No.

In the Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., PETITIONERS

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents are United States-based organizations that receive federal funds to fight HIV/AIDS abroad. In *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013), this Court held that the First Amendment bars enforcement of Congress's directive that respondents "have a policy explicitly opposing prostitution and sex trafficking" as a condition of accepting those funds. 22 U.S.C. 7631(f). The question presented is whether the First Amendment further bars enforcement of that directive with respect to legally distinct foreign entities operating overseas that are affiliated with respondents.

PARTIES TO THE PROCEEDING

Petitioners are the United States Agency for International Development; Mark Green, in his official capacity as Administrator of the United States Agency for International Development; the United States Department of Health and Human Services; Alex M. Azar II, in his official capacity as Secretary of Health and Human Services; the United States Centers for Disease Control and Prevention; and Robert R. Redfield, in his official capacity as Director of the United States Centers for Disease Control and Prevention.

Respondents are Alliance for Open Society International, Inc.; Pathfinder International, Inc.; Global Health Council; and InterAction.*

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* The Open Society Institute (OSI) was named as a party in the caption below, see App., *infra*, 1a, but OSI's claim was dismissed for lack of standing in 2006, see 430 F. Supp. 2d 222, 277-278, and OSI has not attempted to participate in the litigation since that time. See, *e.g.*, 12-10 Pet. II (not naming OSI as a party to the prior proceeding in this Court); 12-10 U.S. Br. II (same); 12-10 Resp. Br. 4-5 (describing respondents without mentioning OSI); 651 F.3d 218, 223 (naming "Plaintiffs-Appellees" and not including OSI).

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Alliance for Open Soc'y Int'l, Inc. v. *United States Agency for Int'l Dev.*, No. 05-cv-8209 (June 29, 2006) (granting preliminary injunction)

Alliance for Open Soc'y Int'l, Inc. v. *United States Agency for Int'l Dev.*, No. 05-cv-8209 (Aug. 8, 2008) (granting modified preliminary injunction)

Alliance for Open Soc'y Int'l, Inc. v. *United States Agency for Int'l Dev.*, No. 05-cv-8209 (Jan. 30, 2015) (granting permanent injunction)

United States Court of Appeals (2d Cir.):

Alliance for Open Soc'y Int'l, Inc. v. *United States Agency for Int'l Dev.*, No. 06-4035 (Nov. 8, 2007) (summary order remanding case)

Alliance for Open Soc'y Int'l, Inc. v. *United States Agency for Int'l Dev.*, No. 08-4917 (July 6, 2011) (affirming preliminary injunction)

Alliance for Open Soc'y Int'l, Inc. v. *United States Agency for Int'l Dev.*, No. 15-974(L), 17-2126(Con) (Dec. 20, 2018) (affirming permanent injunction)

Supreme Court of the United States:

Agency for Int'l Dev. v. *Alliance for Open Soc'y Int'l, Inc.*, No. 12-10 (July 22, 2013) (affirming preliminary injunction)

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The Solicitor General, on behalf of the United States Agency for International Development (USAID), the United States Department of Health and Human Services (HHS), the United States Centers for Disease Control and Prevention, and officials of those agencies, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 911 F.3d 104. The order of the district court granting a permanent injunction (App., *infra*, 46a-60a) is reported at 106 F. Supp. 3d 355. The order of the district court denying reconsideration (App., *infra*, 61a-72a) is reported at 258 F. Supp. 3d 391.

This Court's previous opinion in this case is reported at 570 U.S. 205. An earlier opinion of the court of appeals is reported at 651 F.3d 218. Earlier relevant opinions of the district court are reported at 430 F. Supp. 2d 222 and 570 F. Supp. 2d 533.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2018. A petition for rehearing was denied on May 9, 2019. See App., *infra*, 72a-73a (amended order). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech." Section 7631(f) of Title 22 provides:

> No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

22 U.S.C. 7631(f).

Other pertinent statutory and regulatory provisions are reprinted in the appendix to this petition. App., *infra*, 82a-119a.

STATEMENT

Respondents are United States-based organizations that receive federal funds to fight HIV/AIDS abroad.

In 2005, respondents sought to enjoin enforcement of the statutory directive that they "have a policy explicitly opposing prostitution and sex trafficking" as a condition of accepting those funds. 22 U.S.C. 7631(f). The district court granted preliminary injunctions barring enforcement of Section 7631(f) against respondents. 570 F. Supp. 2d 533; 430 F. Supp. 2d 222. The court of appeals affirmed, 651 F.3d 218, and this Court affirmed, 570 U.S. 205. Respondents then sought a permanent injunction barring the government from enforcing Section 7631(f) against both them and their legally distinct foreign affiliates. The district court granted their requested injunction. App., *infra*, 46a-60a. The court of appeals affirmed. *Id.* at 1a-45a.

1. During the 1980s and 1990s, HIV/AIDS "assumed pandemic proportions, spreading * * * to all corners of the world, and leaving an unprecedented path of death and devastation." 22 U.S.C. 7601(1). By 2003, more than 65 million people had been infected and more than 25 million had died, making HIV/AIDS the "fourth-highest cause of death in the world." 22 U.S.C. 7601(2). In sub-Saharan Africa, HIV/AIDS was expected to "claim the lives of one-quarter of the population * * * in the next decade." 22 U.S.C. 7601(4).

In addition to its humanitarian toll, HIV/AIDS posed a "serious security issue for the international community." 22 U.S.C. 7601(10). The uncontrolled spread of HIV/AIDS created the "potential for political instability and economic devastation, particularly in those countries and regions most severely affected by the disease." 22 U.S.C. 7601(10)(A). HIV/AIDS thus presented "a major global health, national security, development, and humanitarian crisis." 22 U.S.C. 2151b-2(a).

In 2003, President George W. Bush proposed and Congress enacted the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act or Act), 22 U.S.C. 7601 *et seq.* The Act set forth detailed findings about the harms caused by HIV/AIDS and authorized billions of dollars for the President's Emergency Plan for AIDS Relief (PEPFAR). See 22 U.S.C. 2151b-2, 7601, 7671. The Act also provided extensive direction on the use of those funds, specifying that they be spent on, *inter alia*, HIV/AIDS prevention, treatment, and care. 22 U.S.C. 7611(a). Of central relevance here, the Act directed that "the reduction of HIV/AIDS behavioral risks" must be "a priority of all prevention efforts." 22 U.S.C. 7611(a)(12).

The Leadership Act devoted particular attention to reducing behavioral risks created by the sex industry. Congress found that the "sex industry, the trafficking of individuals into such industry, and sexual violence are * * * causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23). The Act stated that it "should be the policy of the United States to eradicate" the practices of "[p]rostitution and other sexual victimization," which are "degrading to women and children." *Ibid.* And the Act mandated that funds be spent, *inter alia*, "educating men and boys about the risks of procuring sex commercially," promoting "alternative livelihoods, safety, and social reintegration strategies for commercial sex workers and their families," and "working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children." 22 U.S.C. 7611(a)(12)(F), (H), and (J).

In addition to specifying how Leadership Act funds may be spent, Congress provided direction about who may spend them. The Leadership Act recognized that

"[n]ongovernmental organizations * * * have proven effective in combating the HIV/AIDS pandemic," 22 U.S.C. 7601(18), and would be "critical to the success of * * * efforts to combat HIV/AIDS," 22 U.S.C. 7621(a)(4). The Leadership Act accordingly provided that "an appropriate level of" funds should be disbursed to "nongovernmental organizations" in "areas affected by the HIV/AIDS pandemic." 22 U.S.C. 2151b-2(c)(2).

To ensure that nongovernmental organizations receiving Leadership Act funds complied with Congress's priorities—including its objectives of eradicating prostitution and sex trafficking, see p. 4, *supra*—Congress established two conditions on Leadership Act funds. First, no Leadership Act funds "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. 7631(e). Second, and centrally relevant here, no Leadership Act funds "may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. 7631(f). That condition does not "apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency." *Ibid.*

Since 2003, Congress has repeatedly authorized—and Presidents Bush, Obama, and Trump have each approved—additional funds for PEPFAR. See Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, 122 Stat. 2918; PEPFAR Stewardship and Oversight Act of 2013, Pub. L. No. 113-56, 127 Stat. 648; PEPFAR Extension Act of 2018, Pub. L. No. 115-305, 132 Stat. 4402. All told, the United States has committed "a total of

$79.7 billion for PEPFAR." H.R. Rep. No. 1014, 115th Cong., 2d Sess. 6 (2018) (House Report). That commitment has "changed the course of the HIV/AIDS pandemic." *Id.* at 4. When the Leadership Act was enacted, "fewer than 50,000 people living with HIV/AIDS in sub-Saharan Africa had access to life-saving antiretroviral treatment." *Ibid.* That number now stands at more than 14 million. *Id.* at 6. PEPFAR has also provided voluntary testing and counseling services "for over 85.5 million people, helped avert 2.2 million infections among babies born to HIV-positive mothers, * * * and provided palliative care for 6.4 million" orphans and vulnerable children. *Ibid.* PEPFAR amounts to the "largest bilateral global health initiative aimed at combatting a single disease in history." *Id.* at 3.

2. Respondents are "a group of domestic organizations engaged in combating HIV/AIDS overseas." 570 U.S. at 210. Respondents receive "substantial private funding" for that work. *Ibid.* After enactment of the Leadership Act, respondents applied for Leadership Act funds to support their HIV/AIDS relief projects abroad. See *id.* at 210-211. Respondents, however, objected to the condition that recipients of Leadership Act funds "have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. 7631(f). Although respondents "do not support * * * prostitution," 12-10 Resp. Br. 11, they believe that adopting a policy opposing prostitution "may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS," 570 U.S. at 211.

Initially, respondents were able to receive Leadership Act funds despite their unwillingness to comply

with Section 7631(f). Following a "tentative" determination by the Department of Justice that Section 7631(f) could constitutionally be applied only to "non-U.S." funding recipients, HHS and USAID issued guidance requiring that "non-U.S. non-governmental organizations * * * agree that they have a policy explicitly opposing" prostitution and sex trafficking. 430 F. Supp. 2d at 234 (citations omitted). Because respondents are U.S.-based organizations, they were "not * * * subject to" Section 7631(f) under the government's initial approach. *Id.* at 235. Respondents did not contest the application of Section 7631(f) to foreign recipients of Leadership Act funds.

In 2005, the Justice Department reconsidered its position and determined that "reasonable arguments" could be made in support of applying Section 7631(f) to U.S.-based funding recipients. 430 F. Supp. 2d at 234 (citation omitted). HHS and USAID then began requiring U.S.-based recipients of Leadership Act funds to state in their funding award agreements that they have a policy opposing prostitution and sex trafficking. *Id.* at 234-235. Failure to make such a statement was a ground for termination of funding. *Ibid.*

3. Respondents filed an action in federal district court seeking to enjoin HHS and USAID from revoking their Leadership Act funds based on their refusal to comply with Section 7631(f). 430 F. Supp. 2d at 237. The court concluded that respondents were likely to succeed on their claim that Section 7631(f) "as applied to" them "falls squarely beyond what the Supreme Court has permitted to date as conditions of government financing." *Id.* at 255. The court accordingly entered an injunction barring the government from en-

forcing Section 7631(f) against respondents or requiring respondents to enforce Section 7631(f) "against their United States-based sub-recipients, sub-grantees, and sub-contractors." App., *infra*, 78a. Respondents did not request, and the injunction did not require, that the government refrain from enforcing Section 7631(f) against foreign recipients.

4. The government appealed to the Second Circuit. While that appeal was pending, HHS and USAID issued guidelines clarifying that a Leadership Act funding recipient could work with an affiliated organization that "engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking," so long as the recipient maintains "objective integrity and independence from such an organization." 45 C.F.R. 89.3 (HHS guidelines); see App., *infra*, 120a-127a (USAID guidelines). The Second Circuit remanded for the district court to reconsider its decision in light of the affiliate guidelines. 254 Fed. Appx. 843.

The district court again entered an injunction barring enforcement of Section 7631(f) against respondents, see 570 F. Supp. 2d at 550, and a divided Second Circuit affirmed, see 651 F.3d at 223-224. The Second Circuit majority agreed with the district court that Section 7631(f), as applied to respondents, is an impermissible funding condition. *Id.* at 234. The majority distinguished prior decisions upholding "a restriction on the First Amendment activities of *foreign* NGOs receiving U.S. government funds." *Id.* at 238. The majority emphasized that respondents' "challenge here is to the impact of the Policy Requirement on *domestic* NGOs." *Ibid.* "Indeed," the majority added, HHS and USAID "have applied the Policy Requirement to foreign organizations since its inception, without challenge." *Ibid.*

Judge Straub dissented, concluding that Section 7631(f) was a permissible "exercise of Congress's powers pursuant to the Spending Clause." 651 F.3d at 240. The government sought rehearing en banc, which the Second Circuit denied over a dissent by Judges Cabranes, Raggi, and Livingston. 678 F.3d 127.

5. This Court granted the government's petition for a writ of certiorari and affirmed. 570 U.S. at 212, 221.

The Court explained that Congress's spending power, see U.S. Const. Art. I, § 8, Cl. 1, "includes the authority to impose limits on the use of" federal "funds to ensure they are used in the manner Congress intends," 570 U.S. at 213. "As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds." *Id.* at 214. "At the same time," the government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech.'" *Ibid.* (citation omitted). The "relevant distinction," the Court explained, "is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Id.* at 214-215.

The Court concluded that the funding condition in Section 7631(f) "falls on the unconstitutional side of the line." 570 U.S. at 217. "By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern," the Court reasoned, Section 7631(f) "by its very nature affects 'protected conduct outside the scope of the federally funded program.'" *Id.* at 218 (citation omitted).

The Court then considered whether the "affiliate guidelines, established while this litigation was pending, save the program." 570 U.S. at 219. As the Court explained, the government contended that:

> [T]he guidelines alleviate any unconstitutional burden on respondents' First Amendment rights by allowing them to either: (1) accept Leadership Act funding and comply with the Policy Requirement, but establish affiliates to communicate contrary views on prostitution; or (2) decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds, thereby "cabin[ing] the effects" of the Policy Requirement within the scope of the federal program.

Ibid. (quoting 12-10 U.S. Br. 38-39, 44-49) (brackets in original). The Court rejected that contention, explaining:

> Neither approach is sufficient. When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program. Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy.

Ibid. (citation omitted).

In sum, the Court concluded, Section 7631(f) "compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program," and thus "violates the First Amendment." 570 U.S. at 221.

Justice Scalia dissented, joined by Justice Thomas. 570 U.S. at 221. Justice Kagan did not participate. *Ibid.*

6. Following this Court's decision, HHS and USAID issued notices stating that they would not apply Section 7631(f) to U.S.-based recipients of Leadership Act funds, but would continue to apply Section 7631(f) to non-U.S. recipients, as they had since enactment of the statute. App., *infra*, 116a-119a, 128a-132a. Respondents then moved to convert the preliminary injunction issued by the district court into a permanent injunction, and to apply the injunction to both themselves and foreign organizations operating overseas that are affiliated with them. *Id.* at 47a-48a. After receiving letters from the parties, the court granted both requests. *Id.* at 59a-60a. In the court's view, applying Section 7631(f) to respondents' foreign affiliates would violate respondents' own First Amendment rights by presenting the choice "between forced speech and paying 'the price of evident hypocrisy.'" *Id.* at 55a (quoting 570 U.S. at 219). The court accordingly issued the expanded injunction respondents sought. *Id.* at 59a-60a. The court subsequently denied the government's request for reconsideration. *Id.* at 61a-71a.

7. After staying the injunction pending appeal, see App., *infra*, 6a, a divided panel of the court of appeals affirmed the injunction, *id.* at 1a-45a.

a. The panel majority framed the issue before it as "whether applying the Policy Requirement to" respond-

ents' "legally distinct" but "closely aligned foreign affiliates violates [respondents'] own First Amendment rights." App., *infra*, 4a, 7a. In the majority's view, this Court's 2013 decision had "considered this question" and "resolved it in [respondents'] favor." *Id.* at 7a. Specifically, the majority held that requiring respondents' foreign "affiliates to abide by the Policy Requirement would require the closely related—and often indistinguishable—[respondents] to be seen as simultaneously asserting two conflicting messages," thereby presenting the "'evident hypocrisy'" this Court discussed. *Id.* at 9a-10a (quoting 570 U.S. at 219).

The panel majority acknowledged the government's argument "that foreign organizations like [respondents'] affiliates do not possess First Amendment rights." App., *infra*, 10a. But the majority reiterated its view that "[i]t is the First Amendment rights of the *domestic* [*respondents*] that are violated when the Policy Requirement compels them to 'choose between forced speech and paying "the price of evident hypocrisy." '" *Ibid.* (citation omitted). The majority also rejected the government's reliance on the Second Circuit's prior decisions in *Planned Parenthood Federation of America, Inc.* v. *Agency for International Development*, 915 F.2d 59 (1990), cert. denied, 500 U.S. 952 (1991), and *Center for Reproductive Law & Policy* v. *Bush*, 304 F.3d 183 (2002) (Sotomayor, J.) (*CRLP*), in which the court rejected First Amendment challenges by domestic organizations to the Mexico City Policy—"a funding condition requiring foreign organizations to agree not to promote abortion." App., *infra*, 11a. In the majority's view, those precedents were distinguishable because they involved "mere potential [foreign] part-

ners" of domestic organizations, rather than "homogenous" foreign organizations that "share" the domestic organizations' "names, logos, and brands," and also because the organizations in those cases "were not compelled to make contradictory statements." *Id.* at 11a-12a.

b. Judge Straub dissented. App., *infra*, 14a-45a. He explained that the majority's holding "requires the United States to fund the activities of foreign organizations, which have no constitutional rights, despite their refusal to comply with our government's funding condition"—a "startling holding" for which "[t]here is no support." *Id.* at 14a. Judge Straub emphasized that, prior to 2014, respondents had repeatedly "made clear that they did *not* dispute that the Policy Requirement could be constitutionally applied to any foreign organization, including their foreign partners or affiliates," and had "raised only an 'as-applied' challenge." *Id.* at 15a-16a, 23a (citation omitted). Given that backdrop, he explained, this Court "never had any reason to consider" whether Section 7631(f) could be applied to respondents' foreign affiliates. *Id.* at 15a.

In Judge Straub's view, the majority erred by treating respondents and their legally distinct foreign affiliates as "*one entity* for First Amendment free speech purposes," thereby creating an unprecedented right for "United States-based organizations to export their own First Amendment rights to foreign organizations." App., *infra*, 44a-45a. Judge Straub instead would have analyzed respondents' claim as an assertion of a "right to associate with foreign organizations," would have rejected that claim under the Second Circuit's decisions upholding the Mexico City Policy in *Planned Parenthood* and *CRLP*, and would have concluded that Section

7631(f) "may constitutionally be applied to any foreign organization, including [respondents'] 'clearly identified' foreign affiliates." *Id.* at 37a, 44a-45a.

The government sought rehearing en banc, which the court of appeals denied. App., *infra*, 72a-73a. Judge Straub noted his dissent. *Id.* at 73a. The court stayed its mandate pending the government's decision whether to file a petition for a writ of certiorari. *Id.* at 74a-75a.

REASONS FOR GRANTING THE PETITION

The divided court of appeals held that the First Amendment forbids Congress from enforcing a condition on federal funds accepted by foreign recipients operating overseas because a separate, affiliated entity in the United States objects to that condition. The majority below did not articulate any constitutional principle to support that position, and none exists. Foreign recipients of federal funds operating overseas have no First Amendment right to object to conditions on those funds. Nor can they acquire such a right by affiliating with a domestic entity. And while a domestic entity can object to a condition on its own speech, it has no basis to object to a condition on the speech of a legally separate foreign organization operating overseas. The First Amendment rights of a U.S. entity belong to that entity alone; they cannot be borrowed, shared, or exported.

The majority below reached a contrary result based on its misreading of a few sentences in this Court's prior decision in this case. But this Court held only that respondents—"a group of domestic organizations engaged in combating HIV/AIDS overseas"—cannot be subjected to the condition in Section 7631(f). 570 U.S. at 210. The Court did not suggest that respondents have an additional right to negate the condition on funds accepted by legally distinct foreign entities operating

overseas. The court of appeals' invalidation of a federal statute on constitutional grounds alone warrants certiorari. And review is especially appropriate because the decision below will affect billions of taxpayer dollars distributed through one of America's most significant and successful foreign-aid programs.

A. The Court Of Appeals Erred In Holding Unconstitutional The Application Of Section 7631(f) To Foreign Recipients Of Leadership Act Funds

The panel majority erred by holding unconstitutional the application of Section 7631(f) to foreign recipients of Leadership Act funds that have affiliates in the United States. No decision of this Court, including its earlier decision in this case, supports the "startling" proposition that Congress may not impose a speech-related funding condition on a foreign entity operating overseas simply because that entity has a U.S. affiliate that opposes the condition. App., *infra*, 14a (Straub, J., dissenting). This Court should grant certiorari and reverse the misguided decision below.

1. Foreign recipients of Leadership Act funds have no First Amendment right to defy congressionally imposed conditions on those funds

Under its spending power conferred by the Constitution, Art. I, § 8, Cl. 1, Congress has broad authority both to direct the distribution of federal funds and to "impose limits on the use of such funds." 570 U.S. at 213; see, *e.g.*, *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (*FAIR*); *United States* v. *American Library Ass'n, Inc.*, 539 U.S. 194, 212 (2003) (plurality opinion); *Rust* v. *Sullivan*, 500 U.S. 173, 195-196 & n.4 (1991); *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). "As a general matter, if a party

objects to a condition on the receipt of federal funding, its recourse is to decline the funds." 570 U.S. at 214. Under this Court's unconstitutional-conditions cases, however, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Ibid.* (citation omitted).

