BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

October 1, 2007

By Hand

Honorable Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the Second Circuit
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl St.
New York, NY 10007

Re: *Alliance for Open Society International v. USAID*
06-4035-cv

Dear Ms. Wolfe:

Pursuant to the Court's order of August 7, 2007, Plaintiffs-Appellees Alliance for Open Society International and Pathfinder International (collectively, "Plaintiffs") submit this reply letter brief. Plaintiffs ask that the enclosed copies be circulated to Judges Straub, Pooler and Barrington Parker, each of whom sat on the oral argument panel on June 1, 2007. Plaintiffs also respectfully request a resumption of the June 1, 2007, oral argument to address the issues raised by the government's issuance of the guidelines discussed herein.

INTRODUCTION

In their opening letter brief ("Letter Brief"), Plaintiffs advanced four arguments as to why the guidelines issued by Defendants-Appellants United States Agency for International Development ("USAID") and the United States Department of Health and Human Services ("HHS") (collectively, "Defendants" or "government")[1] perpetuate the constitutional and statutory infirmities of the Policy Requirement, 22 U.S.C. § 7631(f):

[1] In describing these guidelines in their letter brief, Defendants omit one of the five factors relevant to a determination whether adequate physical and financial separation exists between a grantee and any organization engaging in activities barred by 22 U.S.C. § 7631(f). *See* Letter from Sean Lane to Hon. Catherine O'Hagan Wolfe (Sept. 17, 2007) at 3, 7. The omitted factor is (iv), which requires agency officials to examine "[t]he extent to which signs and other forms of identification which distinguish the Recipient from the affiliated organization are present, and signs and materials that could be associated with the affiliated organization or restricted activities are absent." HHS, Office of Global Health Affairs, Guidance Regarding Section 301(f) of the U.S. Leadership Against HIV/AIDS, Tuberculosis & Malaria Act of 2003,

1) The guidelines do not cure the compelled speech violation created by the Policy Requirement.
2) The guidelines fail to afford Plaintiffs an adequate alternative channel through which to speak with their private funds. Moreover, the government has failed to justify these harsh measures.
3) The guidelines fail to identify the specific activities that the government considers prohibited, thereby rendering them unconstitutionally vague.
4) The guidelines authorize government officials to analyze not just the speech and beliefs of grantees, but also those of every organization with which grantees might be remotely affiliated, an arrogation of power that has no basis in the statute.

As discussed below, none of Plaintiffs' arguments is vitiated by the contents of Defendants' letter brief, and in fact some of these arguments are strengthened.

ARGUMENT

I. The Guidelines Do Not Cure the Policy Requirement's Violation of the Compelled Speech Doctrine.

As Plaintiffs argued in their opening Letter Brief, even with the new guidelines the Policy Requirement continues to violate the First Amendment's prohibition against compelled speech. *See* Ltr. From Rebekah Diller to Hon. Catherine O'Hagan Wolfe (Sept. 17, 2007) ("Pls.' Ltr. Br.") at 4-5; *see also* Pls.' Br. of Dec. 14, 2006, at 27-30. Defendants' Letter Brief asserts that Plaintiffs' compelled speech claim is "unrelated to the guidelines issued by HHS and USAID." Letter from Sean Lane to Hon. Catherine O'Hagan Wolfe (Sept. 17, 2007) ("Defs.' Ltr. Br.") at 7 n.3. But saying so does not make it so. By continuing to require that independent non-profit organizations adopt the government's viewpoint on a contested social issue, both the Policy Requirement and the guidelines are unconstitutional. *See* Pls.' Ltr. Br. at 4-5.

II. The Policy Requirement and Guidelines Substantially Burden Plaintiffs' First Amendment Rights Without Adequate Justification.

A. The Government Must Come Forward With Adequate Justification for the Burdens Imposed by the Guidelines.

As Plaintiffs explained in their Letter Brief, the government may not substantially burden the First Amendment rights of funding recipients unless it affords them an adequate alternative channel through which to speak. Plaintiffs explained further that, under this standard, government may not impose substantial burdens on the privately funded speech of funding recipients unless an adequate, legitimate government interest justifies those burdens. Pls.' Ltr.

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72 Fed. Reg. 41,076, 41077 (July 26, 2007) ("HHS Guidelines"); USAID, Acquisition & Assistance Policy Directive 05-04 Amend. 1 ("USAID Guidelines").

Br. at 5-8. The cases cited by the government support application of this level of scrutiny to the guidelines. *See* Defs.' Ltr. Br. at 5-6; Pls.' Ltr. Br. at 7-8.

B. The Policy Requirement and Guidelines Are So Burdensome That They Fail to Provide Plaintiffs an Adequate Alternative Channel Through Which to Speak.

