

No. 19-177

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 WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE PETITIONERS

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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 congressional directive with respect to legally distinct foreign entities operating overseas with which respondents claim an affiliation.

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.*

* The Open Society Institute (OSI) was named as a party in the caption below, see Pet. App. 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 Gov't 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).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 911 F.3d 104. The order of the district court granting a permanent injunction (Pet. App. 46a-60a) is reported at 106 F. Supp. 3d 355. The order of the district court denying reconsideration (Pet. App. 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. Another earlier opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 254 Fed. Appx. 843. 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 Pet. App. 72a-73a (amended order). The petition for a writ of certiorari was filed on August 7, 2019, and was granted on December 13, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY 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 provisions are reprinted in an appendix to this brief. App., *infra*, 1a-45a.

STATEMENT

Through the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act or Act), 22 U.S.C. 7601 *et seq.*, Congress has provided billions of dollars to fight HIV/AIDS abroad, subject to certain funding conditions. Respondents are United States-based organizations that receive funds under the Act. In 2005, respondents sought to enjoin

application to them of the condition that they “have a policy explicitly opposing prostitution and sex trafficking” in order to receive Leadership Act 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 enforcement of Section 7631(f) against both them and foreign entities operating abroad with which they claim an affiliation. The district court granted the requested injunction. Pet. App. 46a-60a. The court of appeals affirmed. *Id.* at 1a-45a.

A. Statutory Background

1. At the turn of the twenty-first century, HIV/AIDS had “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). “[M]ore than 65 million people had been infected by HIV and more than 25 million had lost their lives, making HIV/AIDS the fourth highest cause of death worldwide.” 570 U.S. at 208; see 22 U.S.C. 7601(2).

The crisis was most acute in sub-Saharan Africa. There, “AIDS had claimed the lives of more than 19 million individuals and was projected to kill a full quarter of the population * * * over the next decade.” 570 U.S. at 208; see 22 U.S.C. 7601(4). “Health systems were collapsing.” H.R. Rep. No. 1014, 115th Cong., 2d Sess. 4 (2018) (2018 House Report). “Teachers, factory workers, health care providers, and soldiers were dying faster than they could be replaced.” *Ibid.* “In the hardest hit countries, life expectancy plummeted to just 30 years.” *Ibid.* “The situation was so dire that, in January 2000, the National Intelligence Estimate identified

the AIDS pandemic as a threat to U.S. national security, noting in particular that dramatic declines in life expectancy would heighten the risk of ‘revolutionary wars, ethnic wars, genocides and disruptive regime transitions’ in the developing world.” *Ibid.*

2. In response to that crisis, President George W. Bush proposed and Congress enacted the Leadership Act. See 22 U.S.C. 7601(6)-(10), (25)-(29). After setting forth detailed factual findings, 22 U.S.C. 7601, the Act directs “the President to establish a ‘comprehensive, integrated’ strategy to combat HIV/AIDS around the world,” 570 U.S. at 209 (quoting 22 U.S.C. 7611(a)). The Act prescribes numerous elements of that strategy, including “plans to increase the availability of treatment for infected individuals, prevent new infections, [and] support the care of those affected by the disease.” *Ibid.* To enable those efforts, the Act authorizes unprecedented federal funding, establishing “the largest international public health program of its kind ever created.” 22 U.S.C. 7601(29); see 22 U.S.C. 2151b-2(c), 7671.

a. Among the Leadership Act’s first findings is that women “are four times more vulnerable to [HIV/AIDS] infection than are men.” 22 U.S.C. 7601(3)(B). That disparity arises “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.” *Ibid.* Of particular relevance here, Congress identified “[p]rostitution and other sexual victimization,” including sex trafficking, as significant harms to women and children. 22 U.S.C. 7601(23). Congress found that such practices not only are “degrading to women and children,” but also are “causes of and factors in the spread of the HIV/AIDS epidemic.”