Respondents and the court below appear to agree that foreign recipients of Leadership Act funds operating overseas have no constitutional basis to defy the funding condition in Section 7631(f). The unconstitutional-conditions doctrine applies only where a party can invoke a "constitutionally protected" right. 570 U.S. at 214 (quoting *FAIR*, 547 U.S. at 59). Thus, "entities [that] do not have First Amendment rights" may not "assert an 'unconstitutional conditions' claim." *American Library Ass'n*, 539 U.S. at 210-211 (plurality opinion). And there is no dispute that foreign entities operating overseas, like aliens outside this country, have no First Amendment rights applicable here. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972); *United States ex rel. Turner* v. *Williams,* 194 U.S. 279, 292 (1904); see also *Mandel*, 408 U.S. at 771 (Douglas, J., dissenting) ("[A]n alien * * * has no First Amendment rights while outside the Nation."); *DKT Mem'l Fund Ltd.* v. *Agency for Int'l Dev.*, 887 F.2d 275, 284 (D.C. Cir. 1989) ("[A]liens beyond the territorial jurisdiction of the United States are generally unable to claim the protections of the First Amendment.").

Respondents and the court of appeals also appear to agree that a foreign recipient of Leadership Act funds operating overseas does not somehow acquire First

Amendment rights of its own by affiliating with a "legally distinct" entity in the United States. App., *infra*, 4a. Under basic principles of corporate law, legally distinct entities, such as a parent organization and its separately incorporated subsidiary, have "different rights and responsibilities due to [their] different legal status." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001). Those "different rights" include different constitutional entitlements (or lack thereof). *Ibid.*; see, *e.g.*, *Daimler AG* v. *Bauman*, 571 U.S. 117, 134-136 (2014). Indeed, this Court has expressly relied on distinctions between corporate entities in assessing First Amendment objections to statutory funding conditions. See *Regan* v. *Taxation With Representation*, 461 U.S. 540, 544 (1983). The court of appeals accordingly recognized that only "the First Amendment rights of the *domestic* [*respondents*]" could potentially be "violated" by enforcement of Section 7631(f) against their foreign affiliates. App., *infra*, 10a; see *id.* at 36a (Straub, J., dissenting) ("It is undisputed that [respondents'] foreign affiliates lack First Amendment rights because they are foreign organizations operating outside the United States.").

2. Respondents have no First Amendment right to exempt legally distinct foreign affiliates operating overseas from statutory funding conditions

Although the panel majority correctly acknowledged that foreign recipients of Leadership Act funds operating overseas have no First Amendment right to defy Section 7631(f), see App., *infra*, 10a, the majority nevertheless held that Section 7631(f) cannot be applied to such foreign recipients because doing so would violate the First Amendment rights of respondents—their "le-

gally distinct" domestic affiliates, *id.* at 4a. That reasoning does not follow. As just discussed, core principles of corporate law dictate that legally separate entities exercise separate legal rights. See p. 17, *supra*. Just as a foreign recipient of federal funds operating overseas cannot borrow the First Amendment rights of a legally distinct domestic affiliate, so too a domestic organization cannot share its First Amendment rights with a legally distinct foreign affiliate operating overseas. Neither respondents nor the courts below identified any case in which domestic organizations have been allowed "to export their own First Amendment rights to foreign organizations" operating overseas in such a manner. App., *infra*, 45a (Straub, J., dissenting).

In reaching a contrary result, the majority suggested that this Court's 2013 holding that respondents are no longer subject to the funding condition in Section 7631(f) means that its affiliates cannot be subjected to that condition either. App., *infra*, 7a-8a (citing 570 U.S. at 219). That understanding is mistaken. In its 2013 decision, this Court reviewed its funding-condition precedents and explained that, under those precedents, affiliates can "allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program." 570 U.S. at 219. For example, the Court explained, *Regan* upheld a condition barring a nonprofit organization that claimed tax-exempt status under 26 U.S.C. 501(c)(3) from engaging in lobbying. 570 U.S. at 215. The Court upheld the condition because it "did not prohibit" the nonprofit "from lobbying Congress altogether." *Ibid.*; see *Regan*, 461 U.S. at 544-545. Rather, the nonprofit could comply with the funding condition while "separately incorporating" an entity under 26 U.S.C. 501(c)(4) that could

engage in lobbying. 570 U.S. at 215. That arrangement ensured that the funding condition "did not deny the organization a government benefit" as the price of exercising its First Amendment rights. *Ibid.*; see *Regan*, 461 U.S. at 544.

Critically, however, *Regan* did not suggest that the Section 501(c)(3) entity could escape the funding condition simply because the "affiliated" Section 501(c)(4) entity was not subject to it. App., *infra*, 13a-14a. Quite the opposite, the possibility of creating the Section 501(c)(4) affiliate was the reason the Court *upheld* enforcement of the funding condition against the Section 501(c)(3) entity. See 570 U.S. at 215; *Regan*, 461 U.S. at 544-545; see also *Rust*, 500 U.S. at 197 (describing *Regan* in similar terms). *Regan* and its progeny thus indicate that a funding condition does not violate the First Amendment if an entity complying with that condition can establish a separate affiliate that allows it to speak freely. See 570 U.S. at 215-219; *FCC* v. *League of Women Voters*, 468 U.S. 364, 400 (1984) (stating that enforcement of a funding condition against one organization would "plainly be valid" if an affiliate could be created to engage in the speech barred by the condition). The cases do not suggest, as the majority below believed, that lifting a funding condition with respect to *one* affiliate (such as respondents) required lifting the funding condition with respect to *all* affiliates (such as the separate foreign entities at issue here).

Perhaps recognizing that flaw in its reasoning, the panel majority alternatively suggested that respondents and their foreign affiliates, although "legally distinct," should in fact be considered the "same[]" for First Amendment purposes. App., *infra*, 4a, 11a; see *id.*

at 11a (declaring respondents and their separate affiliates "homogenous"). The majority, however, did not identify any source of authority to pronounce that two legally distinct entities had become one for purposes of assessing the constitutionality of a funding condition imposed only on the foreign entity. Nor did the court explain how respondents' practice of "shar[ing] * * * names, logos, and brands with their foreign affiliates" could render the separate entities a single entity under any accepted legal standard. *Id.* at 11a; see *id.* at 45a (Straub, J., dissenting) (observing that no decision of "the Supreme Court, nor any court" supported the majority's treatment of respondents and their affiliates as a single entity); cf. *Daimler*, 571 U.S. at 134-135 (declining to subject a foreign corporation to general jurisdiction of U.S. courts based on the contacts of its legally distinct subsidiary). Respondents and their foreign affiliates are "legally distinct" entities, App., *infra*, 4a, and they must be treated as such.

3. The Court's prior decision in this case does not resolve the question presented

Without any other support for its novel holding, the panel majority relied almost entirely on its understanding of a few sentences in this Court's prior decision. In particular, the majority focused on this Court's statement that the First Amendment problems with enforcing Section 7631(f) against respondents could not be alleviated through affiliates without producing "evident hypocrisy." 570 U.S. at 219; see App., *infra*, 7a ("The Supreme Court's decision considered this question and resolved it in [respondents'] favor."); App., *infra*, 11a (describing this Court's "articulation of 'evident hypocrisy' as [its] lodestar"). The majority, however, misread this Court's decision, which neither considered the

question presented here nor provided any basis for resolving it in respondents' favor.

As discussed above, the question before this Court in 2013 was whether respondents, "a group of domestic organizations engaged in combating HIV/AIDS overseas," had a First Amendment right to accept Leadership Act funds without complying with Section 7631(f). 570 U.S. at 210. The Court concluded that respondents had such a right, because Section 7631(f) required them to "adopt—as their own—the Government's view on an issue of public concern" and thereby impermissibly affected "'protected conduct outside the scope of the federally funded program.'" *Id.* at 218 (citation omitted). The bottom line of the Court's holding was straightforward: Section 7631(f) can no longer be applied to respondents. HHS and USAID accordingly stopped enforcing Section 7631(f) against respondents—and also against all domestic recipients of Leadership Act funds, each of whom could assert the same constitutional claims as respondents. See p. 11, *supra*. All U.S. funding recipients can thus now accept Leadership Act funds without adopting any policy on prostitution.

Despite having received all the relief they sought, respondents pursued—and the courts below approved—an expansion of the injunction to cover respondents' legally distinct foreign affiliates. Respondents based that request almost entirely on this Court's 2013 discussion of why the affiliate guidelines could not "save" the government's position that Section 7631(f) could be constitutionally applied to respondents themselves. 570 U.S. at 219. Specifically, this Court explained that affiliates could "allow an organization bound by a funding condition to exercise its First Amendment rights outside the

scope of the federal program," but that affiliates "cannot serve that purpose when," as here, "the condition is that a funding recipient espouse a specific belief as its own." *Ibid.* To illustrate why, the Court explained: "If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy." *Ibid.*

The panel majority interpreted the final sentence of this Court's discussion to create a freestanding First Amendment protection against funding conditions that create a perception of hypocrisy, even if those conditions are enforced exclusively against separate legal entities. See App., *infra*, 9a-10a ("[W]hen the Government requires contrasting, hypocritical messages between domestic and foreign affiliates by making one speak the Government's message, this requirement infringes the speech of the domestic affiliate and, in so doing, violates the First Amendment."). That reading reflects a serious misunderstanding of this Court's opinion. The Court discussed the prospect of hypocrisy only to explain why the affiliate guidelines could not "save" the application of Section 7631(f) to respondents. 570 U.S. at 219. The Court did not create a separate, affirmative right for an organization to have affiliates that do not contradict its own views. The Court's discussion of affiliates proceeded on the premise that respondents were "bound by a funding condition." *Ibid.* Now that respondents are not "bound by a funding condition," the Court's affiliate discussion is beside the point. *Ibid.*

Much of the court of appeals' analysis thus proceeds from a mistaken premise. The majority described respondents as facing a choice "between forced speech

and paying 'the price of evident hypocrisy.'" App., *infra*, 10a (citation omitted). But that is no longer a choice respondents face. Because respondents are not subject to Section 7631(f), they are not "forced" to provide any speech as a condition of obtaining Leadership Act funds. *Ibid.* They are free under Section 7631(f) to accept those funds without any speech at all. And they are free to use those funds in foreign countries without adopting any policy on prostitution. They are thus analogous to the Section 501(c)(4) entity in *Regan*, which had the freedom to lobby while its Section 501(c)(3) affiliate abided by the funding condition barring lobbying. See 461 U.S. at 544. As explained above, however, neither *Regan* nor any other precedent of this Court has held that an entity free of a funding condition has a constitutional entitlement to share that freedom with all other affiliates. See pp. 18-20, *supra*. Rather, *Regan* and related cases expressly contemplated that one affiliated entity would remain bound by a funding condition while another affiliated entity would not. See 461 U.S. at 544. The court of appeals' assertion that the government "violates the First Amendment" when it "requires contrasting, hypocritical messages between domestic and foreign affiliates by making *one* speak the Government's message" is inconsistent with those precedents. App., *infra*, 9a-10a (emphasis added).

Respondents' position, moreover, does not follow as a practical matter. Respondents, who have asserted only an as-applied challenge, see pp. 7-8, *supra*; 12-10 Resp. Br. 42 n.11, do not affirmatively *support* prostitution, see p. 6, *supra*, so there would no hypocrisy evident in their affiliating with an organization that opposes prostitution. After all, a group that has no policy on a

particular practice (for example, the consumption of alcohol) would not typically be viewed as hypocritical if it affiliated with an organization that either supported or opposed that practice (*i.e.*, either a bar or a temperance society).

At most, as the dissenting judge below recognized, respondents' claim turns not on freedom of *speech*, but on freedom of *association*. App., *infra*, 37a. As noted, respondents' speech is now unrestricted by Section 7631(f); by virtue of this Court's 2013 decision, respondents are free to receive Leadership Act funds without adopting any policy on prostitution. Respondents seek to associate with affiliates that have similarly unrestricted speech. But as the dissent observed, respondents remain free to associate with any foreign affiliate they want. *Id.* at 42a. If they choose a foreign affiliate that funds its operations without Leadership Act funds (*i.e.*, with private funds or funds from a foreign government or multinational organization), the foreign affiliate will not be required to say anything about prostitution, and respondents will face no risk that any messages of the two organizations on prostitution would vary. And even if respondents choose foreign affiliates that accept Leadership Act funds, nothing would stop either respondents or their foreign affiliates (or both) from issuing disclaimers clarifying that the foreign affiliates' policy opposing prostitution does not represent respondents' own views. See *id.* at 42a-43a. If confusion somehow nonetheless ensues—a possibility that respondents have not demonstrated—respondents would remain free to choose a different affiliate or to persuade their existing affiliate to "decline the [Leadership Act] funds." 570 U.S. at 214.

Respondents' claim thus amounts to an assertion that its desire to affiliate with foreign entities operating overseas that are free to accept federal funds without restrictions outweighs Congress' foreign-policy decision not to provide unrestricted funds to such foreign entities. Respondents do not identify any case in which such a claim has succeeded. To the contrary, the most analogous claims—challenges by domestic organizations to the Mexico City Policy's restriction on the promotion of abortion by foreign funding recipients operating overseas—have been repeatedly rejected. See *Center for Reprod. Law & Policy* v. *Bush*, 304 F.3d 183, 190-191 (2d Cir. 2002) (Sotomayor, J.); *Planned Parenthood Fed. of Am., Inc.* v. *Agency for Int'l Dev.*, 915 F.2d 59, 65-66 (2d Cir. 1990), cert. denied, 500 U.S. 952 (1991); cf. *DKT*, 887 F.2d at 291-296.

B. The Question Presented Warrants This Court's Review

The court of appeals invalidated the government's application of a federal statute on constitutional grounds. That alone warrants certiorari. This Court's review is particularly appropriate because the funding condition struck down by the court of appeals applies to billions of taxpayer dollars in one of the United States' most significant and successful foreign-aid programs.

1. The panel majority invalidated, on constitutional grounds, the application of an Act of Congress to foreign recipients of Leadership Act funds that affiliate with domestic entities. App., *infra*, 3a-12a. This Court's "usual" approach "when a lower court has invalidated a federal statute" is to "grant[] certiorari." *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019). The Court has done so repeatedly in cases presenting significant First Amendment questions, even in the absence of a square circuit conflict. See, *e.g.*, *ibid.*; *Matal* v. *Tam*, 137 S. Ct.

1744 (2017); *United States* v. *Alvarez*, 567 U.S. 709 (2012); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010); *United States* v. *Stevens*, 559 U.S. 460 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004). The Court has reviewed multiple decisions striking down congressionally imposed conditions on federal funds. See, *e.g.*, *FAIR*, 547 U.S. at 51; *American Library Ass'n,* 539 U.S. at 203 (plurality opinion); *League of Women Voters*, 468 U.S. at 373; *Regan*, 461 U.S. at 543. And of course, the Court granted certiorari to review the Second Circuit's earlier decision invalidating application of Section 7631(f) to respondents. 570 U.S. at 212. This Court's review of a divided decision striking down an important application of the Leadership Act on constitutional grounds is warranted once again.

2. The decision below is important in multiple other respects. One of the central pillars of the Leadership Act is that "the reduction of HIV/AIDS behavioral risks" must be "a priority of all prevention efforts." 22 U.S.C. 7611(a)(12). Prostitution and sex trafficking constitute two of the most troubling of such "behavioral risks." *Ibid.* Congress expressly recognized that the "sex industry, the trafficking of individuals into such industry, and sexual violence are * * * causes of and factors in the spread of the HIV/AIDS epidemic," and that it should therefore "be the policy of the United States to eradicate" the practices of "[p]rostitution and other sexual victimization," which are "degrading to women and children." 22 U.S.C. 7601(23). Section 7631(f)'s requirement that Leadership Act funding recipients have a policy "explicitly opposing prostitution and sex trafficking" directly serves that policy objective. 22 U.S.C.

7631(f). Although Section 7631(f) can no longer be applied to domestic funding recipients in light of this Court's 2013 decision, applying Section 7631(f) to foreign funding recipients—including those affiliated with domestic organizations—remains critical to enforcing the Leadership Act as Congress designed it. This Court should not allow such an important provision to be wholly nullified without further review.

The decision below, moreover, will affect a substantial amount of federal funding. Following the 2018 reauthorization of PEPFAR, Congress has committed a total of more than $79 billion in taxpayer dollars to fund HIV/AIDS relief abroad. House Report 6. A significant portion of that money has been disbursed to foreign recipients, many of whom have (or could readily find) domestic affiliates. According to the Office of the U.S. Global AIDS Coordinator, more than 30% of new PEPFAR funding in 2018 was granted directly to foreign recipients. An additional amount (the exact percentage is not readily calculable) was subgranted to foreign recipients by domestic recipients. And the share of PEPFAR funds granted to foreign recipients is likely to grow. Officials administering the program have committed to increase the percentage of its funding that goes to foreign implementing partners to at least 40% by the end of fiscal year 2019 and 70% by the end of fiscal year 2020. See U.S. PEPFAR, *PEPFAR 2019 Country Operational Plan Guidance for all PEPFAR Countries* 79 (FY 2019), https://go.usa.gov/xye56.

If not reversed by this Court, the decision below will also create significant disruptions to the administration of PEPFAR. HHS and USAID have applied Section 7631(f) to foreign recipients of Leadership Act funds—even those with domestic affiliates—for the entire

16 years that PEPFAR has been in effect. See pp. 6-7, 11, *supra*. Yet until this Court's decision, no funding recipient (including respondents) so much as hinted that the First Amendment prohibits application of Section 7631(f) to foreign recipients of Leadership Act funds. And even now, no funding recipient (including respondents) has identified "even one specific instance where a foreign affiliate's position on prostitution actually resulted in harm such as lost Leadership Act funding, lost private funding, or even inconsistent messaging (in other words, 'evident hypocrisy')." App., *infra*, 42a (Straub, J., dissenting). No sound basis exists for disrupting PEPFAR by suddenly removing a funding condition that has been present since the program's creation. At a minimum, this Court should not permit such a result without further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2017
Nos. 15-974 (L), 17-2126 (Con)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, PATHFINDER INTERNATIONAL INC., GLOBAL HEALTH COUNCIL, AND INTERACTION, PLAINTIFFS-APPELLEES

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, MARK GREEN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ROBERT R. REDFIELD, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, AND HIS SUCCESSORS, ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES 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[*]

Argued: May 17, 2018
Decided: Dec. 20, 2018

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[*] The Clerk of Court is respectfully directed to amend the official caption as listed above.

Appeal from the United States District Court
for the Southern District of New York
No. 05 Civ. 8209 (VM), Victor Marrero,
District Judge, Presiding

Before: STRAUB, POOLER, and PARKER, Circuit Judges.

Judge Straub dissents in a separate opinion.

BARRINGTON D. PARKER, Circuit Judge:

In *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013) ("*AOSI*"), the Supreme Court held that a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), 22 U.S.C. § 7601 *et seq.*, which required that recipients of funds appropriated under the Act affirmatively adopt a policy explicitly opposing prostitution and sex trafficking violated the First Amendment. The Court determined that this condition, known as the Policy Requirement, could not be applied to plaintiffs because, as Chief Justice Roberts stated, it "compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program." *AOSI*, 570 U.S. at 221.

The Government subsequently interpreted the Supreme Court's opinion as allowing the Policy Requirement to continue to be applied to foreign affiliates. Plaintiffs disagreed and sought and obtained a permanent injunction in the District Court, which concluded that *AOSI* did not allow the Policy Requirement to be

applied to plaintiffs' foreign affiliates. The Government appeals and we are required to determine the narrow issue of whether the Government's reading of the Supreme Court's decision is correct. We agree with the District Court that the Government's reading is foreclosed by that opinion and, consequently, we affirm the order below.

BACKGROUND

The background of this litigation is well known and fully described in the various judicial decisions that have been issued: the Honorable Victor Marrero's thorough and well reasoned decision in 2006, our 2011 opinion affirming him, and the Supreme Court's 2013 opinion affirming us. *See Alliance for Open Soc'y Int'l v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006); *Alliance for Open Soc. Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218 (2d Cir. 2011); *AOSI*, 570 U.S. 205 (2013). We recount here only the background necessary for understanding this appeal.

In 2003, Congress passed the Leadership Act, which authorized the appropriation of billions of dollars to nongovernmental organizations to assist the worldwide fight against HIV/AIDS and other diseases. The Leadership Act contains the Policy Requirement, which states that "[n]o funds . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. § 7631(f).

Plaintiffs are several domestic organizations that fight HIV/AIDS abroad. Many plaintiffs carry out their aid work through legally distinct affiliates that together

constitute global families of closely aligned entities. For example, plaintiff InterAction is a network of U.S.-based humanitarian organizations and contains, as a member, the domestic entity Save the Children Federation, Inc., which is a part of the global set of entities operating as Save the Children, an international aid organization that focuses on children's health. Save the Children Federation, Inc., in turn, is part of the Save the Children Association, a non-profit Swiss association that owns the Save the Children logo and maintains criteria for Save the Children members. There are over 30 distinct Save the Children entities incorporated around the world in addition to in the United States, such as in Australia, Brazil, Canada, India, Japan, Norway, South Africa, Spain, and Swaziland. These entities comprise Save the Children, and share the same name, logo, brand, and mission, even though they are distinct legal entities incorporated in various jurisdictions worldwide.

As plaintiffs explain and the record reflects, maintaining a unified global identity, branding, and approach enhances the ability of an organization like Save the Children to perform its aid mission. Moreover, various legal and administrative considerations encourage (and sometimes require) such international aid organizations to operate as formally legally distinct entities, despite otherwise being unified. As an example, the president and chief executive officer of plaintiff Pathfinder International attested that defendant United States Agency for International Development ("USAID") gives preference for Leadership Act contracts to NGOs that are incorporated outside the United States and sought to in-

crease direct partnerships with local organizations in order to enhance the long-term effectiveness of aid delivery. USAID also limits a significant number of potential grants to organizations incorporated outside of the United States. Moreover, some foreign governments require NGOs to be incorporated in their countries in order to be permitted to undertake public health work there. Overall, factors such as these have caused international aid organizations to be organized as formally legally distinct entities while operating with a unified and consistent identity, mission, and work. As a consequence, these organizations appear to the public as unified entities. Throughout this litigation, plaintiffs have emphasized that, while they do not support prostitution, they would not include in their mission statements a policy officially expressing an opposition to prostitution because, among other things, effectively fighting diseases like HIV/AIDS often requires direct involvement with sex-worker communities.