Plaintiffs argued in their opening brief, and in a July 25, 2007 letter to this Court to which Defendants' Letter Brief responds, that the guidelines are so restrictive that they fail to provide Plaintiffs with an adequate alternative channel through which to speak. In particular, Plaintiffs pointed to four ways in which the guidelines are more restrictive than the legal services "program integrity" regulation considered in *Brooklyn Legal Services Corp. B v. LSC*, 462 F.3d 219 (2d Cir. 2006), *cert. denied*, 552 U.S. -- (U.S. Oct. 1, 2007) (No. 06-1308)[2] and *Velazquez v. LSC*, 164 F.3d 757 (2d Cir. 1999), *aff'd on other grounds*, 531 U.S. 533 (2001): 1) they require grantees to adopt organizational policies; 2) they prohibit overlapping management and governance, thus robbing a grantee of the ability to control – and exercise its First Amendment rights through – that channel; 3) they apply separation measures that Defendants have recognized to be excessively harsh in the faith-based context; and 4) they fail to take into account the unique challenges faced by international humanitarian groups. Pls.' Ltr. Br. at 8-12. Plaintiffs explain below why nothing in Defendants' letter brief undercuts any of these assertions.

First, Defendants do not deny that the Policy Requirement and guidelines require an independent non-profit organization to adopt the government's view on a contested public health issue. *See* discussion *supra* § I.

Second, Defendants assert two reasons why their guidelines purportedly permit grantees to speak through another organization. First, they claim the existence of overlapping boards or management is just one of several criteria that officials will examine to determine "whether sufficient physical and financial separation exists," and that none of the criteria is determinative. Defs.' Ltr. Br. at 7. In effect, they warn grantees that any attempt to speak through an affiliate with an overlapping board and management may fall afoul of the guidelines, while claiming that this warning is immune to First Amendment challenge.

The First Amendment bars the government from chilling speech in this way. The Supreme Court has made clear that a threat to censor speech is just as much a violation of the First Amendment as a direct ban on speech. Thus, in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the Court upheld an injunction against a state commission that engaged in "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" to suppress constitutionally protected speech, but did not actually issue criminal sanctions against the speech. *Id.* at 66-67. *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988) (invalidating a statute granting a mayor unbridled authority over whether to allow newsracks, because of threat that newspaper publishers would self-censor); *Transportation*

[2] The Supreme Court order denying *certiorari*, issued today, is available at: http://www.supremecourtus.gov/orders/courtorders/100107pzor.pdf.

Alternatives, Inc. v. City of New York, 340 F.3d 72, 79 (2d Cir. 2003) (warning government not to include "problematic" factors in a list of ten non-exclusive factors, none of which was assigned any particular weight, used to determine how much speakers must pay to engage in speech in city parks); *Harman v. City of N.Y.*, 140 F.3d 111, 120 (2d Cir. 1998) (invalidating city requirement that child welfare employees obtain permission before speaking to the media because "a preclearance requirement may have a broad inhibiting effect on all employees, even those who might ultimately receive permission to speak").

Defendants also claim that the prohibition on overlapping boards does not rob the grantee of its First Amendment rights because ultimate control of a corporation resides with its shareholders. Defs.' Ltr. Br. at 8. While this may be true with regard to for-profit entities, it most certainly is not true for the Plaintiffs and other non-profit corporations.[3] As non-profits, Plaintiffs cannot issue stock and do not have shareholders.[4] Consequently, it is their boards of directors that control and direct their affairs.[5] As Plaintiffs noted in their initial Letter Brief, the legal services regulation at issue in *Brooklyn Legal Services Corp.* explicitly allows board control precisely because the Legal Services Corporation acknowledged that this was the only way a government grantee could speak through an affiliate. Pls.' Ltr. Br. at 8.

Third, Defendants do not even try to explain why their own statements describing the intolerably burdensome nature of physical and legal separation for faith-based non-profits receiving funding from the defendant agencies are inapplicable to the Plaintiffs, which are also non-profits receiving funding from Defendants. *See* Pls.' Ltr. Br. at 9-10; Ltr. From Rebekah Diller to Hon. Catherine O'Hagan Wolfe (July 25, 2007) at 2. Their assertion that there is no Establishment Clause violation is beside the point. *See* Defs.' Ltr. Br. at 6. The fact stands that they are attempting to impose here precisely the measures that they have rejected as too burdensome in the faith-based context, making clear that Defendants are fully aware that these measures leave no alternative channel for speech.

Fourth, Defendants are wrong that Plaintiffs' evidence regarding the obstacles to registering NGOs in the countries in which Plaintiffs operate are mere "generalizations regarding the possible difficulties that might face NGOs in registering in particular countries." Defs.' Ltr.