Ibid. Congress highlighted, for example, that “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.” *Ibid.* Congress recognized that “[v]ictims of coercive sexual encounters do not get to make choices about their sexual activities.” *Ibid.* The Leadership Act accordingly states that it “should be the policy of the United States to eradicate” the practices of “[p]rostitution and other sexual victimization.” *Ibid.*

To further its objectives, Congress required “the reduction of HIV/AIDS behavioral risks” to be “a priority of all prevention efforts.” 22 U.S.C. 7611(a)(12). Among other relevant provisions, the Leadership Act directs funding for “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). The Leadership Act thus makes clear that “eradicating prostitution is an integral part of the comprehensive strategy Congress envisioned in the fight against HIV/AIDS.” 430 F. Supp. 2d at 243 (emphasis omitted).

b. In addition to specifying how funds may be spent, the Leadership Act provides direction about who may be eligible to receive funds to achieve the Act’s goals. Congress found 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 Act accordingly “enlist[s] the assistance of nongovernmental organizations to help

achieve the many goals of the program,” rather than relying primarily on government-provided services. 570 U.S. at 209; see 22 U.S.C. 2151b-2(c)(2) (directing that “an appropriate level of” funds should be disbursed to “nongovernmental organizations” in “areas affected by the HIV/AIDS pandemic”).

To ensure that nongovernmental organizations receiving Leadership Act funds comply with Congress’s priorities—including eradicating prostitution and sex trafficking, see pp. 4-5, *supra*—Congress established two conditions on the use of 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 at the center of this case, 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.*

3. Since 2003, Congress has three times passed—and Presidents Bush, Obama, and Trump have each signed—legislation authorizing additional Leadership Act funds. 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. In all, the United States has committed “a total of \$79.7 billion” for the President’s Emergency

Plan for AIDS Relief (PEPFAR), the HIV/AIDS component of the Leadership Act. 2018 House Report 6. That commitment has “changed the course of the HIV/AIDS pandemic.” *Id.* at 4. According to the most recent estimates, PEPFAR “has saved more than 17 million lives,” and “up to 13 countries are on pace to control their HIV/AIDS epidemic by” this year. U.S. Dep’t of State, *PEPFAR: 2019 Annual Report to Congress* 3, 6, <https://go.usa.gov/xdC64f> (2019 PEPFAR Report).

Notwithstanding that progress, the “HIV pandemic continues to evolve in every community and country.” 2019 PEPFAR Report 6. The agencies administering PEPFAR have accordingly placed an increasing emphasis on granting funds to foreign-based organizations, which are best-positioned to understand local conditions. *Id.* at 16; see George W. Bush, *Remarks on Signing the United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008*, 2 Pub. Papers 1066, 1067 (July 30, 2008) (explaining that PEPFAR “puts local partners in the lead, because they know the needs of their people best”). Specifically, the government has committed to increase the percentage of PEPFAR funding that goes to foreign implementing partners to at least 70% by the end of fiscal year 2020. See 2019 PEPFAR Report 16.

B. Prior Proceedings

1. Respondents are “a group of domestic organizations engaged in combating HIV/AIDS overseas.” 570 U.S. at 210. After enactment of the Leadership Act, respondents applied for funding under that statute to supplement the “substantial private funding” they receive. *Ibid.* Respondents objected, however, to the statutory 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.

a. Initially, respondents were able to receive Leadership Act funds despite their objection to Section 7631(f). In response to First Amendment concerns, the Department of Justice issued a “tentative” determination that Section 7631(f) could constitutionally be applied only to “foreign organizations * * * engaged in activities overseas.” J.A. 95-96. The agencies administering the Leadership Act—the Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID)—accordingly issued guidance requiring only 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); see J.A. 106-107. Because respondents are U.S.-based organizations, they were “not * * * subject to” Section 7631(f) under the government’s initial approach. 430 F. Supp. 2d at 235.