In 2005, plaintiffs sued to enjoin the Government's implementation of the Policy Requirement. As noted, the District Court issued a preliminary injunction, which we affirmed on appeal.[1] The Supreme Court granted certiorari and also affirmed, holding that "[t]he Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program.

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[1] Judge Straub dissented in 2011 on the basis that the Policy Requirement did not violate the First Amendment, a position that the Supreme Court subsequently rejected squarely. *See* 651 F.3d at 240.

In so doing, it violates the First Amendment and cannot be sustained." *AOSI*, 570 U.S. at 221.

After the Supreme Court's decision, the Government nevertheless continued to apply the Policy Requirement to plaintiffs' foreign affiliates. In January 2015, after receiving letter briefing, the District Court converted its preliminary injunction to a permanent injunction barring the Government from imposing the Policy Requirement on plaintiffs or their affiliates. The Government appealed, and we stayed the permanent injunction pending this appeal.

STANDARD OF REVIEW

A district court's decision to issue a permanent injunction is reviewed for abuse of discretion, as "[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also, e.g.*, *Knox v. Salinas*, 193 F.3d 123, 128-29 (2d Cir. 1999) (per curiam). A district court commits an abuse of discretion when it "(1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions." *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620, 627 (2d Cir. 2018) (internal quotation marks omitted). We review questions of law *de novo*. *See ACORN v. United States*, 618 F.3d 125, 133 (2d Cir. 2010).

DISCUSSION

I.

The narrow issue before this Court is whether applying the Policy Requirement to plaintiffs' closely aligned foreign affiliates violates plaintiffs' own First Amendment rights. The Supreme Court's decision considered this question and resolved it in plaintiffs' favor. Consequently, we conclude that the District Court did not abuse its discretion in issuing its permanent injunction.[2]

In *AOSI*, the Supreme Court explained that requiring the recipient of government funds to adopt the Government's view on the issue of prostitution and sex trafficking was a violation of plaintiffs' First Amendment rights. 570 U.S. at 219. The Court's opinion focused on the distinction "between conditions that define the federal program and those that reach outside it," *id.* at

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[2] A plaintiff seeking a permanent injunction against government action taken pursuant to a statutory or regulatory scheme must demonstrate an entitlement to such equitable relief by showing (1) irreparable injury and (2) actual success on the merits. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542, 546 n.12 (1987); *Ognibene v. Parkes*, 671 F.3d 174, 182 (2d Cir. 2011). As an equitable remedy, a permanent injunction also requires a showing that remedies at law will inadequately compensate for the injury, that an equitable remedy is warranted in light of the balance of hardships between the plaintiff and defendant, and that the injunction would not disserve the public interest. *eBay*, 547 U.S. at 391; *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A constitutional violation, or an allegation of a constitutional violation, satisfies the irreparable injury requirement. *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *see also Ognibene*, 671 F.3d at 182.

217, and the Court explicitly considered the role that affiliates of a funded organization can play in that dichotomy, *id.* at 219. It noted that where a funded organization's speech was limited by a federal program, the funded organization could employ affiliates *outside* the federal program to exercise its First Amendment rights. *Id.* In so reasoning, the Court explicitly recognized that organizations exercise their First Amendment rights through their affiliates. *Id.*

The Court therefore made clear that forcing an entity's affiliate to speak the Government's message unconstitutionally impairs that entity's own ability to speak. As Chief Justice Roberts noted, where, as here, an affiliate is "clearly identified" with the recipient of government funds, the recipient can express beliefs that contradict the speech of its affiliate "only at the price of evident hypocrisy." *Id.*[3] Applying the Court's hold-

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[3] It was immaterial to the Supreme Court that an affiliate may be foreign-incorporated. The AOSI opinion speaks only of the harm to plaintiffs due to their affiliation, not about the nature of the affiliated entity. The Supreme Court was keenly aware of the foreign nature of plaintiffs' work and of their partnerships and affiliations with foreign-incorporated organizations. This awareness was on full display at oral argument, where the Government argued that there would be no hypocrisy between a plaintiff and an affiliate because the entities would be required to be sufficiently separate. Justice Ginsburg, for example, apparently rejected this premise, noting that this case differed from those in which forming a separate subsidiary to abide by a funding condition was "a simple matter of corporate reorganization" that cured any constitutional problems with the funding condition. Transcript of Oral Argument at 18. She stated that "getting an NGO . . . recognized in dozens of foreign countries is no simple thing to accomplish" and using a foreign affiliate to

ing in *AOSI* to the present iteration of this case as we must, we hold that the speech of a recipient who rejects the Government's message is unconstitutionally restricted when it has an affiliate who is forced to speak the Government's contrasting message.[4]

These principles decide this appeal. Here, the affiliates are clearly identified with plaintiffs, and to require the affiliates to abide by the Policy Requirement would require the closely related—and often indistinguishable—plaintiffs to be seen as simultaneously asserting two conflicting messages. This is the "evident hypocrisy" to which the Chief Justice referred: when the Government requires contrasting, hypocritical messages between domestic and foreign affiliates by making one speak the Government's message, this requirement in-

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speak the Government's message and collect federal funds is "differen[t] in this international setting." *Id.*; J. App. 1787. Justice Kennedy explicitly concurred with Justice Ginsburg's statements regarding foreign NGOs. Transcript of Oral Argument at 26 ("I have the same concerns that Justice Ginsburg expressed about the difficulty of simply creating structures in—in foreign countries.").

[4] The dissent attempts to characterize this case as one involving freedom of association. This approach misunderstands both the nature of the right at issue and the Supreme Court's decision. The right that plaintiffs seek to vindicate is the right to free speech: to be able to speak freely without being either compelled to speak or allowed to speak only "at the price of evident hypocrisy." *AOSI*, 570 U.S. at 219. The Court made clear that it conceived of the issue as one involving freedom of speech, stating several times that its animating concerns were the ability of the funding recipient "to *express its beliefs*." *Id.* (emphasis added). Contrary to the assertions made in the dissent, the cases involving freedom of association are not particularly helpful.

fringes the speech of the domestic affiliate and, in so doing, violates the First Amendment. *Id.* Indeed, the Government itself acknowledges that forced hypocrisy can impair an entity's ability to speak: "It may be true that when two organizations are closely linked, in some circumstances the speech of one can be seen as the speech of both." *See* Gov't Reply at 9.

The Government's arguments in this appeal are unpersuasive. It mainly contends that foreign organizations like plaintiffs' affiliates do not possess First Amendment rights. But the Government as well as our dissenting colleague misunderstands the Supreme Court's decision in *AOSI*. It is the First Amendment rights of the *domestic plaintiffs* that are violated when the Policy Requirement compels them to "choose between forced speech and paying 'the price of evident hypocrisy.'" *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 106 F. Supp. 3d 355, 361 (S.D.N.Y. 2015) (quoting *AOSI*, 570 U.S. at 219).

The Government also contends that the contrasting speech between domestic and foreign affiliates is irrelevant because, following the Supreme Court's decision, the Policy Requirement may no longer be applied to domestic organizations, and so domestic organizations may now say what they want and still receive government funds. But this argument also misses the point. It is the domestic organization's speech, not its funding, that is at stake when its affiliate is forced to speak the Government's message. If the Government is right, then Chief Justice Roberts was wrong. We part ways with our dissenting colleague because we believe that it

is the Supreme Court's decision and not the Government's brief that controls this appeal.

The Government finally argues that our decisions in *Planned Parenthood Federation of America, Inc. v. Agency for International Development*, 915 F.2d 59 (2d Cir. 1990) and *Center for Reproductive Law & Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002), which upheld a funding condition requiring foreign organizations to agree not to promote abortion, require us to vacate the injunction. These cases, however, are of little help to the Government. In *Center for Reproductive Law & Policy,* we identified the "thrust of the claim" as that because of the government's funding conditions, "foreign NGOs are chilled from interacting and communicating with domestic abortion rights groups such as plaintiff CRLP, thus depriving plaintiffs of the rights to freedom of speech and association in carrying out the mission of the organization." *Center for Reprod. Law & Policy,* 304 F.3d at 188. The foreign NGOs at issue were mere potential partners of the plaintiffs; they were not affiliated. In contrast, here the foreign NGOs and plaintiffs are not just affiliates—they are homogenous. Plaintiffs share their names, logos, and brands with their foreign affiliates, and together they present a unified front. This sameness *creates* the risk of evident hypocrisy that motivated the Supreme Court to find a First Amendment violation. *AOSI,* 570 U.S. at 219. With the Supreme Court's articulation of "evident hypocrisy" as our lodestar, *Center for Reproductive Law & Policy* did not address the role of closely affiliated foreign NGOs and cannot decide today's result.

Nor can *Planned Parenthood.* In that case, the government refused to fund foreign NGOs who offered abortion as a family-planning technique. We weighed allegations "that it is impractical for United States citizens or organizations to engage in abortion-related activities abroad without the cooperation of foreign organizations and that the Standard Clause deters many of the most logical and effective foreign partners." *Id.* at 64 (internal quotation marks omitted). But critically, the government did not request that foreign NGOs explicitly adopt a policy of not advocating for abortion. As such, the domestic NGOs and partner foreign NGOs were not compelled to make contradictory statements regarding their core objectives as plaintiffs and their foreign affiliates are in this case.

The policies in these cases did not compel speech, did not involve closely identified organizations, and, unlike this case, did not burden the free speech rights of domestic organizations. *Planned Parenthood*, 915 F.2d at 64. We therefore hold that the District Court did not abuse its discretion in enjoining the Government from imposing the Policy Requirement on plaintiffs' closely aligned foreign affiliates.

II.

The Government also argues that the District Court violated Federal Rule of Civil Procedure 65 by imposing the permanent injunction on the basis of letter briefing and in the absence of a formal motion and a full hearing. The Government also argues that the injunction is unclear because its reference to plaintiffs "or their domestic and foreign affiliates" is imprecise. We see no abuse of discretion.

There is no requirement that a District Court must wait for a formal motion and hold a hearing to issue a permanent injunction. This conclusion is, in our view, particularly sound in a case such as this, involving nearly a decade of litigation, multiple appeals and resolution by the Supreme Court. In any event, Rule 65 requires hearings for only preliminary injunctions, not permanent injunctions. *Beck v. Levering*, 947 F.2d 639, 641-42 (2d Cir. 1991) (per curiam) ("Appellants contend that [Rule 65] requires that an evidentiary hearing be held in order to issue a permanent injunction. However, Rule 65 requires hearings for preliminary injunctions, not permanent injunctions.").

Nor does the injunction violate Rule 65(d)'s requirement that an injunction "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(C). We are confident that the term "affiliate" is sufficiently clear so that the Government will be able "to ascertain from the four corners of the order precisely what acts are forbidden." *In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985) (internal quotation marks omitted). As the District Court correctly noted, the word "affiliate" has a sufficiently clear meaning. It is defined, according to that Court, as "[a] corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation." 258 F. Supp. 3d 391, 396 (S.D.N.Y. 2017) (quoting Black's Law Dictionary (10th ed. 2014)). As previously noted, there is an unusually full record in this case. We do not think that the Government, in applying a definition such as this, lacks adequate guidance in determining the entities to which

the injunction applies or that the District Court otherwise abused its discretion in fashioning the permanent injunction as it did.

CONCLUSION

For the foregoing reasons, the order of the District Court is **AFFIRMED.**

STRAUB, Circuit Judge, dissenting:

Today, a majority panel of this Court requires the United States to fund the activities of foreign organizations, which have no constitutional rights, despite their refusal to comply with our government's funding condition. There is no support for such a startling holding. The majority misreads the Supreme Court's 2013 decision in this case, which only held that the First Amendment protects *United States-based* organizations from being required to adopt a particular policy position as a condition of federal funding and to conform their privately-funded activities to that position. The majority decision extends the Supreme Court's holding to an unspecified group of "clearly identified" foreign "affiliates," or "co-branded" foreign partner organizations—an issue that was not before the Supreme Court, and a result that is clearly foreclosed by two of this Court's precedential decisions, *Center for Reproductive Law & Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002), and *Planned Parenthood Federation of America v. United States Agency for International Development*, 915 F.2d 59 (2d Cir. 1990), which held that the Government's foreign policy interest in choosing which foreign organizations it wishes to fund outweighs any incidental impact on domestic organizations' ability to associate with foreign

organizations. The majority decision overrules those cases without even the benefit of *en banc* review and effectively extends First Amendment rights to foreign organizations operating outside of the United States by treating "clearly identified" domestic and foreign organizations as a single entity for First Amendment purposes. Although the majority asserts that its decision is narrow because it only applies to "clearly identified" foreign organizations, nothing in our constitutional jurisprudence allows foreign organizations to avoid the Government's funding restrictions by closely associating with domestic organizations and nothing in the majority's decision limits the scope of foreign organizations that may gain First Amendment protection by forming associations with United States-based entities going forward. Indeed, the majority further expands the applicable class of foreign organizations to those which are "closely aligned"—whatever that might mean. Accordingly, I respectfully dissent.

Background

I. Procedural History

A. 2005-2013: United States Organizations Challenge Policy Requirement

A close reading of the procedural history of this case clarifies that the Supreme Court never had any reason to consider whether 22 U.S.C. § 7631(f) (the "Policy Requirement") is constitutional as applied to Plaintiffs' foreign affiliates or any other foreign organization. At several points during this litigation, Plaintiffs made clear that they did *not* dispute that the Policy Require-

ment could be constitutionally applied to any foreign organization, including their foreign partners or affiliates. Rather, they *only* challenged the Policy Requirement's direct application to United States-based organizations, and they took great pains to distinguish this Court's binding case law upholding similar funding requirements for the foreign partners of United States-based organizations. Only in 2014, after the Supreme Court had ruled in this case, did Plaintiffs begin to assert that their foreign affiliates must also be exempted from the Policy Requirement. This is a clear departure from their position during earlier stages of this litigation, and this assertion significantly broadens the scope of their First Amendment challenge to the Policy Requirement. As discussed below, this result, which effectively exports First Amendment free speech rights to foreign organizations, was not contemplated by the Supreme Court in 2013 or by any of the prior decisions in this litigation.

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act"), 22 U.S.C. § 7601 *et seq.*, authorized appropriations to fund worldwide efforts to combat HIV/AIDs, tuberculosis, and malaria. Among other objectives, the Act "make[s] the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts." 22 U.S.C. § 7611(a)(12); *see also* § 7601(15) ("Successful strategies to stem the spread of the HIV/AIDS pandemic will require . . . measures to address the social and behavioral causes of

the problem. . . . ").[5] The Act identifies "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence" as "additional causes of and factors in the spread of the HIV/AIDS epidemic" and declares that "[p]rostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices." § 7601(23). The Leadership Act authorizes funding to combat HIV/AIDS, § 7631, but imposes two restrictions on such funding. First: "No funds . . . may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." § 7631(e). Second:

> No funds . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

§ 7631(f). Only the second condition—the "Policy Requirement"—is at issue.

In 2004, the Government began requiring foreign organizations that applied for Leadership Act funding to comply with § 7631(f) by adopting an affirmative anti-prostitution policy. *See* U.S. Agency for Int'l Dev. ("USAID"), Acquisition & Assistance Policy Directive

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[5] All references to the U.S. Code are to Title 22, unless otherwise indicated.

("AAPD") 04-04 (Revised) (Feb. 26, 2004); *see also All. for Open Soc'y Int'l v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222, 234 (S.D.N.Y. 2006).[6] Notably, Plaintiffs did not challenge the Government's application of the Policy Requirement to their foreign affiliates, partners, or sub-grantees. *All. for Open Soc'y Int'l*, 430 F. Supp. 2d at 235-36. Instead, they initiated this lawsuit in September 2005, shortly after the Government began requiring United States-based organizations to comply with the Policy Requirement. *See id.* at 237; *see also* USAID, AAPD 05-04 (June 9, 2005). And throughout this litigation, until 2014, Plaintiffs explicitly limited the relief they sought to United States-based organizations.

In 2006, when the District Court granted Plaintiffs' motion for a preliminary injunction, it distinguished our cases regarding funding restrictions to foreign nongovernmental organizations ("NGOs"). *All. for Open Soc'y Int'l*, 430 F. Supp. 2d at 267. Specifically, the District Court stated:

> In the instant case, as Plaintiffs have pointed out, the restrictions at issue apply to NGOs based in the United States, restrictions which extend to these NGOs' speech within [the] United States (for example, a conference on sexual rights and sexual health that AOSI will cosponsor in this country in June of

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[6] Those foreign organizations included the Soros Foundations in Tajikistan and Kyrgyzstan, which implemented a Leadership Act-funded project in Central Asia in partnership with the U.S.-based Alliance for Open Society International, one of the Plaintiffs in this litigation. *See All. for Open Soc'y Int'l*, 430 F. Supp. 2d at 235-36.

> 2006). Defendants simply have not made an adequate showing as to why such domestic, private speech activity should be necessarily classified as a matter of American foreign policy.

Id. The District Court ordered the parties to submit a proposed injunction. *Id.* at 278. In June 2006, the District Court entered the preliminary injunction. In addition to prohibiting the Government from enforcing the Policy Requirement against Plaintiffs Alliance for Open Society International ("AOSI") and Pathfinder International, the injunction proposed by the parties and entered by the District Court included a paragraph that exempted Plaintiffs' *United States-based* "sub-recipients, sub-grantees and sub-contractors" (referred to collectively as "sub-organizations"). This paragraph did not exempt *foreign* sub-organizations, and the injunction makes no reference to foreign organizations.

In August 2006, the Government appealed the preliminary injunction. In 2007, we remanded for the District Court to consider whether new federal guidelines provided an adequate constitutional safeguard for domestic organizations bound by the Policy Requirement. *All. for Open Soc'y Int'l v. U.S. Agency for Int'l Dev.*, 254 F. App'x 843 (2d Cir. 2007) (summary order). These guidelines—the Government's "Affiliate Guidelines"—were intended to provide an alternative channel for the Plaintiffs and other United States-based organizations to express their First Amendment-protected views regarding prostitution but have instead been the source of a great deal of unnecessary confusion in this case. The Affiliate Guidelines stated as follows:

> [T]he Government's organizational partners that have adopted a policy opposing prostitution and sex-trafficking may, consistent with the policy requirement, maintain an affiliation with separate organizations that do not have such a policy, provided that such affiliations do not threaten the integrity of the Government's programs and its message opposing prostitution and sex trafficking, as specified in this guidance. To maintain program integrity, adequate separation as outlined in this guidance is required between an affiliate which expresses views on prostitution and sex trafficking contrary to the government's message and any federally-funded partner organization.

Dep't of Health and Human Servs. ("HHS"), Guidance Regarding Section 301(f) of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, 72 Fed. Reg. 41,076 (July 23, 2007); *see also* USAID, AAPD 05-04 Amend. 1 (July 23, 2007). Simply put: the Affiliate Guidelines provided a way for domestic entities to abide by the Policy Requirement while using affiliates to express their contrary views on prostitution.

Plaintiffs' 2008 declarations argued that the Affiliate Guidelines did not provide an adequate alternative channel for communicating their own viewpoints on prostitution, in large part because of the degree of legal separation that the Guidelines required between an organization receiving Leadership Act funding and an affiliate organization expressing views on prostitution that deviated from the Policy Requirement. The 2008 declarations also discussed the legal and practical difficulties of

establishing affiliates in foreign countries, implying that they did *not* currently have any affiliates operating in those countries. In particular, declarations from the presidents of Cooperative for Assistance and Relief Everywhere ("CARE") and Pathfinder International described how the United States-based organizations operated directly in several foreign countries through "registered branch offices" or "field offices," and did not mention the existence of any legally separate affiliate organizations operating in those countries.[7]

On remand, Plaintiffs moved to add Interaction and Global Health Council ("GHC") to the lawsuit. These are umbrella organizations for public health NGOs, and GHC includes foreign members. However, Plaintiffs explicitly limited the relief sought to Interaction's and GHC's *United States-based* members. And Plaintiffs' motion to extend the preliminary injunction to Interaction and GHC again exempted only United States-based sub-grantee organizations from the Policy Requirement.

In 2008, the District Court reaffirmed its 2006 preliminary injunction and extended that injunction to Interaction and GHC. *All. for Open Soc'y Int'l v. U.S. Agency for Int'l Dev.*, 570 F. Supp. 2d 533 (S.D.N.Y.

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[7] The 2008 Gayle declaration described CARE as a member of CARE International, "a federation of 12 other CARE nonprofit members incorporated separately in Australia, Austria, Belgium, Canada, Denmark, France, Germany, Japan, the Netherlands, Norway, Thailand, and the United Kingdom." However, the declaration only discussed the Government's application of the Policy Requirement to CARE itself and did not further mention CARE International or its foreign members.

2008). The District Court reasoned that the Affiliate Guidelines did not cure the First Amendment violation, namely, the requirement that the United States-based Plaintiffs adopt an anti-prostitution policy and conform their privately-funded activities to this policy in order to receive Leadership Act funding. *Id.* at 545-50. When discussing the question of standing, the District Court focused exclusively on GHC's United States-based members. *Id.* at 538, 540, 541-42.

In 2011, this Court upheld the District Court's preliminary injunctions. *All. for Open Soc'y Int'l v. U.S. Agency for Int'l Dev.*, 651 F.3d 218 (2d Cir. 2011), *en banc reh'g denied*, 678 F.3d 127 (2d Cir. 2012). In doing so, the instant majority explicitly distinguished the Government's restrictions on funding to foreign NGOs:

> The Agencies' reliance on *DKT Memorial Fund Ltd. v. Agency for International Development*, 887 F.2d 275 (D.C. Cir. 1989), is misplaced, as that case centered around a restriction on the First Amendment activities of *foreign* NGOs receiving U.S. government funds. The challenge here is to the impact of the Policy Requirement on *domestic* NGOs. Indeed, the Agencies have applied the Policy Requirement to foreign organizations since its inception, without challenge. This litigation arose only after the government reversed course and began also applying the Requirement to U.S.-based organizations like AOSI and Pathfinder. The Policy Requirement compels domestic NGOs to adopt a policy statement on a particular issue, and prohibits them from

> engaging in certain expression at, for example, conferences and forums throughout the United States. These factors convince us that the speech is far more of a domestic than a foreign concern.