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[3] Plaintiff AOSI is a Delaware not-for-profit corporation. JA 231. Pathfinder International is a Washington, D.C., not-for-profit corporation. JA 364.

[4] *See* 19 William Meade Fletcher *et al.*, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2:15 (perm. ed. 1988 & Supp. 2004); Del. Code. Ann. Tit. 8 § 102(a)(4) (prohibiting nonprofit corporations from issuing stock); D.C. Code § 29-301.27 (same). *See also* Pls.' Br. of Dec. 14, 2006, at i (stating in corporate disclosure statement that Plaintiffs issue no stock).

[5] *See* James J. Fishman & Stephen Schwarz, NONPROFIT ORGANIZATIONS 144 (2000); Del. Code. Ann tit. 8 § 141(a) (business and affairs of non-profit corporations shall be managed by or under the direction of a board of directors); D.C. Code § 29-301.02(7) (defining board of directors as "group of persons vested with the management of the affairs of a corporation . . .").

Br. at 8.[6] On the contrary, Plaintiffs have submitted specific statements made by the State Department – of which Defendant USAID is an arm – describing the particular and severe obstacles to registration in Egypt, Uzbekistan, Tajikistan and Sudan, all countries in which Plaintiffs operate. Pls.' Ltr. Br. at 11-12.

C. Defendants Have Failed to Offer A Constitutionally Sufficient Justification for the Harshness of the Affiliation Requirements.

In prefatory comments accompanying the guidelines, in multiple letters to this Court after issuance of the guidelines, and now in their Letter Brief, Defendants have consistently failed to explain how the stringent separation measures required by the guidelines further some interest of the government. Instead, they assert broadly that adequate separation is necessary to "guard against a public perception that the affiliate's views on prostitution and sex trafficking may be attributed to the recipient organization and thus to the government," without explaining how the particular separation measures they demand further this purpose. Defs.' Ltr. Br. at 7 (quoting HHS Guidelines, 72 Fed. Reg. 41076).[7]

Defendants' Letter Brief makes clear why Defendants cannot provide such an explanation: the guidelines are an attempt to require the maximum amount of separation possible, rather than an exercise of considered judgment regarding the separation measures that will actually achieve specific goals. Indeed, Defendants characterize the guidelines as being "modeled upon" and "track[ing]" the legal services restrictions considered by this Court in *Brooklyn Legal Services Corp.*, 462 F.3d 219, and *Velazquez*, 164 F.3d 757. *See* Defs.' Ltr. Br. at 1, 2, 3. The First Amendment demands more than a cookie-cutter approach to regulation of speech. It requires that government show that restrictions on private speech are tailored to serve important government interests. *See* Pls. Ltr. Br. at 6-7. This, Defendants do not, and cannot, do.

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[6] Due to the simultaneous nature of this round of briefing, Defendants had not seen Plaintiffs' Letter Brief when they wrote this.

[7] Defendants also allude to Senate testimony "that some organizations receiving foreign aid funding from the United States Government had" engaged in activities inconsistent with the government's position on prostitution and HIV/AIDS. Defs.' Ltr. Br. at 1-2. This cannot be the purpose of either the Policy Requirement or the guidelines, because the very organizations discussed in that testimony – the United Nations and World Health Organization – are expressly exempted from both. *Compare Trafficking of Women and Children in East Asia and Beyond: A Review of U.S. Policy: Hearing Before the S. Foreign Relations Comm.*, 108th Cong., 1st. Sess. (April 9, 2003) (statement of Donna M. Hughes, Univ. of Rhode Island) (claiming that a United Nations entity "called for prostitution and sex industries to be officially recognized as a legitimate economic sector" and that the World Health Organization has "recommended the decriminalization of prostitution"); 22 U.S.C. 7631(f) (exempting United Nations and World Health Organization).

III. Defendants Fail to Grapple With the Utter Silence of the Guidelines as to the Activities They Prohibit, Rendering Them Unconstitutionally Vague.

Plaintiffs were compelled to bring this lawsuit after Defendants refused to provide guidance regarding the scope of the Policy Requirement, despite Plaintiffs' repeated attempts to obtain clarity from Defendants regarding what kind of policy they were required to adopt, and which activities that policy would bar them from engaging in. JA 534-538. In what can only be deemed a Kafkaesque process, the contours of the Policy Requirement have grown significantly vaguer as the litigation has proceeded.