Respondents did not contest the application of Section 7631(f) to foreign recipients of Leadership Act funds. To the contrary, they appeared to accept that foreign recipients, including those they considered affiliates, must comply with that condition. Respondent Alliance for Open Society International (AOSI), for example, sent a memorandum to USAID stating its understanding that “because AOSI is a US NGO, AOSI itself is not required to have” a policy opposing prostitution and sex

trafficking, “but is required to ensure that its non-US subgrantees have such a policy.” J.A. 112. AOSI added that its affiliated entities based in Tajikistan and Kyrgyzstan had adopted a policy opposing prostitution and sex trafficking that it believed would comply with both Section 7631(f) and the “Principles of Governance” that apply to “[a]ll of the foundations in [its] Network.” J.A. 111; see J.A. 112, 131; see also 430 F. Supp. 2d at 235.

b. In 2005, the Department of Justice reconsidered its position and determined that “reasonable arguments” could be made in support of applying Section 7631(f) to U.S.-based funding recipients. J.A. 115. 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. J.A. 124-125. The agencies did not require recipients to make any additional affirmative statements opposing prostitution or sex trafficking. See 12-10 Gov’t Br. 43-44 & n.6.

Respondent AOSI filed an action in federal district court seeking to enjoin HHS and USAID from revoking its Leadership Act funds based on its refusal to comply with Section 7631(f). J.A. 133-151. The complaint, later amended to add respondent Pathfinder International, emphasized that respondents were “based in the United States,” and that they had not brought suit until the government began applying Section 7631(f) to U.S.-based entities. J.A. 134, 138-139; see D. Ct. Doc. 20 ¶¶ 2, 11-12, 34-36 (Dec. 5, 2005) (Amended Complaint). Respondents asked the district court to “declare that USAID’s application” of Section 7631(f) to them “and other US NGOs * * * violates the First” Amendment. J.A. 150; see Amended Complaint 23; see also J.A. 155 (preliminary-injunction motion seeking same relief).

The district 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.” 430 F. Supp. 2d at 255. The court accordingly entered an injunction barring the government from enforcing 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.” Pet. App. 78a. Respondents did not request, and the injunction did not require, that the government refrain from enforcing Section 7631(f) against any foreign recipients.

2. The government appealed the preliminary injunction to the Second Circuit. While that appeal was pending, HHS and USAID issued guidelines clarifying that a Leadership Act funding recipient could have 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; see Pet. App. 120a-127a. The Second Circuit remanded for the district court to reconsider its decision in light of the affiliate guidelines. 254 Fed. Appx. 843.

In the district court, respondents submitted declarations (later filed in this Court, see 12-10 J.A. 99-111, 123-188, 192-220) emphasizing “the burdens of creating * * * legally and physically separate affiliate organization[s]” abroad as a means to comply with Section 7631(f). 570 F. Supp. 2d at 542. The district court again entered an injunction barring enforcement of Section 7631(f) against respondents. *Id.* at 550. The court also extended that injunctive relief to respondents Global

Health Council and InterAction, see *ibid.*, which stated in an amended complaint that they are “based in the United States” and sought relief only as to their “U.S.-based members” and “other US NGOs,” J.A. 158, 161-164, 193.

A divided Second Circuit affirmed. 651 F.3d 218. The panel 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,” and emphasized that respondents’ “challenge here is to the impact of the Policy Requirement on *domestic* NGOs.” *Id.* at 238. “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.

3. This Court granted certiorari and affirmed. 570 U.S. 205. The Court explained that Congress’s spending power “includes the authority to impose limits on the use of [federal] funds to ensure they are used in the manner Congress intends.” *Id.* at 213. “As a general matter,” the Court continued, “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,” however, 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 Court explained that the “relevant distinction” in the funding-condition context “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 held, Section 7631(f) “by its very nature affects ‘protected conduct outside the scope of the federally funded program.’” *Id.* at 218 (citation omitted).

After reaching that conclusion, the Court 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

the 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. (citation omitted; 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. *Ibid.* Justice Kagan did not participate. *Ibid.*

4. Following this Court’s decision, HHS and USAID issued notices that they would not apply Section 7631(f) to U.S.-based recipients of Leadership Act funds. Pet. App. 118a, 130a. The agencies stated that they would continue to apply Section 7631(f) to non-U.S. recipients operating abroad, as they had since enactment of the statute. *Ibid.*; see 651 F.3d at 238. Respondents then asked the district court to convert the preliminary injunction into a permanent injunction. See Pet. App. 47a. But while respondents had previously made clear that they sought relief only on behalf of U.S.-based organizations, see pp. 9-11, *supra*, this time respondents asked

the district court to apply the injunction to foreign entities operating overseas with which they claim an affiliation, Pet. App. 47a-48a.

