizations are required by the Act to adopt a policy expressly opposing prostitution and to cease all activities deemed to be inconsistent with opposition to prostitution, even where those activities are funded wholly from private sources. Each organization receiving such funds has thus been compelled to espouse a particular, government-sponsored position and to forgo any alternative expression. This unconstitutional condition, placed on the receipt of federal funds, directly interferes with the right to associate for the purposes of speaking collectively on matters of public concern. Independent Sector submits this brief, respectfully urging affirmance of the district court's grant of a preliminary injunction, to explain the importance of preserving the associational independence upon which the third sector, and indeed, our constitutional democracy, depends.

INTRODUCTION

In 2003, Congress enacted the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 ("the Leadership Act"), 22 U.S.C. § 7601 et seq., which authorizes the appropriation of $15 billion over a five year period to fight HIV/AIDS worldwide through education, research, prevention, treatment and care. In the act, Congress required that private recipients of federal Leadership Act funds adopt "a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. § 7631(f) (hereinafter "the pledge requirement"). Pursuant to this provision, recipient organizations are required to adopt an organization-wide policy opposing "sex work."[2] Moreover, defendants United States Agency for International Development ("USAID"), United States Centers for Disease Control ("CDC"), and the United States Department of Health and Human Services ("HHS") have made clear that such organizations must also refrain from using their own private funding to engage in speech and activities that defendants perceive as being insufficiently opposed to sex work. See Appellants' Brief ("AB") at 6; Letter from Christopher D. Crowley, Mission Director, USAID (October 7, 2005) (JA 389)[3]. The Leadership Act also requires that federal funding not be used to "promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. § 7631(e). As opposed to the pledge requirement, this restriction does not apply to the use of non-government funds, and is not at issue here.

When the pledge requirement was enacted in 2003, defendants intentionally chose not to enforce it against organizations based in the United States, having been warned by the Department of Justice that application of the requirement to

[2] In this brief, Amicus uses the term "sex work" or "sex worker" because the term "prostitute" and "prostitution" is viewed as stigmatizing.

[3] References to the joint appendix of the parties appear herein as "JA__."

such organizations would be unconstitutional. See Letter from Daniel Levin, dated Sept. 20, 2004 (JA 155-156). This changed in September 2004 when the Justice Department opined for the first time that "reasonable arguments" exist to support the constitutionality of the pledge requirement as applied by the government to domestic nonprofit organizations; thereafter the pledge requirement was applied to to organizations based in the United States. Id.

In fall 2005, plaintiffs,[4] Alliance for Open Society International ("AOSI") and Pathfinder International, U.S.-based nonprofit organizations that receive government funding to which the pledge requirement attaches, brought suit against the defendants, agencies and officials who distribute Leadership Act funds, arguing that the restriction violates the First Amendment and seeking a preliminary injunction barring defendants from using the pledge requirement as a basis for action against plaintiffs for engaging in activities deemed insufficiently opposed to prostitution. The district court granted AOSI and Pathfinder's request for declaratory and injunctive relief, finding that the pledge requirement was not narrowly tailored to further Congress' goals, and that the requirement unconstitutionally applies viewpoint discrimination to organizations' private funds and compels speech resulting in irreparable injury to plaintiffs. (JA 516-640).

For the reasons explained below, Independent Sector respectfully urges this Court to affirm the district court's grant of a preliminary injunction. The government's position that the pledge requirement does not violate plaintiffs' First Amendment rights, and is not an unconstitutional funding condition, lacks legal support and ignores the First Amendment protection due the associational independence of non-governmental organizations ("NGOs"), without which the

[4] The claims of Open Society Institute, also a plaintiff in this case, are not part of the instant appeal. (JA 629-32).

productive partnership between government and civil society, and fundamental democratic principles critical to our system of government would be undermined.

SUMMARY OF ARGUMENT

The pledge requirement violates the First Amendment rights of organizations that receive Leadership Act funds. By placing unconstitutional conditions on the receipt of such funds, and by restricting the organizations' ability to engage in associational life for the purposes of expression, this provision undercuts the core functions of the third sector. Not only do such restrictions contravene principles upon which our democracy rests, but they also undermine the strength and vitality of the long-standing and productive partnership between government and society.