Id. at 238-39. The Court agreed with the District Court that the Affiliate Guidelines could not cure the First Amendment violation of requiring United States-based organizations to affirmatively adopt an anti-prostitution policy. *Id.* at 239.

Before the Supreme Court, Plaintiffs made it clear that they raised only an "as-applied" challenge to the constitutionality of the Policy Requirement. Brief for Respondents at 42 n.11, *U.S. Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205 (2013) (No. 12-10), 2013 WL 1247770; Transcript of Oral Argument at 36, *U.S. Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205 (2013) (No. 12-10). The parties and the Supreme Court Justices briefly discussed the difficulty of establishing affiliate organizations that would comply with the laws of the foreign countries in which they operated—a discussion that was relevant to the burden imposed by the Affiliate Guidelines and which suggested that Plaintiffs operated directly in those foreign countries and did not have any existing foreign affiliates. Brief for Respondents at 52-56, *U.S. Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205 (2013) (No. 12-10), 2013 WL 1247770; Transcript of Oral Argument at 18-19, 27, *U.S. Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205 (2013) (No. 12-10).

In 2013, the Supreme Court held that the Policy Requirement violated the First Amendment rights of United States-based NGOs by conditioning funding on

adoption of the Government's point of view in a way that could not be cabined to the Leadership Act-funded programs but would also affect the organizations' privately-funded activities. *U.S. Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205, 213-21 (2013). The Supreme Court concluded that while affiliates can provide an adequate safeguard in other contexts, such as where a funding restriction prohibits an organization from using the specified funds for a particular First Amendment-protected activity, "[a]ffiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own." *Id.* at 219. The Supreme Court characterized Plaintiffs as "a group of domestic organizations engaged in combating HIV/AIDS overseas." *Id.* at 210.

Not a single reference was made to the Government's ability to impose the Policy Requirement on foreign organizations in the Supreme Court's decision itself, in the parties' briefs, or at oral argument. Tellingly, the Supreme Court made no mention of our decisions in *Center for Reproductive Law & Policy ("CRLP")* and *Planned Parenthood* because at issue before it was the Policy Requirement's application to domestic organizations and not foreign partner organizations, as in those two cases.

B. 2014-2017 District Court Proceedings: Plaintiffs Challenge Government's Application of the Policy Requirement to Their Foreign "Affiliates"

As discussed above, from 2004 until 2014, the Plaintiffs never challenged the Government's requirement that all foreign organizations which applied for Leadership Act funds or received Leadership Act sub-grants

from domestic organizations adopt an anti-prostitution policy. In this vein, in September 2014, the Government issued funding notices that explicitly exempted all United States-based organizations from the Policy Requirement but continued to apply the Policy Requirement to foreign organizations. *See* HHS Guidance, 79 Fed. Reg. 55,367 (Sept. 16, 2014); USAID, AAPD 14-04, at 9-10 (Sept. 12, 2014). In October 2014, for the first time, Plaintiffs began to argue that the Supreme Court's 2013 decision required the Government to exempt their "foreign affiliates" from the Policy Requirement. Notably, the foreign affiliate organizations described in Plaintiffs' October 2014 declarations were not mentioned at all in Plaintiffs' 2008 declarations, or at any other point during the eight years of litigation that led to the Supreme Court's 2013 decision.[8]

In its pre-motion responses and at an October 2014 pre-motion conference, the Government strongly contested this position, pointing to this Court's decision in *Planned Parenthood* and arguing that the Supreme Court had not considered the Policy Requirement's application to foreign organizations in its 2013 decision because the Plaintiffs had never challenged that practice. The Government also argued that the District Court

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[8] The majority emphasizes an October 2014 declaration from Save the Children's executive vice president and chief operating officer describing that organization's foreign affiliate structure. As noted above, the 2008 declarations stated that Plaintiffs worked directly in foreign countries through local branch offices and did not highlight the role of any foreign affiliates. Save the Children's executive officers did not submit a declaration in this litigation prior to October 2014.

should require further submissions, including a formal motion and opposition, before issuing an injunction. Specifically, in its October 30, 2014, submission, the Government stated:

> There are numerous factual and legal issues that have not been addressed at any stage of this litigation that are implicated by [P]laintiffs' pre-motion letters, including . . . the applicability of constitutional rights to foreign organizations even when affiliated with U.S. organizations, the degree of affiliation that exists in fact, and many others. . . . Additionally, the parties must be afforded an opportunity to respond to each other's submissions provided to the Court today.

In January 2015, without any further submissions or hearings, the District Court granted a permanent injunction. *All. for Open Soc'y Int'l v. U.S. Agency for Int'l Dev.*, 106 F. Supp. 3d 355 (S.D.N.Y. 2015). The District Court relied solely on the Supreme Court's 2013 decision, reasoning that the Supreme Court's discussion of the Government's Affiliate Guidelines exempted both Plaintiffs and their foreign affiliates from the Policy Requirement. *Id.* at 360-61. The District Court prohibited the Government from enforcing the Policy Requirement against Plaintiffs' foreign affiliates, without defining which foreign organizations qualify as Plaintiffs' affiliates. *Id.* at 360-61, 363-64. Under the terms of the injunction, foreign organizations are eligible to receive grants from the Government or sub-grants from Plaintiffs without adopting an anti-prostitution policy, just as the Plaintiffs themselves need not comply with the Policy Requirement to receive Leadership Act grants from

the Government or sub-grants from other organizations. The District Court further directed that, "[i]f the Government intends to apply the Policy Requirement to any organizations whatsoever, then the Government must show cause identifying which categories of organizations and why imposing the requirement would not violate the decisions of this Court and the Supreme Court." *Id.* at 363. The District Court stayed the injunction from January 2015 until June 2017, while the parties engaged in mediation and while it considered the Government's motion for reconsideration and clarification.

In 2017, the Government moved for reconsideration of the District Court's 2015 injunction, arguing that the order did not comply with Federal Rule of Civil Procedure 65's requirement that injunctions be clear and definite because the Government could not ascertain which foreign organizations the injunction applied to. Plaintiffs opposed reconsideration. Plaintiffs stated that "[w]hile the injunction as written is sufficiently clear and specific to take immediate effect, Plaintiffs would have no objection to the Court's addition of language explaining that 'clearly identified' foreign affiliates are those that share the same name, trademark, and public branding (*e.g.*, corporate logo) as Plaintiffs. . . . " Plaintiffs provided examples of "clearly identified" foreign affiliates, such as CARE India and Pathfinder India, and contrasted their definition with the Government's Affiliate Guidelines. Finally, Plaintiffs stated that they "stand ready to work with the government to address individual questions and to provide the government lists of their affiliates—as they have done on prior occasions—which would identify foreign affiliates that

share Plaintiffs' same name, trademark, and public branding." The Government argued that the Plaintiffs' definition was not sufficient because it did not identify a controlling legal standard and because a shared name, trademark, and public branding alone would not necessarily demonstrate that a foreign organization is so closely tied to a domestic organization that the domestic organization's First Amendment rights would be violated if the Government requires the foreign organization to adopt an anti-prostitution policy in order to receive Leadership Act funding.

In June 2017, the District Court denied reconsideration and lifted its stay of the 2015 order. *All. for Open Soc'y Int'l v. U.S. Agency for Int'l Dev.*, 258 F. Supp. 3d 391 (S.D.N.Y. 2017). Citing the Black's Law Dictionary and Oxford English Dictionary definitions of "affiliate," the District Court concluded that, "[t]he class of non-governmental organizations, or corporations, which share such a relationship with Plaintiffs and are thus affiliates for the purposes of the permanent injunction is almost certainly limited and ascertainable." *Id.* at 396. However, the District Court added the following:

> Insofar as the Government needs any additional guidance in defining "affiliate" or identifying specific entities that would be covered by the definition, Plaintiffs have offered a reasonable suggestion to develop clarifying language. The parties therefore should meet and confer in an effort to propose an agreed-upon response within thirty days of the date of this Order. The parties are directed to submit a report on the status of such discussions at that time.

Id. The District Court extended the time for the parties to submit the status report until August 2017. The Government moved to defer the meetings in light of this Court's July 2017 order staying the injunction. Plaintiffs submitted a status report representing that the parties had reached a tentative agreement and reflecting that Plaintiffs wished to continue meeting despite this Court's stay order. In September 2017, the District Court denied the Government's motion to defer the meetings, reasoning that this Court only stayed the injunction insofar as it applied to foreign affiliates; the parties could still agree to a definition of "affiliate" for the purpose of implementing the injunction as to Plaintiffs' domestic affiliates. In October 2017, the parties submitted another status report. The parties agreed that a definition of domestic affiliates was unnecessary because the Government concedes that it may not constitutionally apply the Policy Requirement to *any* United States-based organizations, regardless of affiliation with Plaintiffs. The Government argued that the parties should hold off on any further meetings until this Court concluded its review of the injunction, while Plaintiffs argued that "coming to agreement on the definition of 'affiliate' at this juncture, would facilitate the government's timely implementation of the injunction as to foreign affiliates in the event the court of appeals affirms that aspect of the injunction." This is the last District Court docket entry and it reflects that the District Court and parties have not yet decided exactly which organizations qualify as Plaintiffs' foreign affiliates.

II. Proceedings in this Court

The Government timely appealed both the 2015 injunction and the 2017 denial of reconsideration.[9] In its opening brief, the Government argues that (1) its funding restriction is constitutional as applied to foreign organizations, and thus the District Court erred in extending the injunction to Plaintiffs' foreign affiliates, and (2) the injunction does not "state its terms specifically" or "describe in reasonable detail . . . the act or acts restrained or required" as demanded by Federal Rule of Appellate Procedure 65 because it is unclear which foreign organizations the injunction applies to. In response, the Plaintiffs argue that the Supreme Court's 2013 decision in this case prohibits the Government from applying its funding restriction to Plaintiffs' "clearly identified" foreign affiliates. They attempt to distinguish *CRLP* and *Planned Parenthood*, which upheld a similar funding restriction on foreign organizations, based on Plaintiffs' close association with their foreign affiliates, which they argue will result in "evident hypocrisy" if the foreign affiliates are forced to adopt an anti-prostitution policy. Plaintiffs also argue that the terms of the injunction are clear and specific enough to give the Government notice of what is prohibited.

The Government replies that (1) Plaintiffs mischaracterize the Supreme Court's 2013 decision, which did

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[9] The Government's appeal of the 2015 injunction was withdrawn and reinstated several times while the parties engaged in mediation. In March 2017, this Court reinstated the appeal, but held it in abeyance pending the District Court's determination of the motion to reconsider. This Court reactivated the appeal on June 12, 2017.

not address the application of the Policy Requirement to Plaintiffs' foreign affiliates or any other foreign organization, (2) the injunction is not clear enough for the Government to determine which foreign organizations qualify as Plaintiffs' "clearly identified" foreign affiliates, and (3) the District Court should have allowed further briefing before issuing the permanent injunction. In July 2017, another panel of this Court stayed the injunction insofar as it applies to foreign organizations, including Plaintiffs' foreign affiliates.

Discussion

We review a district court's grant of a permanent injunction for abuse of discretion. *Davis v. Shah*, 821 F.3d 231, 243 (2d Cir. 2016). "A district court abuses its discretion when (1) its decision rests on an error of law or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions. *Id.* (internal quotation marks and ellipsis omitted). We review questions of law *de novo*. *See N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012).

An injunction must "state its terms specifically" and "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)-(C). Rule 65 "reflects Congress' concern with the dangers inherent in the threat of a contempt citation for violation of an order so vague that an enjoined party may unwittingly and unintentionally transcend its bounds." *Corning Inc. v. PicVue Elecs., Ltd.*, 365 F.3d 156, 158 (2d Cir.

2004) (quoting *Sanders v. Airline Pilots' Ass'n, Int'l*, 473 F.2d 244, 247 (2d Cir. 1972)). Under this standard, the enjoined party must be able to "ascertain from the four corners of the order precisely what acts are forbidden." *Id.* (quoting *Sanders*, 473 F.2d at 247). An injunction violates Rule 65's specificity requirement if a party "would have to resort to extrinsic documents to comply with the order's commands." *Id.*

To obtain a permanent injunction, a party "must succeed on the merits and show 'the absence of an adequate remedy at law and irreparable harm if the relief is not granted.'" *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006) (quoting *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989)). Injunctions that alter the status quo, and injunctions against government statutes and policies, are typically disfavored. *Cf. N.Y. Civil Liberties Union*, 684 F.3d at 294 (in preliminary injunction context, injunctions that "alter rather than maintain the status quo" require a heightened showing of likelihood of success); *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995) (in preliminary injunction context, "governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.").

I. Constitutional Issue

Although "freedom of speech prohibits the government from telling people what they must say," *All. for Open Soc'y Int'l*, 570 U.S. at 213, this principle has never before been extended to foreign organizations operating outside the United States that apply for discretionary

funding from the United States government. While the Spending Clause empowers Congress to attach restrictions on the funds it provides to private organizations, the Government may not impose funding conditions that infringe domestic organizations' First Amendment rights. *All. for Open Soc'y Int'l*, 570 U.S. at 213-17. This "unconstitutional conditions" doctrine distinguishes between "conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize," which are generally permissible, and "conditions that seek to leverage funding to regulate speech outside the contours of the program itself," which are not. *Id.* at 214-15. In its 2013 decision, the Supreme Court applied this "unconstitutional conditions" doctrine to the Government's requirement that domestic NGOs adopt an anti-prostitution policy to receive Leadership Act funding and concluded that the Policy Requirement compelled Plaintiffs to adopt the Government's position in a way that could not be limited to the Leadership Act-funded programs and was thus unconstitutional. *Id.* at 217-21.

The Government does not dispute that it may no longer apply the Policy Requirement to any domestic organizations. The only remaining question is whether the Government may apply the Policy Requirement to foreign organizations, including but not limited to, Plaintiffs' foreign affiliates. Because the District Court legally erred when it enjoined the Government from requiring foreign organizations that receive Leadership Act funding to adopt an anti-prostitution policy, I would reverse the injunction.

A. Supreme Court's 2013 Decision

As illustrated by the procedural history detailed above, Plaintiffs' and the District Court's reliance on the Supreme Court's 2013 decision, at this time and in these circumstances, is misplaced. The constitutionality of the Policy Requirement, as applied to any and all foreign organizations, was never contemplated by the Supreme Court, as it was never challenged by the Plaintiffs. The Plaintiffs and District Court misread an excerpt from one paragraph of the Supreme Court's 2013 decision to state that the Government could not constitutionally enforce the Policy Requirement against Plaintiffs' foreign affiliates. The relevant paragraph reads as follows:

> When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program. Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy.

All. for Open Soc'y Int'l, 570 U.S. at 219 (internal citation omitted). The District Court and Plaintiffs rely solely on the Supreme Court's statement regarding the "evident hypocrisy" of differing policy viewpoints between Plaintiffs and their "clearly identified" affiliates, but they have taken this statement out of context. The full excerpt above illustrates that the Supreme Court

did not hold that the "evident hypocrisy" created by affiliates' differing positions violated the First Amendment in itself, but rather that the Affiliate Guidelines failed to provide an adequate alternative channel for Plaintiffs to express their own First Amendment-protected views while complying with the Policy Requirement themselves. *Id.*; *contrast Regan v. Taxation Without Representation*, 461 U.S. 540, 544 (1983) (noting that a domestic organization which was required to refrain from lobbying as a condition of its 501(c)(3) tax-exempt status could form a "dual structure" by establishing a separate 501(c)(4) organization to engage in lobbying activities with independent funding). Because the Plaintiffs and all other United States-based organizations are now exempt from the Policy Requirement, they may express their views on prostitution directly and no longer need to make use of the alternative channel for expression offered by the Government's Affiliate Guidelines.

Plaintiffs also suggest that the Supreme Court's 2013 decision must have applied to foreign organizations as well as domestic organizations because it is a "facial invalidation" of the Policy Requirement. Not so. Plaintiffs repeatedly assured the Supreme Court that they brought only an as-applied challenge. Brief for Respondents at 42 n.11, *U.S. Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205 (2013) (No. 12-10), 2013 WL 1247770; Transcript of Oral Argument at 36, *U.S. Agency for Int'l Dev.*, 570 U.S. 205 (2013) (No. 12-10). However, the Supreme Court's decision can best be understood as striking down the Policy Requirement as ap-

plied to any domestic organization. It is a facial invalidation in the sense that it applies to *all* United States-based organizations, not only the Plaintiffs. The Government has never contested this point. But the Supreme Court's decision should not be read as striking down the Policy Requirement's application to foreign organizations, both because foreign organizations operating outside the United States have no First Amendment rights and because Plaintiffs made clear throughout the litigation that they did not challenge the Government's Policy Requirement as applied to any foreign organization.

B. Applicable Case Law

Because the Supreme Court's 2013 decision and the prior decisions in this litigation did not decide whether the Government may require foreign organizations to comply with the Policy Requirement, we must apply controlling case law upholding restrictions on funding to foreign organizations.

It is undisputed that Plaintiffs' foreign affiliates lack First Amendment rights because they are foreign organizations operating outside the United States. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). The Plaintiffs do not contest this issue. Instead, Plaintiffs argue that requiring their foreign affiliates to comply with the Policy Requirement violates their own First Amendment rights because the foreign affiliates' positions on prostitution will be mistakenly attributed to Plaintiffs or will contradict Plaintiffs' own positions on prostitution, resulting in "evident hypocrisy."

Because the Plaintiffs may now receive Leadership Act funding without regard to whether they have an affirmative anti-prostitution policy—in other words, the Government is no longer compelling the Plaintiffs to adopt any particular position on prostitution as a condition of Leadership Act funding—the issue in this case is no longer about Plaintiffs' free speech rights. Instead, the current constitutional question turns on Plaintiffs' right to associate with foreign organizations. Plaintiffs' argument that their own free speech rights are impacted by their foreign affiliates' compelled speech assumes that Plaintiffs' right to associate with foreign affiliates outweighs Congress's ability to regulate funding to foreign organizations.

The Supreme Court has held that United States citizens' First Amendment right to associate with foreigners (aliens) does not override Congress's plenary power to decide which aliens to admit to the United States and which to exclude. *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (rejecting American scholars' attempt to compel admission of a Belgian Marxist scholar who was invited to an academic conference); *see also Kerry v. Din*, 135 S. Ct. 2128, 2139-41 (2015) (Kennedy, J., concurring) (assuming that U.S. citizen wife had a protected liberty interest in her foreign husband's admission to United States, but upholding the Government's denial of the husband's visa because it was based on a "facially legitimate and bona fide" reason). It follows that United States-based organizations' First Amendment right to associate with foreign organizations does not outweigh the Government's power to conduct foreign affairs by

deciding which, if any, foreign organizations it wishes to fund.

We have previously rejected United States-based organizations' First Amendment challenges to a funding restriction that applied only to foreign organizations. *Ctr. for Reprod. Law & Pol'y v. Bush*, 304 F.3d 183 (2d Cir. 2002); *Planned Parenthood Fed'n of America v. U.S. Agency for Int'l Dev.*, 915 F.2d 59 (2d Cir. 1990).[10] These cases challenged the Government's enforcement of a restriction on foreign funding known as the Mexico City Policy.[11] Under this policy, the Government prohibited grants to foreign NGOs that carried out any activities related to abortion, including privately-funded speech and activities. *Planned Parenthood*, 915 F.2d

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[10] As noted above, this Court distinguished the Government's enforcement of restrictions on domestic organizations from cases involving foreign organizations in its 2011 decision in this litigation. *All. for Open Soc'y Int'l*, 651 F.3d at 238-39.

[11] The Mexico City Policy originated with President Reagan in 1984. *See Ctr. for Reprod. Law & Pol'y*, 304 F.3d at 187. The policy was rescinded by Presidents Clinton and Obama and reinstated by Presidents George W. Bush and Trump. *See id.* at 188; Memorandum, The Mexico City Policy, 82 Fed. Reg. 8495 (Jan. 25, 2017). Human Rights Watch estimated that the Mexico City Policy has affected approximately $8.8 billion in U.S. funding for global health efforts, including funds disbursed for HIV/AIDS prevention. *See* Human Rights Watch, *Trump's 'Mexico City Policy' Or 'Global Gag Rule': Questions & Answers* (Feb. 14, 2018, 12:55 AM), https://www.hrw.org/news/2018/02/14/trumps-mexico-city-policy-or-global-gag-rule.

at 61-62.[12] Planned Parenthood argued that the restriction on funding to foreign organizations violated its First Amendment associational rights by "pick[ing] off or buy[ing] up" potential partner organizations for abortion-related activities and requiring Planned Parenthood to spend more of its own private funds on such activities. *Id.* at 63. This Court rejected the First Amendment claim, reasoning that any harm to Planned Parenthood was incidental to the Government's otherwise-nonjusticiable foreign policy decision and that "[s]uch an incidental effect from the refusal to subsidize the exercise of a constitutional right obviously is not what the Supreme Court considers 'an obstacle in the path' of plaintiffs seeking to exercise the right." *Id.* at 64.[13] We explained that:

> Were the courts to allow challenges to foreign aid programs on the ground that the government's subsidy of a particular viewpoint abroad encourages the foreign recipients of American aid not to speak or associate with Americans opposed to that viewpoint,

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[12] Domestic NGOs that receive Government funding for family planning may carry out privately-funded abortion-related activities and pro-abortion advocacy so long as the organizations maintain adequate physical and financial separation between federally-funded and abortion-related projects. *See Rust v. Sullivan*, 500 U.S. 173 (1991) (rejecting domestic NGOs' First Amendment and other challenges to this funding restriction).