First, Defendants' letter says nothing to defend the guidelines' failure to state what policy is required and what activities and speech are prohibited. In this respect, the guidelines are starkly different from the legal services program integrity regulation, which spells out in great detail the activities that grantees are prohibited from engaging in. *See* 45 C.F.R. § 1610.2(b) (incorporating by reference statutory and regulatory definitions of prohibited activities).[8] On this basis alone, the Policy Requirement and guidelines are unconstitutionally vague. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (invalidating for vagueness statute that made "treasonable or seditious" words or acts grounds for removal from public employment).

Second, Defendants guidelines have introduced a new order of vagueness by permitting the government to bar speech if "[Defendants], the U.S. Government and the project name are [insufficiently] protected from public association with the affiliated organization and its restricted activities in materials such as publications, conferences and press or public statements." Pls.' Ltr. Br. at 15.

Third, in their Letter Brief, Defendants assert that the guidelines contain yet another level of vagueness: although the guidelines require that a grantee be "physically and financially separate" from all organizations engaging in activities barred by the Policy Requirement, the guidelines do not specify what grantees must do in order to maintain such separation. Instead, the guidelines list four factors that "are not absolute requirements, but rather a list of non-exclusive factors that bear on a case-by-case assessment of overall separateness." Defs.' Br. at 7. "[T]he presence or absence of any one of these four factors is 'not determinative.'" *Id.*

This Court has warned that bestowing such unbridled discretion on agency officials violates the First Amendment's requirement that restrictions on speech "contain narrow, objective and definite standards" so that they do not become a means for suppressing a particular viewpoint. *Transportation Alternatives, Inc. v. City of New York*, 340 F.3d 72, 78 (2d Cir. 2003) (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (internal quotations omitted)). In *Transportation Alternatives*, a Parks Commissioner reserved the right to charge a higher permit fee for speech based on both a list of ten factors, and, as here, any other factors the government deemed relevant. *Id.* Also like Defendants' guidelines, the rule did not assign any

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[8] This failure also stands in marked contrast to the program integrity regulation at issue in *Rust v. Sullivan*, which listed the forbidden activities that would be deemed to "encourage, promote or advocate abortion as a method of family planning." 500 U.S. 173, 180 (1991).

weight to any particular factor. This Court held the regulatory scheme invalid because of the "broad and unchecked discretion" it vested with the commissioner. *Id.* Defendants' guidelines are even worse because they grant agency officials unbridled discretion on two fronts: (i) in applying the list of physical and financial separation factors, and (ii) in determining whether an organization's speech is "inconsistent with a policy opposing prostitution."[9] *See Harman v. City of N.Y.*, 140 F.3d 111, 120 (2d Cir. 1998) (requirement that child welfare employees obtain clearance before speaking with press raised concerns because it vested unbridled discretion with government official). They are, consequently, unconstitutionally vague.

IV. The Guidelines and Their Implementation Violate Congressional Intent.

Plaintiffs explained in their Letter Brief that the guidelines have wrenched the Policy Requirement even further away from Congress's intent by undermining the Leadership Act's command that grantees work closely with other U.S. and indigenous NGOs and by potentially prohibiting some of the affiliations that had been permitted under the statute. Pls.' Ltr. Br. at 17-18. In their one example of how the guidelines might work in practice, Defendants make clear that they construe the guidelines to arrogate even more power to the government to examine the beliefs and affiliations of not just the grantee organizations but also their leaders and the leaders of their private affiliates. *See* Defs.' Ltr Br. at 7 (stating that concern about garbling of government's message may arise when a public figure is the head of both the grantee and affiliate.) This roving governmental inquiry into the beliefs and activities of the leaders of private, non-profit organizations is a far cry from the statute's simple language, which requires only an organizational policy and says nothing about specific ways in which grantees or their officials must demonstrate their opposition to prostitution. *See* Pls.' Br. of Dec. 14, 2006, at 56-59.

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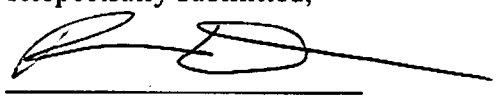
[9] In their response, Defendants may assert that any vagueness can be cured if Plaintiffs would just ask Defendants whether specific affiliations with other organizations comport with the guidelines. Such an assertion would be cold comfort, given Defendants' ongoing refusal to clarify the contours of the Policy Requirement. Moreover, where, as here, government imposes a substantial restriction on First Amendment activities, but fails to provide timely review procedures governed by precise, objective standards, the entire licensing scheme is facially invalid. *See Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. at 772.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Court affirm the preliminary injunction issued by the District Court. In the alternative, should the Court remand the matter to the District Court, Plaintiffs respectfully request that the injunction remain in place until the District Court has an opportunity to evaluate the impact of the guidelines on Plaintiffs' First Amendment and statutory claims.

Respectfully submitted,



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