First, the pledge requirement violates the First Amendment rights of Leadership Act grantees by conditioning access to Leadership Act funds on the forfeiture of protected speech. This requirement forces private organizations to pledge support for a particular government policy as a condition of qualifying for government benefits, and conditions access to government funding on a waiver of the First Amendment right to use private funds to engage in constitutionally protected speech. Thus, the pledge requirement restricts the ability of organizations to speak freely and independently on matters of concern to them and to undertake expressive activity to that end.

Second, the freedom to engage in associational life and to associate for the purposes of expression, especially on issues of public concern, is a critical feature of this nation's history. Such freedoms undergird our democracy and are therefore strongly protected by our constitutional jurisprudence. Because the pledge requirement contravenes these freedoms and encroaches on the autonomy of NGOs

and private voluntary associations to speak freely on matters of public concern, it contravenes core democratic principles.

Third, by placing unconstitutional conditions on the exercise of free speech, and by violating the right to associate for the purposes of collective speech, the pledge requirement violates the integrity and undermines the autonomy of NGOs in general and of Independent Sector's members in particular. Independence is a critical feature of these organizations' ability to effectively partner with government and provide innovative approaches to addressing urgent social problems.

I. ARGUMENT

A. THE PLEDGE REQUIREMENT IMPOSES UNCONSTITUTIONAL CONDITIONS ON THE FIRST AMENDMENT FREEDOMS OF NON-GOVERNMENTAL ORGANIZATIONS.

The pledge requirement violates the First Amendment rights of the recipients of Leadership Act funds by placing unconstitutional conditions on the receipt of federal funds. Under the unconstitutional conditions doctrine, government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech." Perry v. Sindermann, 408 U.S. 593, 597 (1972); see also Speiser v. Randall, 357 U.S. 513, 526 (1958) (state cannot condition property tax exemption on loyalty oath); FCC v. League of Women Voters, 468 U.S. 364 (1984) (FCC not permitted to condition federal funds for radio and television stations on the basis of editorial content). The pledge requirement engenders an unconstitutional condition in two specific respects. First, it requires that the entity receiving federal funds adopt a particular viewpoint -- that is, the viewpoint espoused by the government -- as a condition of receiving such funds. And second, it demands that recipient

organizations forgo certain speech, even when that speech is funded by non-government sources.

The United States Supreme Court has consistently refused to allow government to compel private individuals or organizations to pledge support for a particular government policy -- or for government policy in general -- as a condition of participating in a government program. See, e.g., O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712 (1996) (refusing to permit cancellation of a trash hauling contract because the contractor had vigorously criticized the local government); Bd. Of County Comm'rs Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668 (1996) (invalidating removal of a tow truck operator from the city's rotation list as a penalty for refusing to support the mayor's re-election); West Va. State Bd. Of Educ. V. Barnette, 319 U.S. 624 (1943) (ruling that access to education cannot be conditioned on pledge of allegiance). The Court has also refused to allow the government to condition access to funding on a waiver of the First Amendment right to use private funds to engage in constitutionally protected speech. See League of Women Voters of California, 468 U.S. at 400-01.

The pledge requirement, however, specifically forces NGOs to pledge support for a particular government policy as a condition of qualifying for the receipt of federal funds. Thus, this provision conditions access to government funding on the forfeiture of free expression. As the district court in this case correctly concluded,

> [W]hen the government carries out its powers, including those emanating from the Spending Clause, in a manner whose substantial purpose or effect is to guide or burden choice by recipients of government benefits in the exercise of First Amendment freedoms so as to endorse the viewpoint the government favors or prescribes, such action distinguishes the case from other invocations of

> the Spending Clause power … and indeed demands a heightened level of scrutiny. (JA 573).

Because the government may not "deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech," even though the person has no "right" to the government benefit, this provision is unconstitutional. See Perry, 408 U.S. at 597.

The government misconstrues the pledge requirement as nothing more than the refusal of the government to subsidize the exercise of a particular First Amendment activity. The government thus argues that plaintiffs are "free to adopt any policy they like, or no policy at all.…" AB at 52. The governments' argument, however, profoundly mischaracterizes the pledge requirement and the conditions it places on the exercise of First Amendment activity. As the district court noted, the

> cavalier take-it-or-leave-it answer to an infringement of speech … -- which can more or less be characterized as "if you don't like it, lump it" -- is simply not in keeping with the expectations our society derives from First Amendment freedoms and how government would respond to their invocation. (JA 625).