[13] In a case involving the same restriction, the D.C. Circuit expressed skepticism of the plaintiffs' argument, but ultimately dismissed a First Amendment right to associate claim on ripeness grounds. *DKT Memorial Fund Ltd. v. U.S. Agency for Int'l Dev.*, 887 F.2d 275, 291-98 (D.C. Cir. 1989).

> the political branches would find it impossible to conduct foreign policy.

Id. at 64. In 2002, we reaffirmed this decision. *Ctr. for Reprod. Law & Pol'y*, 304 F.3d at 190-91. The Center for Reproductive Law & Policy ("CRLP") argued that "collaboration [with foreign organizations] is essential to their ability to carry out their mission as advocates of reproductive rights," and listed several ways in which the organization's decreased ability to partner with foreign organizations (because of the funding restriction) hindered its mission. 304 F.3d at 189-90. We concluded that the case was indistinguishable from *Planned Parenthood*, which remained binding given the lack of intervening Supreme Court authority, and also rejected CRLP's due process and equal protection challenges to the funding restriction. *Id.* at 190-91, 195-98.

Plaintiffs argue that *Planned Parenthood* and *CRLP* are distinguishable because the Policy Requirement compels speech, whereas the Mexico City Policy only restricted speech. However, because the compelled speech and unconstitutional conditions doctrines have only been applied in the context of restrictions on funding to domestic organizations and United States-based organizations are no longer bound by the Policy Requirement (remember, foreign organizations operating outside the United States have no First Amendment rights), this distinction does not change the outcome. Further, although it is true that the Mexico City Policy does not require foreign organizations to affirmatively state an opposition to abortion, the policy does not distinguish between United States-funded and privately-funded activities and has been interpreted broadly: to

receive USAID funding, a foreign NGO must certify that it "will not, while receiving assistance under the grant, perform or actively promote abortion as a method of family planning in AID-recipient countries or provide funding to other foreign nongovernmental organizations that conduct such activities." *Ctr. for Reprod. Law & Pol'y*, 304 F.3d at 189 (internal quotation marks omitted). Plaintiffs also argue that *Planned Parenthood* and *CRLP* did not involve "co-branded, clearly identified affiliates that share a common identity with U.S. organizations." But while our prior decisions did not turn on the identity of the foreign partner organizations, the Mexico City Policy applies to *all* United States funding to foreign organizations, regardless of whether the foreign organization applying for funding is "co-branded" or "clearly identified" with a United States-based organization.[14] Indeed, Plaintiffs' case is weaker than Planned Parenthood's or CRLP's because Plaintiffs are not alleging that they have actually lost any or all of their foreign affiliates or partners, but rather that their foreign affiliates' anti-prostitution policies (which the affiliates need only adopt if they apply for Leadership Act funding) will contradict Plaintiffs'

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[14] For example, Save the Children reportedly complies with the Mexico City Policy. *See* Benjamin Kentish, *Sweden Vows To Stop Giving Aid To Any Organisations That Follow Donald Trump's Anti-Abortion Rule*, The Independent (July 12, 2017, 4:27 PM), https://www.independent.co.uk/news/world/europe/sweden-donald-trump-anti-abortion-rule-foreign-aide-ban-mexico-policy-organisations-pro-life-a7837591.html (stating that Swedish officials identified Save the Children as a group of organizations that had adopted the Mexico City Policy).

views and result in inconsistent positions or "evident hypocrisy."

It bears repeating that Plaintiffs never challenged the Government's application of the Policy Requirement to their "co-branded" or "clearly identified" foreign affiliates until October 2014. No reference was made to any "co-branded" or "clearly identified" foreign affiliates that actually existed during the earlier stages of this litigation, and the majority's argument to the contrary misreads portions of the record in which the parties and Supreme Court Justices discussed the practical barriers to establishing *purely hypothetical* affiliate organizations that would have served as an alternative channel for the domestic organizations to express their own anti-prostitution views under the Government's Affiliate Guidelines. And although the Government has been requiring all foreign organizations, including Plaintiffs' "clearly identified" foreign affiliates, to comply with the Policy Requirement throughout this litigation,[15] Plaintiffs have only discussed the harm they face in hypothetical terms. They have failed to identify even one specific instance where a foreign affiliate's position on prostitution actually resulted in harm such as lost Leadership Act funding, lost private funding, or even inconsistent messaging (in other words, "evident hypocrisy"). Moreover, any danger of "evident hypocrisy" resulting from the foreign and domestic organizations' inconsistent positions on prostitution can be avoided en-

[15] While the District Court enjoined the Policy Requirement as to Plaintiffs' foreign affiliates in 2015, that injunction has been stayed throughout the litigation.

tirely if the Plaintiffs' foreign affiliates use private funding rather than applying for Leadership Act funding. In this situation, the Plaintiffs would remain eligible for Leadership Act funding, but would be unable to subgrant Leadership Act funds to their foreign affiliates. Alternatively, as the Government suggests, the Plaintiffs and their foreign affiliates may use disclaimers (i.e., stating specifically that their views on prostitution are solely their own and do not reflect their international affiliates' views) to reduce any confusion regarding their differing approaches to prostitution.

The lack of certainty over which foreign organizations qualify as affiliates is cause for further concern. Notably, the District Court and Plaintiffs seem to have ascribed different meanings to the term "affiliate." In its 2017 order denying reconsideration, the District Court referred to the following definitions: (1) "a corporation that is related to another corporation by shareholding or other means of control; a subsidiary, parent, or sibling corporation," (quoting Black's Law Dictionary 69 (10th ed. 2014)); and (2) "a person or organization officially attached to a larger body," (quoting Oxford English Dictionary). *All. for Open Soc'y Int'l*, 258 F. Supp. 3d at 396. The Plaintiffs, however, suggest that *any* foreign partner organization that shares one of the Plaintiffs' "name, branding, and logo" and "operates within a common corporate framework toward a common mission" would be covered by the injunction, regardless of whether the organization is "related . . . by shareholding or other means of control," so as to satisfy the Black's Law Dictionary definition of an affiliate. The District Court ordered the parties to meet and propose a joint

definition of "affiliate," or a list of covered foreign affiliates, to help the Government identify which foreign entities are covered by the injunction. But the parties have not yet agreed on a definition. Thus, it is unclear whether the injunction can be enforced against the Government (for example, through contempt proceedings) absent further agreement from the parties regarding which foreign organizations the injunction applies to.

I recognize that Plaintiffs have a practical interest in maintaining policy positions that are consistent with their foreign partners, especially where the United States-based and foreign organizations use the same name, signs, and logos, and attempt to "speak with one voice." Requiring Plaintiffs' foreign affiliates to adopt an anti-prostitution policy if they apply for Leadership Act grants or receive sub-grants from Plaintiffs may result in inconsistent messaging between Plaintiffs and their foreign affiliates, or require Plaintiffs to either go back to operating directly in foreign countries (re-opening the branch offices they referred to in their 2008 declarations) or to seek out new foreign partner organizations for Leadership Act projects. If anything, this dilemma raises a constitutional question of whether domestic organizations have a First Amendment right to associate so closely with foreign organizations and whether that associative right outweighs the Government's interest in limiting its funding to foreign organizations. However, this constitutional question was *not* decided by the Supreme Court in 2013 and has never been briefed in this case. Instead, the Plaintiffs and majority seem to assume that a domestic and foreign organization must be treated as *one entity* for First Amendment free speech

purposes because the two organizations share the same name, brand, and mission. Neither the Supreme Court, nor any court, has ever held as much. In sum, I am unconvinced that any inconvenience or inconsistent policy positions that may result from the application of the Policy Requirement to Plaintiffs' "clearly identified" or "closely aligned" foreign affiliates amounts to a violation of Plaintiffs' own First Amendment rights, especially because our decisions in *Planned Parenthood* and *CRLP* held that United States-based organizations do not have an unlimited right to collaborate with foreign organizations. Given the lack of intervening Supreme Court authority, we remain bound by *Planned Parenthood* and *CRLP*, and those decisions control the outcome here. *See United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004) ("[W]e are not the first panel to address this issue and are bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court."). I also agree with the Court's decisions in *Planned Parenthood* and *CRLP* because any other result would allow United States-based organizations to export their own First Amendment rights to foreign organizations.

For the reasons discussed above, I would reverse the District Court's injunction and hold that the Policy Requirement may constitutionally be applied to any foreign organization, including Plaintiffs' "clearly identified" foreign affiliates.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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05 Civ. 8209

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., DEFENDANTS

[Filed: Jan. 30, 2015]

DECISION AND ORDER

VICTOR MARRERO, United States District Judge.

I. INTRODUCTION

Plaintiffs Alliance for Open Society International ("AOSI"), Open Society Institute ("OSI") , Pathfinder International ("Pathfinder"), and Global Health Council ("GHC") (collectively "Plaintiffs") brought action against defendants, the United States Agency for International Development ("USAID"), the United States Department of Health and Human Services ("HHS"), and the United States Centers for Disease Control and Prevention ("CDC") (collectively "Defendants," or the "Agencies," or the "Government"). Plaintiffs sought a pre-

liminary injunction barring the Government from applying 22 U.S.C. Section 7631(f), which requires an organization to have a "policy explicitly opposing prostitution and sex trafficking" (the "Policy Requirement") to be eligible for Government grants under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"). This Court granted a preliminary injunction barring the Government from enforcing the Policy Requirement against the Plaintiffs because enforcement would cause Plaintiffs irreparable harm and likely amount to coerced speech endorsing the Government's message, thereby violating their First Amendment right to free speech. (Dkt. Nos. 49, 53, 83.) This Court's decision was subsequently affirmed by the Second Circuit and then by the United States Supreme Court. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 224 (2d Cir. 2011), aff'd, 133 S. Ct. 2321 (2013). The Court will assume familiarity with the legal and factual background through the Supreme Court's June 20, 2013 decision affirming the preliminary injunction.

By letter dated September 23, 2014, Plaintiffs sought a pre-motion conference to request the Court convert the preliminary injunction to a permanent injunction, also claiming that the Government failed and continues to fail to comply with the Supreme Court's ruling in this case. (Dkt. No. 106.) The Government responded by letter dated October 3, 2014 (Dkt. No. 107), and the Plaintiffs replied by letter dated October 9, 2014. (Dkt. No. 108.) A pre-motion conference was held on October 16, 2014, at which the Court directed both parties to submit documentation supporting their arguments.

Both parties submitted supporting materials. (Dkt. Nos. 112-17.)

Based on the submissions of the parties and the October 16, 2014 hearing, there are six issues to be decided: first, whether the Government has, in accordance with the preliminary injunction issued by this Court, properly exempted Plaintiffs from meeting the Policy Requirement; second, whether the language exempting Plaintiffs from the Policy Requirement in the USAID requests for proposals ("RFPs") and requests for applications ("RFAs") is so confusing that it chills free speech; third, whether the Supreme Court's decision that Plaintiffs' "affiliates" fall within the scope of the injunction was limited to domestic affiliates, or alternatively, also applies to foreign affiliates; fourth, whether the preliminary injunction in place requires the Government to include language exempting Plaintiffs from the Policy Requirement in its other official communications, including solicitations ("Other Communications"), in addition to in its RFPs and RFAs; fifth, whether the Supreme Court's Opinion found 22 U.S.C. Section 7631(f) to be unconstitutional on its face such that the Government should be precluded from enforcing it against all domestic non-government organizations ("NGOs"), or instead whether the Supreme Court found the Policy Requirement unconstitutional as applied, meaning that the Government should be precluded from enforcing it only against the Plaintiffs in this action; and sixth, whether the Plaintiffs have met their burden in seeking a permanent injunction.

II. DISCUSSION

A. THE GOVERNMENT'S COMPLIANCE WITH THE COURT'S PRELIMINARY INJUNCTION

At the October 16, 2014 conference, there was significant argument over how long the Government has taken to comply with each successive court ruling and how successful the Government has been with its compliance. The Agencies claim they have complied with the Court's preliminary injunction by not enforcing the Policy Requirement against the Plaintiffs and by adding language to their grant contracts explicitly exempting Plaintiffs from fulfilling the Policy Requirement as a prerequisite to obtaining grant money through the Leadership Act.

All parties agree that the Government has not actually enforced the Policy Requirement against the Plaintiffs. All parties also agree that RFPs and RFAs referencing the Policy Requirement should make clear that the Plaintiffs are exempt from it. (See Dkt. Nos. 116, 117.) There is some disagreement, however, regarding whether all RFPs and RFAs actually contain the required exemption and, if so, whether they have been updated in a timely fashion. (See Dkt. Nos. 116, 117.) Plaintiffs offer numerous examples of RFPs and RFAs that the Agencies created and issued after the Supreme Court's decision affirming this Court's preliminary injunction and that do not contain any exemption. (See Dkt. No. 112, Ex. D.) Again, there is no dispute as to whether RFAs and RFPs should contain an exemption for Plaintiffs. Therefore, the Government is directed to ensure that in fact all RFPs and RFAs referencing

the Policy Requirement include an exemption for the Plaintiffs.

B. WHETHER USAID STATES PLAINTIFFS' EXEMPTION IN AN UNCONSTITUTIONALLY CONFUSING MANNER

Each Agency chose different language to express Plaintiffs' exemption from the Policy Requirement. The Plaintiffs argue that the language USAID uses is too confusing, such that it unconstitutionally deters Plaintiffs' affiliates from applying for Leadership Act grants by creating an expectation that they will inevitably be rejected for failing to meet the Policy Requirement. (See Dkt. No. 110, at 22.) USAID argues that the language is clear and it would not deter potential applicants from applying and therefore does not chill speech. (See id. 24.) The USAID language is as follows:

> III. PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (SEPTEMBER 2014)
>
> (a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care,

> treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.
>
> (b)(1) Except as provided in (b) (2), by accepting this award or any subaward, a non-governmental organization or public international organization awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking.
>
> (b)(2) The following organizations are exempt from (b)(1):
>
> > (I) the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.
> >
> > (ii) U.S. non-governmental organization recipients/subrecipients and contractors/subcontractors.
> >
> > (iii) Non-U.S. contractors and subcontractors if the contract or subcontract is for commercial items and services as defined in FAR 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

(Dkt. No. 112, Ex. E, at 60-61.)

Plaintiffs point to the language HHS uses to exempt them from the Policy Requirement as a sufficiently clear statement of the exemption. HHS's language is as follows:

> A standard term and condition of award will be included in the final notice of award; all applicants will

> be subject to a term and condition that none of the funds made available under this award may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. In addition, non-U.S. nongovernmental organizations will also be subject to an additional term and condition requiring the organization's opposition to the practices of prostitution and sex trafficking.

(Dkt. No. 112, Ex. F, at 30.)

The Court is not persuaded that the USAID language is so unclear that it could cause confusion amongst applicants such that they would think the Policy Requirement applies to them, and subsequently not apply for a grant under the Leadership Act. Though not a model of statutory clarity, the language and format used by USAID is relatively common in documents drafted by attorneys. The Court agrees with the Plaintiffs that the HHS language is clearer, but that is not to say that USAID's choice of different, even if less clear, language and drafting structure in its contracts rises to the level of a First Amendment violation. The Constitution does not command linguistic uniformity or perfect clarity in government contracts. The Court thus concludes that the USAID's wording of its exemption from the Policy Requirement is not so confusing as to chill free speech and therefore violate the Constitution.[1]

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[1] Given that the two agencies chose different ways to frame the Policy Requirement exclusion, one simpler and clearer than the other—as read by organizations directly interested in and affected by the matter—USAID would be well-advised to consider adopting the

C. WHETHER FOREIGN AFFILIATES ARE WITHIN THE SCOPE OF THE SUPREME COURT'S RULING REGARDING "AFFILIATES"

Plaintiffs argue that the Supreme Court found explicitly that a domestic NGO cannot be compelled to voice a policy view different from that of its affiliates because that circumstance would require it to face "the price of evident hypocrisy," and that this determination applies both to Plaintiffs' foreign and domestic affiliates. Alliance, 133 S. Ct. at 2331. The Government argues that the Supreme Court's discussion of affiliates relates to the Government's argument that a domestic NGO could "cabin" the effects of the Policy Requirement by creating a domestic affiliate to adopt the Policy Requirement while the domestic NGO does not, and thus the Supreme Court's discussion of affiliates applies only to domestic affiliates. The Supreme Court's characterization of the Government's position and what it held on the topic of affiliates is stated as follows:

> The Government suggests the guidelines alleviate any unconstitutional burden on the respondents' First Amendment rights by allowing them to either: (1) accept Leadership Act funding and comply with Policy Requirement, but establish affiliates to communicate contrary views on prostitution; or (2) decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds, thereby "cabin[ing]

HHS provision and thereby avoid further potential confusion and needless controversy.

> the effects" of the Policy Requirement within the scope of the federal program. Brief for Petitioners 38-39, 44-49.
>
> Neither approach is sufficient. When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program. See Rust, supra, at 197-98, 111 S. Ct. 1759. Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the recipient to express its beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy. The guidelines themselves make that clear. See 45 CFR 89.3 (allowing funding recipients to work with affiliates whose conduct is "inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking").

Alliance, 133 S. Ct. at 2331 (emphasis in original).

As the Supreme Court found, a recipient domestic NGO's right to free speech is violated when it must either comply with the Policy Requirement—an example of forced speech—or face "the price of evident hypocrisy" by taking a stance differing from that of its affiliate. Cast in this light, it is clear that whether the affiliate is foreign or domestic has no bearing on whether the recipient domestic NGO's rights would be violated by expressing contrary positions on the same matter through its different organizational components. The

nature of the affiliate is not relevant because it is not any right held by the affiliate that the Supreme Court's decision protects. Rather, it is the domestic NGO's constitutional right that the Court found is violated when the Government forces it to choose between forced speech and paying "the price of evident hypocrisy." Id. That constitutional violation is the same regardless of the nature of the affiliate.

Accordingly, the Court is persuaded that the Supreme Court's ruling bars the Defendants from requiring the Plaintiffs or any of their affiliates—foreign or domestic—to comply with the Policy Requirement.

D. WHETHER OTHER COMMUNICATIONS MUST ALSO INCLUDE AN EXEMPTION

This Court's preliminary injunction in 2006 ordered that "[d]efendants are enjoined from terminating, suspending, denying, refusing to enter into, or denying funding under, any cooperative agreement, grant, or contract [with Plaintiffs] as a means of enforcing the [Policy Requirement]." (Dkt. No. 53.) Further, the Government is enjoined from "inserting the Policy Requirement in [Plaintiff's] cooperative agreements, grants and contracts for funding under the Act, unless any such cooperative agreement, grant, or contract also states that any attempted enforcement of the Policy Requirement during the Preliminary Injunction Period will be subject to this Order." (Id.) These prohibitions were reiterated in this Court's 2008 preliminary injunction. (See Dkt. No. 83.) All parties agree that the injunction requires that the exemption be included in RFPs and RFAs, but disagree on whether Other Communications must also include an exemption for Plaintiffs.

Plaintiffs argue that the injunction already requires an exemption in Other Communications, or in the alternative, that it should, because the same reasons for an exemption in RFPs and RFAs apply to Other Communications. The Government disagrees, arguing that the injunction does not reference Other Communications nor does it say or suggest anything that would imply the injunction was meant to include them. The injunction bars the Government from denying grants based on Plaintiffs' failure to meet the Policy Requirement, and since the Other Communications are not the instruments through which funding is granted or denied, the Government claims, including the Policy Requirement without an exemption does not violate the Court's preliminary injunction. (See Dkt. No. 117, at 1.) Other Communications are not "legally binding award documents," the Government argues, and since a party can respond to them without yet meeting the Policy Requirement, they cannot violate the Plaintiffs' right to free speech by continuing to use the Policy Requirement language without an exemption. (Id.)

The purpose of the preliminary injunction was to bar the Government from chilling protected speech. The Policy Requirement chills speech where it prevents a domestic NGO or its affiliates from obtaining grants under the Leadership Act because it would not adhere to the Policy Requirement. See Alliance, 133 S. Ct. at 2328 (" [W]e have held that the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'") (internal

citations omitted). It goes without saying that an organization that does not bother applying for a Leadership Act grant based on the expectation that the Government will deny the grant for failure to meet the Policy Requirement—where the expectation rose out of the Government's own communications—has had its speech chilled. If the record indicates that speech was chilled in this manner, then the preliminary injunction has been violated.

The record indicates domestic NGOs were unsure whether to respond to these Other Communications because the communications led them to believe the Policy Requirement would bar them from obtaining grants under the Leadership Act. By letter dated May 4, 2010, Plaintiffs explained to the Government that "a recently issued solicitation for contract awards from [the CDC] includes the full unmodified [Policy Requirement]. [I]t appears that the agency is demanding that all organizations—including those protected by the injunction certify compliance with the blanket clause in order to bid for funding." (Dkt. No. 112, Ex. B.) By letter dated July 14, 2010, Plaintiffs wrote, "In the face of [the Court's injunction,] the solicitations at issue nonetheless persisted in requiring all applicants for CDC funds—including [Plaintiffs] to adopt policies opposing prostitution as a precondition of eligibility for funds." (Id.) At the October 16, 2014 conference in this matter, counsel for Plaintiffs stated "I can't tell you how many [of] [t]he 70 organizations we represent just decided not to apply for funding because the policy requirement was in place . . . What I can tell you is every time [Other

Communications are] issued, I get an email from my clients saying . . . What does this mean? Do we have to comply with it?" (Dkt. No. 110, at 14.)

The Plaintiff organizations, understandably, believe the solicitations when the solicitations unqualifiedly state an applicant must "certify compliance with [the Policy Requirement], prior to award, in a written statement." (Id.) Including the Policy Requirement in Government solicitations without any reference to the Plaintiffs' exemption easily could deter grant applications.

On the other side of the calculation, is the minimal burden to the Government of having to add the exemption language into its Other Communications. The potential for chilling speech far outweighs a minor inconvenience to the Government. Therefore the Court finds that the Government should include the exemption in its Other Communications.