It is true that there is a "distinction between the Government's punishment of speech, and the Government's decision not to subsidize the exercise of First Amendment rights." See AB at 51 (citing DKT Memorial Fund Ltd. v. AID, 887 F.2d 275, 287-288 (1989)). Thus, for example, "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." Rust, 500 U.S. at 194. But, that is not the issue here: the requirement that federal funds not be used to "promote or advocate the legalization or practice

of prostitution or sex trafficking," 22 U.S.C. § 7631(e), is one thing but, its application to the use of non-federal funds is another, and cannot be described as simply insisting that public funds be spent for the purposes for which they were authorized. Rather, the pledge requirement imposes restrictions on the use of non-government funds and thus restricts the speech of the entity as a whole. It requires that all of the organization's funds, whether governmental or not, be spent in accordance with the government's restrictions and that the entity as a whole therefore adopt the government's position and forgo any contrary expressive activity.

The pledge requirement is unconstitutional, then, because it is the entity, not the program, that bears the burden of the condition. For example, in League of Women Voters, the Court invalidated a statute which prohibited non-commercial radio and television stations that accepted federal funds from editorializing even when funded by wholly private funds. 468 U.S. at 368.[5] In Rust v. Sullivan, the Court upheld restrictions on the ability of federal funding recipients to conduct abortions on the grounds that grantees remained free to use private funding to engage in prohibited speech at a separate location. 500 U.S. at 196 (noting that "the regulations do not require [grantees] to give up abortion-relation speech; they merely require that the grantee keep such activities separate and distinct" from

[5] The government attempts to distinguish League of Women Voters from the present case by arguing that the statute at issue in League of Women Voters was "designed not to transmit a governmental message, but rather to facilitate private speech." AB at 49. However, as the district court in this case correctly concluded, both cases involve government infringement on the right to communicate about an issue of public importance: "[the Court] is unpersuaded that the expression at stake here is of such a materially different character [from the journalistic expression at issue in League of Women Voters] as to render the analysis in League of Women Voters, and that decision's application of heightened scrutiny, inapplicable in this case." (JA 597).

their federal funded activities). The Court distinguished Rust from other unconstitutional conditions cases on the grounds that in true unconstitutional conditions cases, such as here, the "Government has placed a condition on the recipient of a subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." 500 U.S. at 197.

This is precisely why the pledge requirement is so offensive to fundamental First Amendment principles. It requires the adoption of a particular viewpoint and places an expressive restriction on the entity as a whole prohibiting contrary expressive activity even outside of the confines of the federally funded program. In requiring that independent, private, voluntary organizations adopt a particular viewpoint, the government not only violates the First Amendment, but also undermines the independence and integrity of organizations which can, as a result, no longer freely adopt alternate viewpoints. The pledge requirement must be invalidated.

B. THE PLEDGE REQUIREMENT RESTRICTS THE FIRST AMENDMENT FREEDOM OF NON-GOVERNMENTAL ORGANIZATIONS TO ENGAGE FREELY IN PRIVATELY FINANCED SPEECH ON MATTERS OF PUBLIC CONCERN.

The speech engaged in by private voluntary associations fulfills a critically important function in a democratic society. As set forth below, such speech lessens the authority of the majority, serves as a bulwark against the power of the state, and enables individuals more powerfully and effectively to advance their views. As is evident from this Nation's history and is enshrined in our constitutional jurisprudence, in order to carry out these critical functions, such private associations must maintain their independence from the state. It follows that, by suppressing their independent speech and by requiring that they espouse

the government's views as a condition of receiving federal funding, the pledge requirement undermines the American democratic system as a whole. While private voluntary associations often partner with government, this valuable partnership need not -- and indeed, must not -- compromise the associational autonomy and independence of NGOs.

The vitality, diversity and abundance of voluntary associations and non-governmental institutions is a central pillar upon which the American democracy rests. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932-33 (1982). Indeed, the constitutional freedom of association specifically affords protection to group activity and speech designed to advocate shared beliefs and controversial viewpoints. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.'" Id. at 908 (quoting Citizens Against Rent Control Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 294 (1981)).

Historically, American life has long been characterized by vigorous associational activity. "Better use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world." Alexis de Tocqueville, DEMOCRACY IN AMERICA 113 (Phillips Bradley, ed. 1990). "In their political associations the Americans of all conditions, minds, and ages, daily acquire a general taste for association and grow accustomed to the use of it. There they meet together in large numbers, they converse, they listen to one another, and they are mutually stimulated to all sorts of undertakings." DEMOCRACY IN AMERICA 129. See also R. Wood, THE CREATION OF THE AMERICAN REPUBLIC 186-96, 319-28 (1969) (associations have been a distinctive feature of American life from the earliest days of the Republic); David Cole, Hanging With The Wrong Crowd: Of Gangs, Terrorists, and The Right Of Association, 1999 Supreme Court Review 203 (quoting Arthur Schlesinger, PATHS

TO THE PRESENT 23 (1949) ("Traditionally, Americans have distrusted collective organization as embodied in government while insisting upon their own untrammeled right to form voluntary associations.")). Indeed, associational activity was extolled in the Federalist Papers as a critical manner of maximizing the power of the people and minimizing the dangers of centralized government. See THE FEDERALIST NO. 56, at 53 (James Madison) (Clinton Rossiter ed. 1961) (describing the virtues of voluntary private association as minimizing the dangers attendant to centralized power).

The critical significance of voluntary association as an essential aspect of the freedom of speech was fortified by and memorialized in the Constitution. Indeed, the Constitution includes provisions which expressly protect rights of association, including the rights of free speech, assembly and petition. See U.S. Const. amend. I. See also DeJonge v. Oregon, 299 U.S. 353, 364 (1937) (maintaining that "[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental"); Republican Part of State of Conn v. Tashjian, 770 F.2d 265, 275-76 (2d Cir. 1985) (noting that the importance of political association was enshrined in the Constitution). Furthermore, the Supreme Court has made clear that there is an independent right of association which derives from the First Amendment guarantees of speech, press, assembly and petition. See NAACP v. Alabama, 357 U.S. 449, 460 (1958). In NAACP v. Alabama, the Supreme Court held that the state could not constitutionally compel production of a membership listing from a private, voluntary association because compelled disclosure would likely curtail the organization's advocacy of dissident beliefs. See id. The Court reasoned that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Id. And as the Court stated in Roberts v. United States Jaycees, "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of

grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group efforts toward those ends were not also guaranteed." 468 U.S. 609, 622 (1984).

The right of association is, in part, a right to speak collectively on matters of public concern. Indeed, the right of association is important precisely because it guarantees "the right of people to make their voices heard on public issues." NAACP v. Claiborne Hardware, 458 U.S. at 908-09. "By collective effort individuals can make their views known, when, individually, their voices would be faint or lost.'" See id.; see also NAACP v. Alabama, 357 U.S. at 460-61 ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.").

In sum, the Supreme Court understands "as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." Id. Freedom of association is therefore protected as a fundamental component of our personal liberty. See also DEMOCRACY IN AMERICA 117 ("The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of Association therefore . . . is as inalienable in its nature as the right of personal liberty.").[6]

---

6 The First Amendment protection afforded associational rights further supports the district court's finding that the regulation here at issue should be subjected to heightened scrutiny. See NAACP v. Alabama, 357 U.S. at 460-61 ("State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.") See also Bates v. Little Rock, 361 U.S. 516, 524 (1960) (in order to justify an encroachment on an associational right, the state must present a

The robust right to associate for expressive purposes -- one of the "foundations of our society," NAACP v. Claiborne, 458 U.S. at 932-33 -- serves several functions that are essential to the democratic principles that undergird our constitutional democracy. See also DeJonge, 299 U.S. at 372 ("the security of the Republic, the very foundation of constitutional government" lies in preserving the right of assembly). First, the right of association serves to lessen the moral authority of the majority and strengthen the minority. See NAACP v. Alabama, 357 U.S. at 460 (reasoning that the right to associate enables the expression of dissident beliefs). As De Tocqueville observed, "[i]n America, the citizens who form the minority associate in the first place to show their number and lessen the moral authority of the majority." DEMOCRACY IN AMERICA 117. Thus, this right "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." Boy Scouts of America v. Dale, 530 U.S. 640, 647-48 (2000).