E. WHETHER THE POLICY REQUIREMENT CAN STILL BE ENFORCED AGAINST NON-PLAINTIFFS

Plaintiffs also contend that the Supreme Court ruled the Policy Requirement statute itself was an unconstitutional violation of the right to free speech, not as applied but on its face. See Alliance, 133 S. Ct. at 2332 ("The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained.") Based on the Supreme Court's decision, this Court foresees no constitutional

application of the Policy Requirement as to domestic NGOs or their affiliates. For the same reasons that the Policy Requirement cannot be applied to the Plaintiffs without violating their constitutional rights, applying it to other domestic NGOs or their affiliates would likewise violate their constitutional rights.

If the Government intends to apply the Policy Requirement to any organizations whatsoever, then the Government must show cause identifying which categories of organizations and why imposing the requirement would not violate the decisions of this Court and the Supreme Court.

F. CONVERTING THE PRELIMINARY INJUNCTION TO A PERMANENT INJUNCTION

A permanent injunction requires a showing of "(1) irreparable harm and (2) actual success on the merits." See Ognibene v. Parkes, 671 F.3d 174, 182 (2d Cir. 2011). This Court has previously found irreparable harm in this case. (See Dkt. Nos. 49, 53, 83.) This Court now finds actual success on the merits, in that enforcing the Policy Requirement against a domestic NGO or its affiliates violates the First Amendment rights of the domestic NGO.

III. ORDER

For the reasons stated above, it is hereby

ORDERED that the Government is permanently enjoined from issuing any official communications—including but not limited to RFAs, RFPs, solicitations, and any guidance—that include the Policy Requirement without also including a clear exemption for Plaintiffs

and their domestic and foreign affiliates; and it is further

ORDERED that the Government is permanently enjoined from applying the Policy Requirement to Plaintiffs or their domestic and foreign affiliates; and it is further

ORDERED that the Plaintiffs' request that USAID be ordered to use different language in its grant contracts to exempt Plaintiffs from the Policy Requirement is DENIED; and it is further

ORDERED that the Plaintiffs' request that the Defendants be ordered to pay Plaintiffs' fees, costs, and expenses incurred in connection with this matter, is DENIED; and it is further

ORDERED that the Plaintiffs' request for an order imposing fines for any further violation of the Court's orders is DENIED; and it is further

ORDERED that the Government show cause why this Court should not bar it from enforcing the Policy Requirement against any organization and why allowing the Government to continue to apply the Policy Requirement would not violate the Supreme Court's decision in this matter.

SO ORDERED.

Dated: New York, New York
30 Jan. 2015

/s/ VICTOR MARRERO
VICTOR MARRERO
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ. 8209

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., DEFENDANTS

Signed: June 6, 2017

DECISION AND ORDER

VICTOR MARRERO, United States District Judge.

Plaintiffs Alliance for Open Society International, Open Society Institute, Pathfinder International, InterAction, and Global Health Council (collectively "Plaintiffs") brought this action against defendants the United States Agency for International Development, the United States Department of Health and Human Services, and the United States Centers for Disease Control and Prevention (collectively, "Defendants" or the "Government"). On January 13, 2017, Defendants moved for reconsideration of this Court's January 30, 2015 order converting the preliminary injunction issued by this Court in this matter into a permanent injunction.

("Motion," Dkt. No. 154.) For the reasons discussed further below, the Motion is DENIED.

I. BACKGROUND

In light of this case's long history before this Court, the Court assumes familiarity with the factual background and lengthy procedural developments in this litigation and addresses only briefly the relevant background below.

Plaintiffs initiated this litigation in 2005, seeking a preliminary injunction barring the Government from applying 22 U.S.C. Section 7631(f), which requires an organization, to be eligible for Government grants under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), to have a "policy explicitly opposing prostitution and sex trafficking" (the "Policy Requirement"). (See Dkt. Nos. 1, 20, 84.) This Court granted a preliminary injunction barring the Government from enforcing the Policy Requirement against Plaintiffs because enforcement would cause Plaintiffs irreparable harm and amount to coerced speech endorsing the Government's message, thereby violating their First Amendment right to free speech. (See Dkt. Nos. 49, 53, 83.) This Court's decision was affirmed by the Second Circuit and subsequently by the United States Supreme Court. See Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 224 (2d Cir. 2011), aff'd, 570 U.S. 205, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013).

By order dated January 30, 2015, this Court converted the preliminary injunction to a permanent injunction. See Alliance for Open Soc'y Int'l, Inc. v. U.S.

Agency for Int'l Dev., 106 F. Supp. 3d 355 (S.D.N.Y. 2015) ("January 2015 Order"). The January 2015 Order permanently enjoined the Government from "issuing any official communications . . . that include the Policy Requirement without also including a clear exemption for Plaintiffs and their domestic and foreign affiliates" and "applying the Policy Requirement to Plaintiffs or their domestic and foreign affiliates[.]" Id. at 363. The Court further ordered the Government to show cause why "enforcing the Policy Requirement against any organization and why allowing the Government to continue to apply the Policy Requirement would not violate the Supreme Court's decision in this matter." Id. at 363-64.

On January 13, 2017, the Government moved for reconsideration and clarification of the Court's January 2015 Order. ("Motion," Dkt. No. 153.) Although the Government notes it may appeal other aspects of the January 2015 Order, the Motion before the Court "is limited to certain aspects of the Court's ruling." ("Memorandum," Dkt. No. 154, at 2.) In particular, the Government maintains that "[t]he injunction against applying the statutory requirement to 'affiliates' is unclear, and requires the government to make determinations about who is an 'affiliate' without established criteria and based on information the government does not have." (Id.) The Government argues that this Court should therefore "clarify the standards for determining which affiliates are sufficiently clearly identified with funding recipients [such] that they are encompassed within the injunction, and clarify how the application of that standard would function under the injunction."

(Id. at 5.) The Government further contends that the injunction regarding enforcement of the Policy Requirement against Plaintiffs or domestic affiliates is unnecessary because "it is undisputed that the Government has not actually enforced the Policy Requirement against Plaintiffs or any other U.S.-based organization since the Supreme Court's 2013 decision." (Id. at 6 (citation and quotation marks omitted).)

In addition, the Government argues that the portion of the January 2015 Order directing the Government to show cause why its enforcement of the Policy Requirement against any organization would not violate the decisions by the Supreme Court and this Court "extends beyond what is necessary to prevent future violations of what the Court has ruled is required by the Constitution[.]" (Id. at 2.) Specifically, the Government argues that "the injunction's application to non-parties exceeds the Court's power, granting relief that plaintiffs never asked for and do not have standing to ask for." (Id.) Therefore, the Government requests that the Court withdraw the show cause portion of the January 2015 Order and any contemplated proceeding on the permanent injunction's application to other parties. (See id. at 8.)

The Government also requested that the Court extend the stay granted previously by this Court pending the Government's determination whether to file a motion for reconsideration. (See id. at 9-10 (citing Dkt. Nos. 122, 125, 128, 129, 131, 132, 134, 136, 138, 140, 142, 145, 147, 149, 151).) The Court granted the extension of the stay pending the resolution of the Motion. (See Dkt. Nos. 155, 159, 161, 164.)

On February 24, 2017, Plaintiffs filed their opposition to the Government's Motion, arguing that the permanent injunction, as stated in the January 2015 Order, (1) was properly granted; (2) appropriately reaches Plaintiffs' foreign affiliates; and (3) is sufficiently clear. ("Opposition," see Dkt. No. 162, at 6-13.) Plaintiffs argue that the permanent injunction was proper in light of Plaintiffs' "actual success on the merits" at every stage of litigation and because of the Government's violations of the preliminary injunction and the Supreme Court's 2013 decision for over a year by failing to communicate the exemption to the Policy Requirement in "other communications[.]" (Id. at 6.) Moreover, Plaintiffs argue that the January 2015 Order explained in detail the rationale for extending the permanent injunction to any affiliate—foreign or domestic—of a domestic NGO, and that the Government's arguments regarding foreign affiliates are simply restatements of arguments it has already presented to this Court at prior stages of litigation. (Id. at 8-9.) Nonetheless, Plaintiffs state that, although the January 2015 Order is sufficiently clear, Plaintiffs would be amenable to additional language clarifying the meaning of "'clearly identified' foreign affiliate [.]" (Id. at 11; see also id. at 11-13.) Plaintiffs further argue that, as the Order to Show Cause portion of the January 2015 Order "has no injunctive effect and does not alter the scope of the permanent injunction[,]" the Government's objections to the Order to Show Cause are misplaced and, therefore, the permanent injunction need not be modified. (Id. at 13.)

Accordingly, Plaintiffs argue that no further stay of the injunction is warranted and the Plaintiffs should "at

long last" benefit from the relief to which they are entitled. (Id. at 14.)

In its reply memorandum dated March 6, 2017, the Government reiterates that the permanent injunction was improper and is insufficiently clear. In addition, the Government argues that Plaintiffs' proposals regarding clarifying language or case-by-case review of affiliates would still fail to resolve the Government's concerns regarding the permanent injunction's application to affiliate organizations. (See Dkt. No. 163, at 2-5.)

II. DISCUSSION

Reconsideration of a previous order by the court is an "extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." In re Health Mgmt. Sys. Inc. Sec. Litig., 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000). The provision for reargument "is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple. . . . " Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012) (citation and internal quotation marks omitted). The primary grounds justifying reconsideration are "an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 729 F.3d 99, 104 (2d Cir. 2013) (quoting Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)).

Local Rule 6.3 ("Rule 6.3"), which provides for reconsideration or reargument upon motion, is intended to "'ensure the finality of decisions and to prevent the practice of a losing party . . . plugging the gaps of a lost motion with additional matters.'" S.E.C. v. Ashbury Capital Partners, No. 00 Civ. 7898, 2001 WL 604044, at *1 (S.D.N.Y. May 31, 2001) (quoting Carolco Pictures, Inc. v. Sirota, 700 F. Supp. 169, 170 (S.D.N.Y. 1988)). Under Rule 6.3, a moving party must point to controlling law or factual matters that the court overlooked in its decision on the underlying matter and that might reasonably be expected to alter the conclusion reached by the court. See Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). Rule 6.3 must be narrowly construed and strictly applied so as to "avoid duplicative rulings on previously considered issues" and prevent the rule from being used to advance theories not previously argued or "as a substitute for appealing a final judgment." Montanile v. Nat'l Broad. Co., 216 F. Supp. 2d 341, 342 (S.D.N.Y. 2002); see also Shamis v. Ambassador Factors Corp., 187 F.R.D. 148, 151 (S.D.N.Y. 1999).

The Court finds that the Government has failed to present "an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice" sufficient to warrant reconsideration of the January 2015 Order. Kolel Beth, 729 F.3d at 104.

The Motion states the Government's disagreement with the January 2015 Order's issuance of the permanent injunction and the injunction's reach to foreign af-

filiates, without citing to or presenting new facts, evidence, or intervening legal authority in support of its position. Rather, the Motion repeats almost identically many of the arguments the Government made previously in opposition to Plaintiffs' motion to convert the preliminary injunction to a permanent injunction. (Compare Dkt. No. 107, at 2, and Dkt. No. 117, at 2, with Memorandum at 6 (arguing against permanent injunction in light of Government's alleged compliance with the preliminary injunction and the Supreme Court's Order); compare Dkt. No. 107, at 2, with Memorandum at 4 (citing identical authority in support of argument that injunction should not reach foreign affiliates).)

The Court has already considered and, upon issuing the January 2015 Order, rejected these arguments. Without more, the Government presents no basis to reconsider the issuance of the permanent injunction or its application to foreign and domestic affiliates.

In addition, the Government has failed to show that the January 2015 Order's alleged lack of clarity rises to the level of "clear error or . . . manifest injustice" warranting reconsideration. Kolel Beth, 729 F.3d at 104. A permanent injunction must "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d). This Court's command "that the Government is permanently enjoined from applying the Policy Requirement to Plaintiffs or their domestic and foreign affiliates" is straightforward. Open Soc'y Int'l, 106 F. Supp. 3d at 363. The Government argues that the January 2015 Order provides insufficient guidance on how to identify affiliates covered by the injunction. An "affiliate" is "[a] corporation that

is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation." Black's Law Dictionary 69 (10th ed. 2014); see also Affiliate Definition, Oxford English Dictionaries, https://en.oxforddictionaries.com/definition/affiliate (last visited June 2, 2017) (defining the noun as "[a] person or organization officially attached to a larger body"). The class of nongovernmental organizations, or corporations, which share such a relationship with Plaintiffs and are thus affiliates for the purposes of the permanent injunction is almost certainly limited and ascertainable. Accordingly, the Court finds that the permanent injunction is "specific and definite enough to apprise [the Government] of the conduct that is being proscribed[,]" N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1352 (2d Cir. 1989), and that denying the Motion on this point would not result in "clear error or . . . manifest injustice[,]" Kolel Beth, 729 F.3d at 104. Insofar as the Government needs any additional guidance in defining "affiliate" or identifying specific entities that would be covered by the definition, Plaintiffs have offered a reasonable suggestion to develop clarifying language. The parties therefore should meet and confer in an effort to propose an agreed-upon response within thirty days of the date of this Order. The parties are directed to submit a report on the status of such discussions at that time.

The Court also finds that the Government's arguments concerning the Order to Show Cause contained in the January 2015 Order are unwarranted. The January 2015 Order noted that, "[b]ased on the Supreme

Court's ruling, this Court foresees no constitutional application of the Policy Requirement as to domestic NGOs or their affiliates." Open Soc'y Int'l, 106 F. Supp. 3d at 363. The January 2015 Order further explained:

> For the same reasons that the Policy Requirement cannot be applied to the Plaintiffs without violating their constitutional rights, applying it to other domestic NGOs or their affiliates would likewise violate their constitutional rights. If the Government intends to apply the Policy Requirement to any organizations whatsoever, then the Government must show cause identifying which categories of organizations and why imposing the requirement would not violate the decisions of this Court and the Supreme Court.

Id.

Because the Supreme Court's 2013 decision squarely presents the Policy Requirement's potential violation of the First Amendment on its face, not merely as applied, the Court finds no reason why the Order to Show Cause contained in the January 2015 Order is improper. See Alliance, 133 S. Ct. at 2332 ("The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained.") Although the Government erroneously suggests that this portion of the January 2015 Order extends the injunction to non-parties to this case, it does no such thing. Accordingly, the Court concludes that reconsideration or withdrawal of that portion of the January 2015 Order is not warranted, and further notes that

the Government has to date failed to respond to the Order to Show Cause of the January 2015 Order.

Finally, the Court granted a stay of the permanent injunction pending the Government's determination regarding whether to file a motion for reconsideration and then extended the stay pending the resolution of this Motion. Having found Plaintiffs successful on the merits in the January 2015 Order and now denying the Government's motion for reconsideration, the Court concludes that the stay of the permanent injunction is no longer necessary and should be lifted.

III. ORDER

For the reasons stated above, it is hereby

ORDERED that the Government's motion for reconsideration and clarification of this Court's January 30, 2015 order (Dkt. No. 153) is **DENIED**; and it is further

ORDERED that the stay issued pending this Court's decision on the Government's Motion is **LIFTED**.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 15-974(L), 17-2126(Con)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, PATHFINDER INTERNATIONAL INC., GLOBAL HEALTH COUNCIL, INTERACTION, PLAINTIFFS-APPELLEES

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, MARK GREEN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ROBERT R. REDFIELD, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, AND HIS SUCCESSORS, ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES 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

May 10, 2019

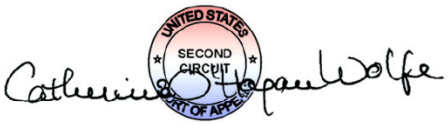
AMENDED ORDER

Appellants filed a petition for panel rehearing or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for

panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied. Judge Chester J. Straub, a member of the panel, dissents and would grant panel rehearing.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of the Court



APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 15-974(L), 17-2126(Con)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL., PLAINTIFFS-APPELLEES

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., DEFENDANTS-APPELLANTS

Filed: May 21, 2019

ORDER

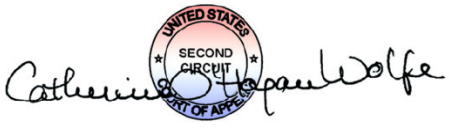
Before: CHESTER J. STRAUB, ROSEMARY S. POOLER, BARRINGTON D. PARKER, *Circuit Judges*.

Appellants move for a stay of the Court's mandate pending the Solicitor General's determination of whether to petition for a writ of *certiorari*. The motion is on consent.

IT IS HEREBY ORDERED that the motion to stay the mandate is GRANTED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of the Court



APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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05 Civ. 8209

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., DEFENDANTS

[Filed: June 29, 2006]

PRELIMINARY INJUNCTION ORDER

VICTOR MARRERO, United States District Judge.

WHEREAS, Plaintiffs Alliance for Open Society International, Inc. ("AOSI") and Open Society Institute ("OSI") filed a complaint on September 23, 2005, against Defendants the United States Agency for International Development and Andrew Natsios, in his official capacity as its Administrator (collectively, "USAID"), and subsequently filed a motion for preliminary injunction with respect to USAID on September 28, 2005;

WHEREAS, Plaintiffs AOSI and OSI filed an amended complaint on December 5, 2005, adding Pathfinder International ("Pathfinder") as a third plaintiff, and adding as defendants United States Department of

Health and Human Services and Michael O. Leavitt, in his official capacity as its Secretary, and United States Centers for Disease Control and Prevention ("CDC") and Julie Louise Gerberding in her official capacity as its Director (collectively, "HHS"; together with USAID, "Defendants");

WHEREAS, Pathfinder filed a motion for preliminary injunction with respect to HHS and USAID on December 8, 2005;

WHEREAS, the Court issued a Decision and Order (the "Order"), dated May 9, 2006, granting AOSI's and Pathfinder's motions for a preliminary injunction;

IT IS THEREFORE ORDERED that,

1. Pending entry of a final judgment on the merits of the parties' dispute in this action, or until any reconsideration or modification of the Order is authorized by the Court (the "Preliminary Injunction Period"):

Defendants are enjoined from terminating, suspending, denying, refusing to enter into, or denying funding under, any cooperative agreement, grant or contract:

(a) between USAID or HHS and AOSI or Pathfinder;

(b) between USAID or HHS and any other entity that provides funding to AOSI or Pathfinder under a cooperative agreement, grant or contract; and

(c) between AOSI or Pathfinder as a sub-recipient, sub-grantee, or sub-contractor and any entity with a cooperative agreement, grant or contract with USAID or HHS;

as a means of enforcing the provision of 22 U.S.C. § 7631(f) of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Act") requiring that, as a condition to receiving funding under the Act, AOSI and Pathfinder "have a policy explicitly opposing prostitution" (the "Policy Requirement").

2. During the Preliminary Injunction Period, Defendants are also enjoined from taking any enforcement action of the type listed in 45 C.F.R. § 74.62, or any other measure directed against AOSI or Pathfinder that is inconsistent with the Court's Order, including, but not limited to, investigating or auditing AOSI or Pathfinder regarding compliance with the Policy Requirement or inserting the Policy Requirement in AOSI's or Pathfinder's cooperative agreements, grants and contracts for funding under the Act, unless any such cooperative agreement, grant, or contract also states that any attempted enforcement of the Policy Requirement during the Preliminary Injunction Period will be subject to this Order. For purposes of this paragraph, "cooperative agreement, grant, or contract" shall include a sub-agreement, subgrant, or sub-contract.

3. During the Preliminary Injunction Period Defendants are preliminarily enjoined from requiring AOSI or Pathfinder to enforce the Policy Requirement against their United States-based sub-recipients, subgrantees and sub-contractors (the "sub-organizations") provided that Plaintiffs make a showing that any such sub-organization is factually and legally similarly situated to Plaintiffs by submitting to the Court, by letter, a brief description of such sub- organization's legal structure, history and mission, the general program activities in

which it has been engaged and the specific project(s) for which Plaintiffs have provided funding received pursuant to the Act. Defendants shall have thirty days following any such submission by Plaintiffs to respond to Plaintiffs' letter by letter to the Court presenting any arguments showing cause as to why any such sub-organization does not fall within the scope and protection of the Order.

4. Defendants are directed to inform all known recipients of grants and cooperative agreements of which Pathfinder is a sub-recipient, sub-grantee or subcontractor that, during the Preliminary Injunction Period in accordance with the Order, Pathfinder is not required to comply with the Policy Requirement. "Known recipients" shall include all entities listed on Attachment A to this Order, and any other similarly situated entity of which Defendants are aware or become aware.

Dated: New York, New York
June 26, 2006

/s/ HON. VICTOR MARRERO
HON. VICTOR MARRERO
UNITED STATES DISTRICT JUDGE

ATTACHMENT A

Agreements in which Pathfinder International is a Subgrantee to a Primary Grant Recipient

- **Subagreement under GPH A-00-01-00007-00**
  - Primary recipient: Pact Inc.
  - Term: August 30, 2005-August 29, 2006
  - Purpose: Improve Sexually Transmitted Infection (STI) and HIV/AIDS prevention in Vietnam
  - Agency: USAID
- **Subagreement under 620-A-00-05-00098-00**
  - Primary recipient: Society for Family Health, Nigeria
  - Term: June 8, 2005-June 7, 2010
  - Purpose: Improve quality of service delivery in target states in Nigeria
  - Agency: USAID
- **Subcontract under 620-A-00-04-00126-00**
  - Primary recipient: The Futures Group, LLC
  - Term: June 17, 2004-June 16, 20009
  - Purpose: Institutional capacity building and education in HIV/AIDS prevention and reproductive health advocacy in Nigeria
  - Agency: USAID

- **Subagreement under GPH-A-00-02-001-00 and 623-A-00-03-00069-00**
  - Primary recipient: Engenderhealth
  - Term: July 1, 2005-June 30, 2006
  - Purpose: Prevent mother to child transmission in three communities near Arusha, Tanzania
  - Agency: USAID
- **Subagreement under GPO-A-00-05-00016-00**
  - Primary recipient: Christian Children's Fund, Kenya
  - Term: March 18, 2005-September 30, 2006
  - Purpose: Support orphans and other Kenyan children affected by HIV/AIDS
  - Agency: USAID

APPENDIX G

1. 22 U.S.C. 2151b-2(a)-(c) provides:

Assistance to combat HIV/AIDS

(a) Finding

Congress recognizes that the alarming spread of HIV/AIDS in countries in sub-Saharan Africa, the Caribbean, Central Asia, Eastern Europe, Latin America and other developing countries is a major global health, national security, development, and humanitarian crisis.