---

compelling reason for that encroachment). The Supreme Court has struck down state action which curtails the freedom to associate as unconstitutional. Such impermissible state action includes, but is not limited to, the imposition of penalties or withholding of benefits from individuals because of their membership in a disfavored group, requests for disclosure of the fact of membership in a group seeking anonymity, and interference with the internal organization or affairs of the group. See Roberts, 468 U.S. at 622-23. See also Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (holding that right of expressive association trumps state public accommodations law); Cousins v. Wigoda, 419 U.S. 477, 487-88 (1974) (holding that associations have right to be free from state interference with the internal structure of the organization); Gibson v. Florida Legislative Investigation Comm., 371 U.S. 539 (1963) (contempt conviction for refusal to divulge information in local NAACP membership lists violated the right of association); Shelton v. Tucker, 364 U.S. 479 (1960) (statute compelling teachers to file affidavit organizational affliation invalid on the grounds of associational freedom).

Second, a robust right of association which protects "expressive group effort" enhances both "political and cultural" diversity and gives voice to our "abiding commitment to pluralism." See NAACP v. Alabama, 357 U.S. at 277-78 ("Because of this nation's abiding commitment to pluralism, and our candid recognition that the sum of an association may often be far greater than its individual parts, courts have been particularly hesitant to countenance any governmental intrusion -- either direct or indirect -- into the core of expressive group effort."); Roberts, 468 U.S. at 622 ("According protection to collective effort on behalf of shared goals is especially important to preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."). Indeed, associational life provides the participants in the third sector with "socialization into the political values necessary for self-government." CIVIL SOCIETY AND GOVERNMENT 18 (Robert C. Post and Nancy L. Rosenbaum eds.).

Third and finally, the right of expressive association protects against tyranny and serves as a bulwark against centralized power. "Despotism, by its very nature suspicious, sees the isolation of men as the best guarantee of its own permanence." DEMOCRACY IN AMERICA 119; Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 1313 (2d ed. 1988) ("[T]o destroy the authority of intermediate communities and groups . . . destroys the only buffer between the individual and the state."); Cf. DeJonge, 299 U.S. at 364-65 (reasoning that the right of assembly ensures that "government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means"). The third sector thus serves as a "center of collective political resistance against capricious and oppressive government." CIVIL SOCIETY AND GOVERNMENT 18 (Robert C. Post and Nancy L. Rosenbaum eds.).

The vital functions that associations serve in our society, as mediating institutions that stand between the individual and the state, are incompatible with

government intrusion into the province of associational life. Government must not be permitted to supervise or manage civil associations and to interfere with their free speech "lest their independent influence on society be diluted." See DEMOCRACY IN AMERICA 115-119, 312. This is not to say, and *amicus* does not contend, that there can be no laws governing this sector, only that the government must not interfere with private associations in a manner that compromises their independence, and with it, their salutary function in society. Indeed, it is the independence of associational life from government interference that enables the third sector to serve this critical function. As the district court in this case correctly stated, "The diversity and breadth of the traditional public functions NGOs contribute to our society should rank the quality of First Amendment rights and protection they merit to no lesser degree than that accorded to editorial opinion or to universities." (JA 599). While government should, and commonly does, partner with private associations, and while it is certainly appropriate for government to shape and tailor its funding to serve the purposes it wishes such funding to serve, it is not permissible for the government to use funding to co-opt the entities with which it partners, many of which receive much of their funding from other sources.[7]

7 During fiscal year 2004, U.S private voluntary organizations working with USAID took in $14.9 billion in annual private support. This was nearly six times the $2.6 billion they received from USAID during the same period, with other U.S. and international agencies contributing an additional $2.5 billion. See USAID Report, *The Voluntary Foreign Aid Programs: 2006 Report of Voluntary Agencies Engaged in Overseas Relief and Development*, at 5. Only a fraction of USAID NGO partners' budgets, therefore, comes from the U.S. government.

C. THE PLEDGE REQUIREMENT UNDERMINES THE VALUABLE PARTNERSHIP BETWEEN GOVERNMENT AND THE THIRD SECTOR.

Requiring Independent Sector's members that receive Leadership Act funds to satisfy the pledge requirement and to cease all contrary speech undermines their constitutionally protected independence. Indeed, such compelled adoption of government sponsored views compromises the right of these members to associate for the purposes of collective expression. In so doing, the pledge requirement undermines the independence of the third sector and the crucial partnership between government and civil society.

Private associations have long provided critically needed services in concert with governmental programs and entities and have assisted government in solving pressing social problems. See Alice Gresham Bullock, Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity, 6 Cornell J.L. Pub. Pol'y 325, 332 (1997); Lester M. Salamon, Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations, in THE NONPROFIT SECTOR 99 (Walter W. Powell, ed., 1987). During the Colonial period, government provided funds to private charitable educational institutions, hospitals, and social service agencies, enabling those institutions to provide services needed by local communities. Salamon, Partners in Public Service, at 100. Later, public officials relied upon private nonprofit agencies to assist in addressing the social problems that accompanied urbanization and industrialization. Id. These partnerships continue today: while government has no inherent obligation to provide funding for NGOs, it nevertheless frequently does so. These partnerships take a "dizzying array" of forms: loans, loan guarantees, grants, contracts, insurance, tax expenditures, vouchers and more. See Lester M. Salamon, The New Governance and the Tools of Public Action: An Introduction, 28 Fordham Urb.

L.J. 1611, 1612 (2001). See also Partnerships for a Stronger Civil Society, A Report to the President from the Interagency Task Force on Nonprofits and Government 6 (Dec. 2000).

But the success of this partnership depends upon the independence of the third sector and its institutions from governmental control. Without such independence and autonomy, the creativity and innovation that define this sector would be undermined and its valuable contributions to American life would be lessened. Historically, organizations in the third sector have taken on a pioneering role, bringing new ideas into public consciousness, shaping public policy, setting standards for government performance and inspiring moral and social reform. See, e.g., Dean Rusk, THE ROLE OF THE FOUNDATION IN AMERICAN LIFE 14 (1961). As the district court in this case correctly noted, "NGOs have played a significant role as partners of government in administering vital public services. They promote fuller participation and a diversity of views in civil society." (JA 598). Thus, the organized efforts of the third sector to abolish slavery, protect civil rights and create public libraries all depended upon the independence of private, voluntary associations that arose in order to bring about these results. See John H. Filer, The Filer Commission Report; Report of the Commission of Private Philanthropy and Public Needs, in THE NONPROFIT ORGANIZATION: THE ESSENTIAL READINGS 70, 80 (David L. Geis, et al. eds. 1990); see also Arnaud C. Marts, PHILANTHROPY'S ROLE IN CIVILIZATION: ITS CONTRIBUTION TO HUMAN FREEDOM 50 (1991) (noting that this sector has pioneered almost every cultural advance for the past three hundred years). It is precisely their independence from government control -- and their corresponding freedom to innovate and effect change -- that enables the third sector to effectively partner with government.

Here, the pledge requirement directly compromises the independence and autonomy of Independent Sector's member-organizations that receive Leadership

Act funds; it thereby cripples their valuable partnership with defendants. In particular, many NGOs adopt a principle of impartiality in providing humanitarian relief and assistance. Specifically, the Code of Conduct for NGOs in Disaster Relief provides that "[a]id not be used to further a particular political or religious standpoint," and that such agencies "act independently from governments." See Code of Conduct for NGOs in Disaster Relief, Articles 3, 4; see also Larry Minear, THE HUMANITARIAN ENTERPRISE, DILEMMAS AND DISCOVERIES 76-80 (describing the importance of impartiality to international relief organizations and the way in which independence from state governments enables them to carry out their "humanitarian imperative"); Henry J. Steiner and Philip Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 943-52 (2d ed.) According to these principles, humanitarian assistance, in order to be effective, must not be linked to any political or religious viewpoint. See id. In part this is so because of the danger attendant to operating in a conflict situation in which the organization is deemed to be an agent of any one side. See THE HUMANITARIAN ENTERPRISE 117-18, 161-65 (describing the dangers of humanitarian operations in unstable and war-torn countries as well as the dangers of being perceived by the population to be served as affiliated with a participant in the conflict). Thus, in many instances, NGOs depend upon their independence from government and state actors in order to carry out their work effectively, by, for example, serving communities that might otherwise be wary of receiving assistance from government or state actors. Especially during armed conflict or in states that are suffering from significant and often violent schisms, NGOs must remain impartial in order to serve their broader goals, such as the protection of public health or the delivery of humanitarian assistance. This purpose is undermined by the requirement of a pledge that inexorably links them to a particular side of the conflict.

Indeed, Congress has recognized the importance of relying on the third sector to achieve development objectives abroad "without compromising their private and independent nature." Foreign Assistance Act, 22 U.S.C. § 2151u. USAID has also acknowledged the importance of the independence of the third sector from the government stating that one "inherent challenge" "is achieving the right mixture of collaboration and independence between public and private spheres. A healthy degree of separation between the two is essential for the unique mission of each, but cooperation is also critical to the success of both." USAID Report, *The Voluntary Foreign Aid Programs: 2006 Report of Voluntary Agencies Engaged in Overseas Relief and Development* 4 ("USAID recognizes the independent mission of [the third sector]….").