(b) Policy

(1) Objectives

It is a major objective of the foreign assistance program of the United States to provide assistance for the prevention and treatment of HIV/AIDS and the care of those affected by the disease. It is the policy objective of the United States, by 2013, to—

(A) assist partner countries to—

(i) prevent 12,000,000 new HIV infections worldwide;

(ii) support—

(I) the increase in the number of individuals with HIV/AIDS receiving antiretroviral treatment above the goal established under section 7672(a)(3)[1] of this title and increased

[1] See References in Text note below.

pursuant to paragraphs (1) through (3) of section 7673(d)[1] of this title; and

(II) additional treatment through coordinated multilateral efforts;

(iii) support care for 12,000,000 individuals infected with or affected by HIV/AIDS, including 5,000,000 orphans and vulnerable children affected by HIV/AIDS, with an emphasis on promoting a comprehensive, coordinated system of services to be integrated throughout the continuum of care;

(iv) provide at least 80 percent of the target population with access to counseling, testing, and treatment to prevent the transmission of HIV from mother-to-child;

(v) provide care and treatment services to children with HIV in proportion to their percentage within the HIV-infected population of a given partner country; and

(vi) train and support retention of health care professionals, paraprofessionals, and community health workers in HIV/AIDS prevention, treatment, and care, with the target of providing such training to at least 140,000 new health care professionals and paraprofessionals with an emphasis on training and in country deployment of critically needed doctors and nurses;

(B) strengthen the capacity to deliver primary health care in developing countries, especially in sub-Saharan Africa;

(C) support and help countries in their efforts to achieve staffing levels of at least 2.3 doctors, nurses, and midwives per 1,000 population, as called for by the World Health Organization; and

(D) help partner countries to develop independent, sustainable HIV/AIDS programs.

(2) Coordinated global strategy

The United States and other countries with the sufficient capacity should provide assistance to countries in sub-Saharan Africa, the Caribbean, Central Asia, Eastern Europe, and Latin America, and other countries and regions confronting HIV/AIDS epidemics in a coordinated global strategy to help address generalized and concentrated epidemics through HIV/AIDS prevention, treatment, care, monitoring and evaluation, and related activities.

(3) Priorities

The United States Government's response to the global HIV/AIDS pandemic and the Government's efforts to help countries assume leadership of sustainable campaigns to combat their local epidemics should place high priority on—

(A) the prevention of the transmission of HIV;

(B) moving toward universal access to HIV/AIDS prevention counseling and services;

(C) the inclusion of cost sharing assurances that meet the requirements under section 2151h of this title; and

(D) the inclusion of transition strategies to ensure sustainability of such programs and activities, including health care systems, under other international donor support, or budget support by respective foreign governments.

(c) Authorization

(1) In general

Consistent with section 2151b(c) of this title, the President is authorized to furnish assistance, on such terms and conditions as the President may determine, for HIV/AIDS, including to prevent, treat, and monitor HIV/AIDS, and carry out related activities, in countries in sub-Saharan Africa, the Caribbean, Central Asia, Eastern Europe, Latin America, and other countries and areas, particularly with respect to refugee populations or those in postconflict settings in such countries and areas with significant or increasing HIV incidence rates.

(2) Role of NGOs

It is the sense of Congress that the President should provide an appropriate level of assistance under paragraph (1) through nongovernmental organizations (including faith-based and community-based organizations) in countries in sub-Saharan Africa, the Caribbean, Central Asia, Eastern Europe, Latin America, and other countries and areas affected by the HIV/AIDS pandemic, particularly with respect

to refugee populations or those in post-conflict settings in such countries and areas with significant or increasing HIV incidence rates..[2]

(3) Coordination of assistance efforts

The President shall coordinate the provision of assistance under paragraph (1) with the provision of related assistance by the Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Children's Fund (UNICEF), the World Health Organization (WHO), the United Nations Development Programme (UNDP), the Global Fund to Fight AIDS, Tuberculosis and Malaria and other appropriate international organizations (such as the International Bank for Reconstruction and Development), relevant regional multilateral development institutions, national, state, and local governments of partner countries, other international actors,,[2] appropriate governmental and nongovernmental organizations, and relevant executive branch agencies within the framework of the principles of the Three Ones.

2. 22 U.S.C. 7601 provides:

Findings

Congress makes the following findings:

(1) During the last 20 years, HIV/AIDS has assumed pandemic proportions, spreading from the most severely affected regions, sub-Saharan Africa and the Caribbean, to all corners of the world, and

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[2] So in original.

leaving an unprecedented path of death and devastation.

(2) According to the Joint United Nations Programme on HIV/AIDS (UNAIDS), more than 65,000,000 individuals worldwide have been infected with HIV since the epidemic began, more than 25,000,000 of these individuals have lost their lives to the disease, and more than 14,000,000 children have been orphaned by the disease. HIV/AIDS is the fourth-highest cause of death in the world.

(3)(A) At the end of 2002, an estimated 42,000,000 individuals were infected with HIV or living with AIDS, of which more than 75 percent live in Africa or the Caribbean. Of these individuals, more than 3,200,000 were children under the age of 15 and more than 19,200,000 were women.

(B) Women are four times more vulnerable to infection than are men and are becoming infected at increasingly high rates, in part because many societies do not provide poor women and young girls with the social, legal, and cultural protections against high risk activities that expose them to HIV/AIDS.

(C) Women and children who are refugees or are internally displaced persons are especially vulnerable to sexual exploitation and violence, thereby increasing the possibility of HIV infection.

(4) As the leading cause of death in sub-Saharan Africa, AIDS has killed more than 19,400,000 individuals (more than 3 times the number of AIDS deaths in the rest of the world) and will claim the lives of one-

quarter of the population, mostly adults, in the next decade.

(5) An estimated 2,000,000 individuals in Latin America and the Caribbean and another 7,100,000 individuals in Asia and the Pacific region are infected with HIV or living with AIDS. Infection rates are rising alarmingly in Eastern Europe (especially in the Russian Federation), Central Asia, and China.

(6) HIV/AIDS threatens personal security by affecting the health, lifespan, and productive capacity of the individual and the social cohesion and economic well-being of the family.

(7) HIV/AIDS undermines the economic security of a country and individual businesses in that country by weakening the productivity and longevity of the labor force across a broad array of economic sectors and by reducing the potential for economic growth over the long term.

(8) HIV/AIDS destabilizes communities by striking at the most mobile and educated members of society, many of whom are responsible for security at the local level and governance at the national and subnational levels as well as many teachers, health care personnel, and other community workers vital to community development and the effort to combat HIV/AIDS. In some countries the overwhelming challenges of the HIV/AIDS epidemic are accelerating the outward migration of critically important health care professionals.

(9) HIV/AIDS weakens the defenses of countries severely affected by the HIV/AIDS crisis through high

infection rates among members of their military forces and voluntary peacekeeping personnel. According to UNAIDS, in sub-Saharan Africa, many military forces have infection rates as much as five times that of the civilian population.

(10) HIV/AIDS poses a serious security issue for the international community by—

(A) increasing the potential for political instability and economic devastation, particularly in those countries and regions most severely affected by the disease;

(B) decreasing the capacity to resolve conflicts through the introduction of peacekeeping forces because the environments into which these forces are introduced pose a high risk for the spread of HIV/AIDS; and

(C) increasing the vulnerability of local populations to HIV/AIDS in conflict zones from peacekeeping troops with HIV infection rates significantly higher than civilian populations.

(11) The devastation wrought by the HIV/AIDS pandemic is compounded by the prevalence of tuberculosis and malaria, particularly in developing countries where the poorest and most vulnerable members of society, including women, children, and those individuals living with HIV/AIDS, become infected. According to the World Health Organization (WHO), HIV/AIDS, tuberculosis, and malaria accounted for more than 5,700,000 deaths in 2001 and caused debilitating illnesses in millions more.

(12) Together, HIV/AIDS, tuberculosis, malaria and related diseases are undermining agricultural production throughout Africa. According to the United Nations Food and Agricultural Organization, 7,000,000 agricultural workers throughout 25 African countries have died from AIDS since 1985. Countries with poorly developed agricultural systems, which already face chronic food shortages, are the hardest hit, particularly in sub-Saharan Africa, where high HIV prevalence rates are compounding the risk of starvation for an estimated 14,400,000 people.

(13) Tuberculosis is the cause of death for one out of every three people with AIDS worldwide and is a highly communicable disease. HIV infection is the leading threat to tuberculosis control. Because HIV infection so severely weakens the immune system, individuals with HIV and latent tuberculosis infection have a 100 times greater risk of developing active tuberculosis diseases thereby increasing the risk of spreading tuberculosis to others. Tuberculosis, in turn, accelerates the onset of AIDS in individuals infected with HIV.

(14) Malaria, the most deadly of all tropical parasitic diseases, has been undergoing a dramatic resurgence in recent years due to increasing resistance of the malaria parasite to inexpensive and effective drugs. At the same time, increasing resistance of mosquitoes to standard insecticides makes control of transmission difficult to achieve. The World Health Organization estimates that between 300,000,000 and 500,000,000 new cases of malaria occur each year, and annual deaths from the disease number between

2,000,000 and 3,000,000. Persons infected with HIV are particularly vulnerable to the malaria parasite. The spread of HIV infection contributes to the difficulties of controlling resurgence of the drug resistant malaria parasite.

(15) HIV/AIDS is first and foremost a health problem. Successful strategies to stem the spread of the HIV/AIDS pandemic will require clinical medical interventions, the strengthening of health care delivery systems and infrastructure, and determined national leadership and increased budgetary allocations for the health sector in countries affected by the epidemic as well as measures to address the social and behavioral causes of the problem and its impact on families, communities, and societal sectors.

(16) Basic interventions to prevent new HIV infections and to bring care and treatment to people living with AIDS, such as voluntary counseling and testing and mother-to-child transmission programs, are achieving meaningful results and are cost-effective. The challenge is to expand these interventions from a pilot program basis to a national basis in a coherent and sustainable manner.

(17) Appropriate treatment of individuals with HIV/AIDS can prolong the lives of such individuals, preserve their families, prevent children from becoming orphans, and increase productivity of such individuals by allowing them to lead active lives and reduce the need for costly hospitalization for treatment of opportunistic infections caused by HIV.

(18) Nongovernmental organizations, including faith-based organizations, with experience in health care and HIV/AIDS counseling, have proven effective in combating the HIV/AIDS pandemic and can be a resource in assisting indigenous organizations in severely affected countries in their efforts to provide treatment and care for individuals infected with HIV/AIDS.

(19) Faith-based organizations are making an important contribution to HIV prevention and AIDS treatment programs around the world. Successful HIV prevention programs in Uganda, Jamaica, and elsewhere have included local churches and faith-based groups in efforts to promote behavior changes to prevent HIV, to reduce stigma associated with HIV infection, to treat those afflicted with the disease, and to care for orphans. The Catholic Church alone currently cares for one in four people being treated for AIDS worldwide. Faith-based organizations possess infrastructure, experience, and knowledge that will be needed to carry out these programs in the future and should be an integral part of United States efforts.

(20)(A) Uganda has experienced the most significant decline in HIV rates of any country in Africa, including a decrease among pregnant women from 20.6 percent in 1991 to 7.9 percent in 2000.

(B) Uganda made this remarkable turnaround because President Yoweri Museveni spoke out early, breaking long-standing cultural taboos, and changed widespread perceptions about the disease. His leadership stands as a model for ways political leaders in

Africa and other developing countries can mobilize their nations, including civic organizations, professional associations, religious institutions, business and labor to combat HIV/AIDS.

(C) Uganda's successful AIDS treatment and prevention program is referred to as the ABC model: "Abstain, Be faithful, use Condoms", in order of priority. Jamaica, Zambia, Ethiopia and Senegal have also successfully used the ABC model. Beginning in 1986, Uganda brought about a fundamental change in sexual behavior by developing a low-cost program with the message: "Stop having multiple partners. Be faithful. Teenagers, wait until you are married before you begin sex.".

(D) By 1995, 95 percent of Ugandans were reporting either one or zero sexual partners in the past year, and the proportion of sexually active youth declined significantly from the late 1980s to the mid-1990s. The greatest percentage decline in HIV infections and the greatest degree of behavioral change occurred in those 15 to 19 years old. Uganda's success shows that behavior change, through the use of the ABC model, is a very successful way to prevent the spread of HIV.

(21) The magnitude and scope of the HIV/AIDS crisis demands a comprehensive, long-term, international response focused upon addressing the causes, reducing the spread, and ameliorating the consequences of the HIV/AIDS pandemic, including—

(A) prevention and education, care and treatment, basic and applied research, and training of

health care workers, particularly at the community and provincial levels, and other community workers and leaders needed to cope with the range of consequences of the HIV/AIDS crisis;

(B) development of health care infrastructure and delivery systems through cooperative and coordinated public efforts and public and private partnerships;

(C) development and implementation of national and community-based multisector strategies that address the impact of HIV/AIDS on the individual, family, community, and nation and increase the participation of at-risk populations in programs designed to encourage behavioral and social change and reduce the stigma associated with HIV/AIDS; and

(D) coordination of efforts between international organizations such as the Global Fund to Fight AIDS, Tuberculosis and Malaria, the Joint United Nations Programme on HIV/AIDS (UNAIDS), the World Health Organization (WHO), national governments, and private sector organizations, including faith-based organizations.

(22) The United States has the capacity to lead and enhance the effectiveness of the international community's response by—

(A) providing substantial financial resources, technical expertise, and training, particularly of health care personnel and community workers and leaders;

(B) promoting vaccine and microbicide research and the development of new treatment protocols in the public and commercial pharmaceutical research sectors;

(C) making available pharmaceuticals and diagnostics for HIV/AIDS therapy;

(D) encouraging governments and faith-based and community-based organizations to adopt policies that treat HIV/AIDS as a multisectoral public health problem affecting not only health but other areas such as agriculture, education, the economy, the family and society, and assisting them to develop and implement programs corresponding to these needs;

(E) promoting healthy lifestyles, including abstinence, delaying sexual debut, monogamy, marriage, faithfulness, use of condoms, and avoiding substance abuse; and

(F) encouraging active involvement of the private sector, including businesses, pharmaceutical and biotechnology companies, the medical and scientific communities, charitable foundations, private and voluntary organizations and nongovernmental organizations, faith-based organizations, community-based organizations, and other nonprofit entities.

(23) 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 indi-

viduals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic. One in nine South Africans is living with AIDS, and sexual assault is rampant, at a victimization rate of one in three women. Meanwhile in Cambodia, as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast Asia. Victims of coercive sexual encounters do not get to make choices about their sexual activities.

(24) Strong coordination must exist among the various agencies of the United States to ensure effective and efficient use of financial and technical resources within the United States Government with respect to the provision of international HIV/AIDS assistance.

(25) In his address to Congress on January 28, 2003, the President announced the Administration's intention to embark on a five-year emergency plan for AIDS relief, to confront HIV/AIDS with the goals of preventing 7,000,000 new HIV/AIDS infections, treating at least 2,000,000 people with life-extending drugs, and providing humane care for millions of people suffering from HIV/AIDS, and for children orphaned by HIV/AIDS.

(26) In this address to Congress, the President stated the following: "Today, on the continent of Africa, nearly 30,000,000 people have the AIDS virus —including 3,000,000 children under the age of 15. There are whole countries in Africa where more than

one-third of the adult population carries the infection. More than 4,000,000 require immediate drug treatment. Yet across that continent, only 50,000 AIDS victims—only 50,000—are receiving the medicine they need.".

(27) Furthermore, the President focused on care and treatment of HIV/AIDS in his address to Congress, stating the following: "Because the AIDS diagnosis is considered a death sentence, many do not seek treatment. Almost all who do are turned away. A doctor in rural South Africa describes his frustration. He says, 'We have no medicines. Many hospitals tell people, you've got AIDS, we can't help you. Go home and die.' In an age of miraculous medicines, no person should have to hear those words. AIDS can be prevented. Anti-retroviral drugs can extend life for many years * * * Ladies and gentlemen, seldom has history offered a greater opportunity to do so much for so many.".

(28) Finally, the President stated that "[w]e have confronted, and will continue to confront, HIV/AIDS in our own country", proposing now that the United States should lead the world in sparing innocent people from a plague of nature, and asking Congress "to commit $15,000,000,000 over the next five years, including nearly $10,000,000,000 in new money, to turn the tide against AIDS in the most afflicted nations of Africa and the Caribbean".

(29) On May 27, 2003, the President signed this chapter into law, launching the largest international public health program of its kind ever created.

(30) Between 2003 and 2008, the United States, through the President's Emergency Plan for AIDS Relief (PEPFAR) and in conjunction with other bilateral programs and the multilateral Global Fund has helped to—

(A) provide antiretroviral therapy for over 1,900,000 people;

(B) ensure that over 150,000 infants, most of whom would have likely been infected with HIV during pregnancy or childbirth, were not infected; and

(C) provide palliative care and HIV prevention assistance to millions of other people.

(31) While United States leadership in the battles against HIV/AIDS, tuberculosis, and malaria has had an enormous impact, these diseases continue to take a terrible toll on the human race.

(32) According to the 2007 AIDS Epidemic Update of the Joint United Nations Programme on HIV/AIDS (UNAIDS)—

(A) an estimated 2,100,000 people died of AIDS-related causes in 2007; and

(B) an estimated 2,500,000 people were newly infected with HIV during that year.

(33) According to the World Health Organization, malaria kills more than 1,000,000 people per year, 70 percent of whom are children under 5 years of age.

(34) According to the World Health Organization, 1/3 of the world's population is infected with the tuberculosis bacterium, and tuberculosis is 1 of the greatest infectious causes of death of adults worldwide, killing 1,600,000 people per year.

(35) Efforts to promote abstinence, fidelity, the correct and consistent use of condoms, the delay of sexual debut, and the reduction of concurrent sexual partners represent important elements of strategies to prevent the transmission of HIV/AIDS.

(36) According to UNAIDS—

(A) women and girls make up nearly 60 percent of persons in sub-Saharan Africa who are HIV positive;

(B) women and girls are more biologically, economically, and socially vulnerable to HIV infection; and

(C) gender issues are critical components in the effort to prevent HIV/AIDS and to care for those affected by the disease.

(37) Children who have lost a parent to HIV/AIDS, who are otherwise directly affected by the disease, or who live in areas of high HIV prevalence may be vulnerable to the disease or its socioeconomic effects.

(38) Lack of health capacity, including insufficient personnel and inadequate infrastructure, in sub-Saharan Africa and other regions of the world is a critical barrier that limits the effectiveness of efforts to combat HIV/AIDS, tuberculosis, and malaria, and to achieve other global health goals.

(39) On March 30, 2007, the Institute of Medicine of the National Academies released a report entitled "PEPFAR Implementation: Progress and Promise", which found that budget allocations setting percentage levels for spending on prevention, care, and treatment and for certain subsets of activities within the prevention category—

(A) have "adversely affected implementation of the U.S. Global AIDS Initiative";

(B) have inhibited comprehensive, integrated, evidence based approaches;

(C) "have been counterproductive";

(D) "may have been helpful initially in ensuring a balance of attention to activities within the 4 categories of prevention, treatment, care, and orphans and vulnerable children";

(E) "have also limited PEPFAR's ability to tailor its activities in each country to the local epidemic and to coordinate with the level of activities in the countries' national plans"; and

(F) should be removed by Congress and replaced with more appropriate mechanisms that—

(i) "ensure accountability for results from Country Teams to the U.S. Global AIDS Coordinator and to Congress"; and

(ii) "ensure that spending is directly linked to and commensurate with necessary ef-

forts to achieve both country and overall performance targets for prevention, treatment, care, and orphans and vulnerable children".

(40) The United States Government has endorsed the principles of harmonization in coordinating efforts to combat HIV/AIDS commonly referred to as the "Three Ones", which includes—

(A) 1 agreed HIV/AIDS action framework that provides the basis for coordination of the work of all partners;

(B) 1 national HIV/AIDS coordinating authority, with a broadbased multisectoral mandate; and

(C) 1 agreed HIV/AIDS country-level monitoring and evaluating system.

(41) In the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, of April 26-27, 2001 (referred to in this chapter as the "Abuja Declaration"), the Heads of State and Government of the Organization of African Unity (OAU)—

(A) declared that they would "place the fight against HIV/AIDS at the forefront and as the highest priority issue in our respective national development plans";

(B) committed "TO TAKE PERSONAL RESPONSIBILITY AND PROVIDE LEADERSHIP for the activities of the National AIDS Commissions/Councils";

(C) resolved "to lead from the front the battle against HIV/AIDS, Tuberculosis and Other Related Infectious Diseases by personally ensuring that such bodies were properly convened in mobilizing our societies as a whole and providing focus for unified national policymaking and programme implementation, ensuring coordination of all sectors at all levels with a gender perspective and respect for human rights, particularly to ensure equal rights for people living with HIV/AIDS"; and

(D) pledged "to set a target of allocating at least 15% of our annual budget to the improvement of the health sector".