The government's brief attempts to obscure the independent nature of the third sector. First, it characterizes NGOs that receive funds from defendants as government contractors or employees paid to carry out a "public service" of the government, and then argues that consequently, the pledge requirement should be subject to the less stringent balancing test for restrictions on government employee speech articulated in Pickering v. Board of Educ, 391 U.S. 563 (1988). See AB at 40-44 (citing Umbehr, 518 U.S. at 674). While government procurement contracts are established for a government to purchase services or property for its own "direct benefit or use," 31 U.S.C. § 6303, the cooperative agreements commonly used between NGOs and defendants are established for the purpose of transferring funds to a government recipient "to carry out a public purpose of support or stimulation authorized by the law of the United States." 31 U.S.C. § 6304 (grants), § 6305 (cooperative agreements); cf. Forsham v. Califano, 587 F.2d 1128, 1138 (D.C. Cir. 1978) ("The grant is assistance to an autonomous grantee. The grantee is not an arm, agent or instrumentality of the grantor.") (citation omitted), aff'd, Forsham v. Harris, 445 U.S. 169, 180 (1980) (noting "congressional attempts to

maintain the autonomy of federal grantees"). Thus, the legal relationship between grantees and defendants should not be subjected to the lesser scrutiny that might apply if the grantees were government contractors or employees.

The government's brief also asserts that NGOs in partnership with the U.S. government "serve as the public face for the Government worldwide," AB at 30, and further claims 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." Id. at 33. (emphasis added). The government's brief raises the specter of private organizations distorting the government's message if permitted to espouse views contrary to the pledge requirement -- even if doing so with their private funds -- because foreign audiences will not recognize that the organization is speaking in its private rather than official capacity. Id. at 32.

The government's claims that the privately funded speech of organizations receiving federal funds will be perceived as government endorsed is simply not supported by the evidence. In the legislative history of the Leadership Act, Congress made no finding, and considered no evidence, that the U.S. Government's position on prostitution and sex trafficking was being confused with the views of its partner NGOs. Moreover, defendant agencies themselves have recognized that NGOs who receive federal funding will not thereby be perceived as government spokesmen. For example, in 2004 USAID promulgated a rule to remove certain barriers to participation of faith based agencies in USAID programs. See 69 Fed. Reg. 61,716 (Oct. 20, 2004). Under the rule, to avoid violation of the Establishment Clause of the Constitution, faith-based agencies are eligible for USAID funding so long as the funding is not used by those agencies for "inherently religious activities." Id. at 67,717. The rule recognizes that "a religious organization that participates in USAID programs *will retain its independence* and may continue to carry out its mission, including the definition,

practice, and *expression* of its religious beliefs, provided that it does not direct financial assistance from USAID to support any inherently religious activities.…" Id. (emphasis added). It is difficult to reconcile the government's position in this case -- that an organization's privately funded conduct necessarily will be attributed to the government -- with its apparent recognition that an organization may espouse religious messages with private funds without those messages appearing to be government endorsed.[8] Therefore, the government's own actions in another context counter the government's position in this case that the pledge requirement is narrowly tailored to fit Congress' intent.

The principle that NGOs must have independence and autonomy in order to effectively carry out their purposes is particularly true with reference to the pledge requirement here at issue. The NGOs that receive Leadership Act funds operate in regimes that vary with respect to the legality of sex work. For example, sex work is not criminalized in countries such as Senegal and Brazil. See Declaration of Chris Beyrer, dated September 21, 2005 (JA 56 ¶ 20, JA 59 ¶ 27) (describing the success of Senegal in combating the spread of HIV/AIDS by decriminalizing sex work for sex workers registered with the government and noting that due to the decriminalization of sex work in Brazil, outreach programs have been successful in keeping the rates of HIV low). In the Philippines, sex workers register with the government. See id. (JA 59 ¶ 26). In these and other countries in which sex work is not criminalized, United States based NGOs may and frequently do wish to

[8] Notably, in response to a concern raised that the Rule did not ensure the creation of appropriate "Firewalls" between government-funded services and core religious activities of a grantee recipient, USAID stated that "the [existing] system of monitoring is more than sufficient to address the commenter's concerns." 69 Fed. Reg. at 61721 (referring to policies, guidelines and regulations prescribing cost accounting procedures that are to be followed by all recipients in using USAID funds).

provide public health assistance or to subcontract for the provision of such assistance, in order to stop the spread of HIV/AIDS. Adopting the position of the United States government will undermine the work of these organizations and will hamper their ability to operate in these alternative legal regimes.

In the face of the pledge requirement at issue in this case, partnerships between the government and public sector will be less effective, and less likely, as NGOs are forced to choose between adopting policies that may severely hamper their effectiveness or forgoing government funds altogether. Further, as Judge Marrero noted, NGOs such as plaintiffs in this case play a "critical role" in "simulating public discourse on controversial issues, including eminently debatable questions such as what may be the most appropriate or effective policy to engage high-risk groups in [combating the HIV/AIDS pandemic]." (JA 599-600). Third sector organizations will find it difficult if not impossible to experiment with new views and approaches to addressing the HIV and AIDS pandemic if forced to adhere to the restrictions of the pledge requirement. The district court has warned,

> [T]he government's intervention would carry the substantial likelihood to redirect the choice of speech that a recipient might otherwise feel entirely uninhibited to make, and by the use of such inducements derived from its vast resources, to tilt the public power equilibrium to the choice of view the government elects to favor. (JA 589).

It is not only the third sector organizations that stand to lose in such a scenario. Without the vital independence of these organizations, and the diversity of views engendered by that independence, the government is left to partner only with its ideological bedfellows, and is consequently deprived of the robust exchange of ideas that lead to innovative approaches to solving pressing social problems. Cf. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("The

Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'") (finding unconstitutional regulation of speech in university context) (citation omitted).

In sum, the pledge requirement has the effect of undermining the critical partnership between government and civil society, which has served as a cornerstone of our democracy. Without autonomy, the ability of the third sector to work together with government to provide essential services and to solve urgent public problems is severely compromised.

CONCLUSION

For the foregoing reasons, the district court's grant of a preliminary injunction should be affirmed.

Respectfully submitted,

Dated: December 22, 2006

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg
Megan Lewis*
Melanca D. Clark*
GIBBONS, DEL DEO, DOLAN
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102
llustberg@gibbonslaw.com
phone: (973) 596-4700
facsimile: (973) 596 0545

Counsel for Amicus Curiae

*Not admitted in this Circuit.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 22nd day of December, 2006, I caused one true and accurate copy of the Brief of *Amici Curiae* Independent Sector to be served by U.S. mail and email at the following addresses:

Laura K. Abel, Esq. Rebekah Diller, Esq. Aziz Huq, Esq. Burt Neuborne, Esq. David S. Udell, Esq. Brennan Center for Justice at NYU School of Law 161 Avenue of the Americas, 12th floor New York, NY 10013 Richard A. Johnston, Esq. Merriann M. Panerella, Esq. Wilmer Cutler Pickering Hale and Dorr LLP 60 State Street Boston, MA 02109 David W. Bowker, Esq. David N. Cinotti, Esq. Wilmer Cutler Pickering Hale and Dorr LLP 399 Park Avenue New York, NY 10022 *Attorneys for Plaintiffs-Appellant*	Michael J. Garcia, Esq. *United States Attorney for the Southern District of New York* Richard E. Rosenberger, Esq. Sean H. Lane, Esq. 86 Chambers Street, 3rd Floor New York, New York 10007 *Attorneys for Defendants-Appellants*

The undersigned hereby certifies that, on this 22nd day of December, 2006, I caused the original and ten copies of the Brief of *Amicus Curiae* Independent Sector to be delivered to the following address:

Office of the Clerk
United States Court of Appeals for the Second Circuit
U.S. Courthouse
40 Foley Square
New York, New York

/s/ Lawrence S. Lustberg

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of *Amicus Curiae* Independent Sector complies with the type-volume limitation specified in the Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief is proportionately spaced, has a typeface of 14 points and contains less than 7000 words exclusive of the table of contents, table of authorities, and certificate of service.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.
December 22, 2006

CERTIFICATE OF VIRUS CHECK

I hereby certify that a virus check of the electronic .PDF version of this Brief was performed using Symantic AntiVirus, and the .PDF file was found to be virus free.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.
December 22, 2006