3. 22 U.S.C. 7611(a) provides:

Development of a comprehensive, five-year, global strategy

(a) Strategy

The President shall establish a comprehensive, integrated, 5-year strategy to expand and improve efforts to combat global HIV/AIDS. This strategy shall—

(1) further strengthen the capability of the United States to be an effective leader of the international campaign against this disease and strengthen the capacities of nations experiencing HIV/AIDS epidemics to combat this disease;

(2) maintain sufficient flexibility and remain responsive to—

(A) changes in the epidemic;

(B) challenges facing partner countries in developing and implementing an effective national response; and

(C) evidence-based improvements and innovations in the prevention, care, and treatment of HIV/AIDS;

(3) situate United States efforts to combat HIV/AIDS, tuberculosis, and malaria within the broader United States global health and development agenda, establishing a roadmap to link investments in specific disease programs to the broader goals of strengthening health systems and infrastructure and to integrate and coordinate HIV/AIDS, tuberculosis, or malaria programs with other health or development programs, as appropriate;

(4) provide a plan to—

(A) prevent 12,000,000 new HIV infections worldwide;

(B) support—

(i) the increase in the number of individuals with HIV/AIDS receiving antiretroviral treatment above the goal established under section 7672(a)(3) of this title and increased pursuant to paragraphs (1) through (3) of section 7673(d) of this title; and

(ii) additional treatment through coordinated multilateral efforts;

(C) support care for 12,000,000 individuals infected with or affected by HIV/AIDS, including

5,000,000 orphans and vulnerable children affected by HIV/AIDS, with an emphasis on promoting a comprehensive, coordinated system of services to be integrated throughout the continuum of care;

(D) help partner countries in the effort to achieve goals of 80 percent access to counseling, testing, and treatment to prevent the transmission of HIV from mother to child, emphasizing a continuum of care model;

(E) help partner countries to provide care and treatment services to children with HIV in proportion to their percentage within the HIV-infected population in each country;

(F) promote preservice training for health professionals designed to strengthen the capacity of institutions to develop and implement policies for training health workers to combat HIV/AIDS, tuberculosis, and malaria;

(G) equip teachers with skills needed for HIV/AIDS prevention and support for persons with, or affected by, HIV/AIDS;

(H) provide and share best practices for combating HIV/AIDS with health professionals;

(I) promote pediatric HIV/AIDS training for physicians, nurses, and other health care workers, through public-private partnerships if possible, including through the designation, if appropriate, of centers of excellence for training in pediatric

HIV/AIDS prevention, care, and treatment in partner countries; and

(J) help partner countries to train and support retention of health care professionals and paraprofessionals, with the target of training and retaining at least 140,000 new health care professionals and paraprofessionals with an emphasis on training and in country deployment of critically needed doctors and nurses and to strengthen capacities in developing countries, especially in sub-Saharan Africa, to deliver primary health care with the objective of helping countries achieve staffing levels of at least 2.3 doctors, nurses, and midwives per 1,000 population, as called for by the World Health Organization;

(5) include multisectoral approaches and specific strategies to treat individuals infected with HIV/AIDS and to prevent the further transmission of HIV infections, with a particular focus on the needs of families with children (including the prevention of mother-to-child transmission), women, young people, orphans, and vulnerable children;

(6) establish a timetable with annual global treatment targets with country-level benchmarks for antiretroviral treatment;

(7) expand the integration of timely and relevant research within the prevention, care, and treatment of HIV/AIDS;

(8) include a plan for program monitoring, operations research, and impact evaluation and for the

dissemination of a best practices report to highlight findings;

(9) support the in-country or intra-regional training, preferably through public-private partnerships, of scientific investigators, managers, and other staff who are capable of promoting the systematic uptake of clinical research findings and other evidence-based interventions into routine practice, with the goal of improving the quality, effectiveness, and local leadership of HIV/AIDS health care;

(10) expand and accelerate research on and development of HIV/AIDS prevention methods for women, including enhancing inter-agency collaboration, staffing, and organizational infrastructure dedicated to microbicide research;

(11) provide for consultation with local leaders and officials to develop prevention strategies and programs that are tailored to the unique needs of each country and community and targeted particularly toward those most at risk of acquiring HIV infection;

(12) make the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts by—

(A) promoting abstinence from sexual activity and encouraging monogamy and faithfulness;

(B) encouraging the correct and consistent use of male and female condoms and increasing the availability of, and access to, these commodities;

(C) promoting the delay of sexual debut and the reduction of multiple concurrent sexual partners;

(D) promoting education for discordant couples (where an individual is infected with HIV and the other individual is uninfected or whose status is unknown) about safer sex practices;

(E) promoting voluntary counseling and testing, addiction therapy, and other prevention and treatment tools for illicit injection drug users and other substance abusers;

(F) educating men and boys about the risks of procuring sex commercially and about the need to end violent behavior toward women and girls;

(G) supporting partner country and community efforts to identify and address social, economic, or cultural factors, such as migration, urbanization, conflict, gender-based violence, lack of empowerment for women, and transportation patterns, which directly contribute to the transmission of HIV;

(H) supporting comprehensive programs to promote alternative livelihoods, safety, and social reintegration strategies for commercial sex workers and their families;

(I) promoting cooperation with law enforcement to prosecute offenders of trafficking, rape, and sexual assault crimes with the goal of eliminating such crimes; and

(J) working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children;

(13) include programs to reduce the transmission of HIV, particularly addressing the heightened vulnerabilities of women and girls to HIV in many countries; and

(14) support other important means of preventing or reducing the transmission of HIV, including—

(A) medical male circumcision;

(B) the maintenance of a safe blood supply;

(C) promoting universal precautions in formal and informal health care settings;

(D) educating the public to recognize and to avoid risks to contract HIV through blood exposures during formal and informal health care and cosmetic services;

(E) investigating suspected nosocomial infections to identify and stop further nosocomial transmission; and

(F) other mechanisms to reduce the transmission of HIV;

(15) increase support for prevention of mother-to-child transmission;

(16) build capacity within the public health sector of developing countries by improving health systems and public health infrastructure and developing indicators to measure changes in broader public health sector capabilities;

(17) increase the coordination of HIV/AIDS programs with development programs;

(18) provide a framework for expanding or developing existing or new country or regional programs, including—

(A) drafting compacts or other agreements, as appropriate;

(B) establishing criteria and objectives for such compacts and agreements; and

(C) promoting sustainability;

(19) provide a plan for national and regional priorities for resource distribution and a global investment plan by region;

(20) provide a plan to address the immediate and ongoing needs of women and girls, which—

(A) addresses the vulnerabilities that contribute to their elevated risk of infection;

(B) includes specific goals and targets to address these factors;

(C) provides clear guidance to field missions to integrate gender across prevention, care, and treatment programs;

(D) sets forth gender-specific indicators to monitor progress on outcomes and impacts of gender programs;

(E) supports efforts in countries in which women or orphans lack inheritance rights and

other fundamental protections to promote the passage, implementation, and enforcement of such laws;

(F) supports life skills training, especially among women and girls, with the goal of reducing vulnerabilities to HIV/AIDS;

(G) addresses and prevents gender-based violence; and

(H) addresses the posttraumatic and psychosocial consequences and provides postexposure prophylaxis protecting against HIV infection to victims of gender-based violence and rape;

(21) provide a plan to—

(A) determine the local factors that may put men and boys at elevated risk of contracting or transmitting HIV;

(B) address male norms and behaviors to reduce these risks, including by reducing alcohol abuse;

(C) promote responsible male behavior; and

(D) promote male participation and leadership at the community level in efforts to promote HIV prevention, reduce stigma, promote participation in voluntary counseling and testing, and provide care, treatment, and support for persons with HIV/AIDS;

(22) provide a plan to address the vulnerabilities and needs of orphans and children who are vulnerable to, or affected by, HIV/AIDS;

(23) encourage partner countries to develop health care curricula and promote access to training tailored to individuals receiving services through, or exiting from, existing programs geared to orphans and vulnerable children;

(24) provide a framework to work with international actors and partner countries toward universal access to HIV/AIDS prevention, treatment, and care programs, recognizing that prevention is of particular importance;

(25) enhance the coordination of United States bilateral efforts to combat global HIV/AIDS with other major public and private entities;

(26) enhance the attention given to the national strategic HIV/AIDS plans of countries receiving United States assistance by—

(A) reviewing the planning and programmatic decisions associated with that assistance; and

(B) helping to strengthen such national strategies, if necessary;

(27) support activities described in the Global Plan to Stop TB, including—

(A) expanding and enhancing the coverage of the Directly Observed Treatment Short-course (DOTS) in order to treat individuals infected with tuberculosis and HIV, including multi-drug resistant or extensively drug resistant tuberculosis; and

(B) improving coordination and integration of HIV/AIDS and tuberculosis programming;

(28) ensure coordination between the Global AIDS Coordinator and the Malaria Coordinator and address issues of comorbidity between HIV/AIDS and malaria; and

(29) include a longer term estimate of the projected resource needs, progress toward greater sustainability and country ownership of HIV/AIDS programs, and the anticipated role of the United States in the global effort to combat HIV/AIDS during the 10-year period beginning on October 1, 2013.

4. 22 U.S.C. 7621 provides:

Sense of Congress on public-private partnerships

(a) Findings

Congress makes the following findings:

(1) Innovative partnerships between governments and organizations in the private sector (including foundations, universities, corporations, faith-based and community-based organizations, and other nongovernmental organizations) have proliferated in recent years, particularly in the area of health.

(2) Public-private sector partnerships multiply local and international capacities to strengthen the delivery of health services in developing countries and to accelerate research for vaccines and other

pharmaceutical products that are essential to combat infectious diseases decimating the populations of these countries.

(3) These partnerships maximize the unique capabilities of each sector while combining financial and other resources, scientific knowledge, and expertise toward common goals which neither the public nor the private sector can achieve alone.

(4) Sustaining existing public-private partnerships and building new ones are critical to the success of the international community's efforts to combat HIV/AIDS and other infectious diseases around the globe.

(b) Sense of Congress

It is the sense of Congress that—

(1) the sustainment and promotion of public-private partnerships should be a priority element of the strategy pursued by the United States to combat the HIV/AIDS pandemic and other global health crises; and

(2) the United States should systematically track the evolution of these partnerships and work with others in the public and private sector to profile and build upon those models that are most effective.

5. 22 U.S.C. 7631(e)-(f) provides:

Assistance to combat HIV/AIDS

(e) Limitation

No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(f) Limitation

No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

6. 45 C.F.R. 89.3 provides:

Organizational integrity of recipients.

A recipient must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the recipient's opposition

to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children ("restricted activities"). A recipient will be found to have objective integrity and independence from such an organization if:

(a) The affiliated organization receives no transfer of Leadership Act HIV/AIDS funds, and Leadership Act HIV/AIDS funds do not subsidize restricted activities; and

(b) The recipient is, to the extent practicable in the circumstances, separate from the affiliated organization. Mere bookkeeping separation of Leadership Act HIV/AIDS funds from other funds is not sufficient. HHS will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient separation exists. The presence or absence of any one or more factors relating to legal, physical, and financial separation will not be determinative. Factors relevant to this determination shall include, but not be limited to, the following:

(1) Whether the organization is a legally separate entity;

(2) The existence of separate personnel or other allocation of personnel that maintains adequate separation of the activities of the affiliated organization from the recipient;

(3) The existence of separate accounting and timekeeping records;

(4) The degree of separation of the recipient's facilities from facilities in which restricted activities occur; and

(5) The extent to which signs and other forms of identification that distinguish the recipient from the affiliated organization are present.

7. 79 Fed. Reg. 55,367 (Sept. 16, 2014) provides:

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 89

Interim Guidance for Implementation of the Organizational Integrity of Entities Implementing Programs and Activities Under the Leadership Act

AGENCY: Office of Global Affairs (OGA), Department of Health and Human Services (HHS).

ACTION: Notice of interim guidance.

SUMMARY: This document provides interim guidance on the implementation of section 301(f) of the Leadership Act in light of the Supreme Court's decision in *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013) ("*AOSI decision*"). While HHS awarding agencies have implemented the *AOSI* decision since its issuance, this document serves to clarify HHS policy. HHS is also currently developing an amendment to its regulations listed under "Organizational Integrity of Entities Implementing Programs and Activities under the Leadership Act" to ensure consistency with the decision. HHS has been coordinating its implementation activities with the Department of

State, Office of the Global AIDS Coordinator (OGAC) and with the United States Agency for International Development (USAID). While issued through OGA, this guidance represents the views of the various agencies within HHS that issue awards with Leadership Act HIV/AIDS funds, namely, the Centers for Disease Control and Prevention, the National Institutes of Health, and the Health Resources and Services Administration.

DATES: Effective September 16, 2014.

FOR FURTHER INFORMATION CONTACT: Erin Eckstein, Office of Global Affairs, Department of Health and Human Services, Room 639H, 200 Independence Avenue SW., Washington, DC 20201, Telephone (202) 205-3569.

SUPPLEMENTARY INFORMATION:

Background

Section 301(f) of the Leadership Act, subject to limited exceptions, prohibits the use of Leadership Act HIV/AIDS funds "to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." Interpreting the policy requirement, in 2010, HHS provided, through rulemaking, that, unless exempted through statute, contractors, grantees, applicants or awardees who receive Leadership Act funds for HIV/AIDS programs directly

or indirectly from HHS must "agree that they are opposed to the practices of prostitution and sex trafficking." 45 CFR 89.1(b)[1].

In 2005, section 301(f) was challenged as unconstitutional, and in 2013, the Supreme Court affirmed a Second Circuit decision that upheld a lower court's preliminary injunction prohibiting the application of the policy requirement to domestic (United States) organizations, finding that such a condition of federal funding violates the First Amendment. Consistent with the Supreme Court's decision, the requirement to have a specific policy as stated in section 301(f) no longer applies to U.S. organizations.

In coordination with OGAC and USAID, HHS has ceased applying the policy pledge requirement to U.S. organizations, whether they are prime recipients or subrecipients of Leadership Act HIV/AIDS funds. However, the requirement remains applicable to foreign organizations.

Guidance

U.S. organizations that are prime recipients or subrecipients of Leadership Act HIV/AIDS funds are not required to have a policy explicitly opposing prostitution and sex trafficking. The Department of Health and Human Services applies the requirement of the Leader-

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[1] Title 45, Subtitle A, Subchapter A, Part 89 in this Electronic Code of Federal Regulations (*http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=70aabffdee1bdb20e22fdde1663cbbaa&ty=HTML&h=L&r=PART&n=45y1.0.1.1.46*).

ship Act that organizations have a policy explicitly opposing prostitution and sex trafficking only to foreign organizations, including foreign affiliates of United States organizations, whether prime recipients or subrecipients, unless exempted by the Act or implementing regulations. *See, e.g.,* 48 CFR 352.270-8 (2010).

HHS is currently developing an amendment to its regulation at 45 CFR part 89 to reflect the *AOSI* decision and HHS's implementation of that decision with respect to U.S. organizations and foreign organizations that are recipients of Leadership Act HIV/AIDS funds.

Authority: 45 CFR part 89; Section 301(f) of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, Public Law 108-25, as amended, 22 U.S.C. 7601-7682 ("Leadership Act").

Dated: Sept. 11, 2014.

APPENDIX H

Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance

Issued: Feb. 15, 2012

AAPD 12-04

Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, as amended—Conscience Clause Implementation, Medically Accurate Condom Information and Opposition to Prostitution and Sex Trafficking

Subject Category:	ASSISTANCE, ACQUISITION MANAGEMENT
Type:	POLICY

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F. Organization Issues

Sections A.3(b) and C.3(b) in Attachments A and C, respectively, require organizations to state in the award that they oppose the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. COs/AOs must therefore consider the "Organizational Integrity Guidance" below when determining a prospective or existing organization's eligibility or compliance with these sections. COs/AOs must also obtain clearance from Agency legal counsel before issuing any written determination relating to organizational integrity pertaining to USAID awards.

Organizational Integrity of Recipient

Organizations must state in the award that they oppose prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. Due to organizational affiliations, such statement may be adversely implicated by the statements or activities of an affiliate of the awardee. In such cases, AOs and COs must consider the below guidance to assess whether there is such a risk. The Federal Acquisition Regulation (FAR) subpart 2.101 defines "Affiliates" as follows:

> "Affiliates" means associated business concerns or individuals if, directly or indirectly—
>
> (1) Either one controls or can control the other; or
>
> (2) A third party controls or can control both.

There is no corresponding definition of "affiliates" in USAID assistance regulations.

Contractors and recipients of grants and cooperative agreements (hereafter collectively referred to as "Recipients") must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the Recipient's opposition to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children ("restricted activities"). A Recipient will be found to have objective integrity and independence from such an organization if:

(1) The affiliated organization receives no transfer of Leadership Act funds, and Leadership Act funds do not subsidize restricted activities; and

(2) The Recipient is, to the extent practicable in the circumstances, separate from the affiliated organization. Mere bookkeeping separation of Leadership Act funds from other funds is not sufficient. USAID will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient separation exists. The presence or absence of any one or more factors relating to legal, physical, and financial separation will not be determinative. Factors relevant to this determination shall include, but are not limited to:

(a) Whether the affiliated organization is a legally separate entity;

(b) The existence of separate personnel or other allocation of personnel that maintains adequate

separation of the activities of the affiliated organization from the recipient;

(c) The existence of separate accounting and timekeeping records;

(d) The degree of separation of the Recipient's facilities from facilities in which restricted activities occur; and

(e) The extent to which signs and other forms of identification that distinguish the Recipient from the affiliated organization are present.

The following organizations are statutorily-exempt from the requirement to state in their awards that they oppose the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children: the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency (the "Statutorily-Exempt Organizations"). As such, AOs for awards to Statutorily-Exempt Organizations will not need to consider the "Organizational Integrity Guidance" above.

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A.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance) (April 2010)

Prescription. (Note: This provision is unchanged from the version in AAPD 05-04 Amendment 3, so it retains the same title and effective date.) AOs must in-

clude the following Standard Provision in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award, or amendment to an existing award (if not already incorporated into the agreement) to ~~U.S. NGOs, non U.S. NGOs, or~~ non-exempt PIOs in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime recipient must flow this provision down in all subawards, procurement contracts or subcontracts.

"PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (APRIL 2010)

(a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b)(1) Except as provided in (b)(2) and (b)(3), by accepting this award or any subaward, a nongovernmental organization or public international organization awardee/subawardee agrees

> that it is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.[7]

* * * * *

C.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Acquisition) (April 2010)

Prescription. This provision remains unchanged from the version in AAPD 05-04 Amendment 3, dated April 13, 2010, so it retains the same title and effective date.) COs must include the following Special Provision in any new acquisition solicitation, and any new acquisition award or amendment to an existing award (if not already incorporated into the award) in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime contractor must flow this provision down in all subcontracts.

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[7] The following footnote should only be included in awards to Alliance for Open Society International (AOSI), Pathfinder, or a member of the Global Health Council (GHC) or InterAction (with the exception of DKT International, Inc.):

> "Any enforcement of this clause is subject to Alliance for Open Society International v. USAID, 05 Civ. 8209 (S.D.N.Y., orders filed on June 29, 2006 and August 8, 2008) (orders granting preliminary injunction) for the term of the Orders."

The lists of members of GHC and InterAction can be found at: [http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf.]

"PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ACQUISITION) (APRIL 2010)

(a) This contract is authorized under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Pub. L. No. 108-25), as amended. This Act enunciates that the U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. The contractor shall not use any of the funds made available under this contract to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b)(1) Except as provided in (b)(2) and (b)(3), by its signature of this contract or subcontract for HIV/AIDS activities, a non-governmental organization or public international organization awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking because of the psychological and

physical risks they pose for women, men, and children.[9]

* * * * *

[9] The following footnote should only be included in awards to Alliance for Open Society International (AOSI), Pathfinder, or a member of GHC or InterAction (with the exception of DKT International, Inc.):

> "An enforcement of this clause is subject to Alliance for Open Society International v. USAID, 05 Civ. 8209 (S.D.N.Y., orders filed on June 29, 2006 and August 8, 2008) (orders granting preliminary injunction) for the term of the Orders."

The lists of members of GHC and InterAction can be found at: [http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf].

Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance

Issued: Sept. 12, 2014

AAPD 14-04

Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, as amended—Conscience Clause Implementation, Medically Accurate Condom Information and Opposition to Prostitution and Sex Trafficking

Subject Category: ASSISTANCE, ACQUISITION MANAGEMENT

Type: POLICY

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A.4 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance) (September 2014)

APPLICABILITY: *This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award or amendment to an existing award obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account. Further guidance is found in AAPD 14-04, Section 2.E.*

"PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (SEPTEMBER 2014)

(a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b)(1) Except as provided in (b)(2), by accepting this award or any subaward, a non-governmental organization or public international organization awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking.

(b)(2) The following organizations are exempt from (b)(1):

(i) the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.

(ii) U.S. non-governmental organization recipients/subrecipients and contractors/subcontractors.

(iii) Non-U.S. contractors and subcontractors if the contract or subcontract is for commercial items and services as defined in FAR 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

(b)(3) Notwithstanding section (b)(2)(iii), not exempt from (b)(1) are non-U.S. recipients, subrecipients, contractors, and subcontractors that implement HIV/AIDS programs under this assistance award, any subaward, or procurement contract or subcontract by:

(i) Providing supplies or services directly to the final populations receiving such supplies or services in host countries;

(ii) Providing technical assistance and training directly to host country individuals or entities on the provision of supplies or services to the final populations receiving such supplies and services; or

(iii) Providing the types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in (i) and (ii), or making decisions or functioning in a recipient's chain of command (e.g., providing managerial or supervisory services approving financial transactions, personnel actions).

(c) The following definitions apply for purposes of this provision:

"Commercial sex act" means any sex act on account of which anything of value is given to or received by any person.

"Prostitution" means procuring or providing any commercial sex act and the "practice of prostitution" has the same meaning.

"Sex trafficking" means the recruitment, harboring, transportation, provision, or obtaining of a person for

the purpose of a commercial sex act (22 U.S.C. 7102(9)).

(d) The recipient must insert this provision, which is a standard provision, in all subawards, procurement contracts or subcontracts for HIV/AIDS activities.

(e) This provision includes express terms and conditions of the award and any violation of it shall be grounds for unilateral termination of the award by USAID prior to the end of its term.

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