After receiving letters from the parties (but without ordering briefing), the district court granted respondents' requests. Pet. App. 59a-60a. In the court's view, applying Section 7631(f) to foreign entities with which respondents have an affiliation would violate respondents' own First Amendment rights by presenting an impermissible choice "between forced speech and paying 'the price of evident hypocrisy.'" *Id.* at 55a (quoting 570 U.S. at 219).

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

a. The panel majority framed the issue before it as "whether applying the Policy Requirement to" respondents' "legally distinct" but "closely aligned foreign affiliates violates [respondents'] own First Amendment rights." Pet. App. 4a, 7a. In the majority's view, this Court's 2013 decision "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 had discussed. *Id.* at 9a-10a (quoting 570 U.S. at 219).

The panel majority acknowledged that "foreign organizations like [respondents'] affiliates do not possess First Amendment rights." Pet. App. 10a. But the majority reiterated its view that "[i]t is the First Amend-

ment 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); see *id.* at 9a (“[W]e 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.”).

b. Judge Straub dissented. Pet. App. 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’ claimed foreign affiliates. *Id.* at 15a.

In Judge Straub’s view, the majority further erred by treating respondents and their claimed 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.” Pet. App. 44a-45a. Judge Straub explained that respondents’ claim actually amounted to an assertion of a “right to associate with foreign organizations.” *Id.* at 37a. He would have rejected that claim and held that Section

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

c. The government sought rehearing en banc, which the court of appeals denied. Pet. App. 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. The mandate remains stayed following this Court’s grant of the government’s petition.

SUMMARY OF ARGUMENT

The statutory requirement that a recipient of Leadership Act funds must have a policy opposing prostitution and sex trafficking, 22 U.S.C. 7631(f), may be applied to foreign entities operating abroad, even if they have an affiliation with domestic organizations.

A. Under its spending power, Congress has broad authority to set limits on the use and distribution of federal funds. Potential recipients who object to particular conditions typically may avoid those conditions only by declining the funds. As this Court explained in its prior decision in this case, the unconstitutional-conditions doctrine is an exception to that general rule. Under that doctrine, the government may not deny funding to a recipient on a basis that infringes its constitutional rights, including its First Amendment right to free speech. The unconstitutional-conditions doctrine, however, applies only to entities that have constitutional rights. Foreign entities operating abroad—the only entities against which the government now enforces Section 7631(f)—have no such rights. Respondents do not dispute those premises; indeed, they previously emphasized the distinction between their domestic status and

foreign entities operating abroad in this litigation. Under settled constitutional principles, the government can accordingly enforce Section 7631(f) against all foreign entities operating abroad.

B. The court of appeals erroneously held that the First Amendment bars enforcement of Section 7631(f) against foreign entities operating abroad that have some affiliation with respondents, such as through the common use of names, logos, or brands. In the court's view, such enforcement violates respondents' own right to free speech. No legal principle supports that proposition. Respondents acknowledge that they and the claimed foreign affiliates to which the government applies Section 7631(f) are legally distinct. Under basic tenets of corporate law, distinct legal entities have distinct responsibilities and rights. Enforcing Section 7631(f) against respondents' claimed affiliates does not infringe respondents' own First Amendment rights.

Respondents maintain that they and their claimed foreign affiliates should be treated as a single entity for purposes of the constitutional analysis. But no support exists for such a constructive merger. Outside of exceptional circumstances like veil piercing, which respondents do not contend applies here, legally distinct entities are not treated as one. That remains true even if the organizations share similar names, logos, and brands as respondents assert they and their claimed affiliates do. This Court's decisions have never suggested that such parallel means of identification have constitutional significance. To the contrary, the Court has repeatedly enforced corporate separation even when presented with closer claimed affiliations.

C. Nothing in this Court's prior decision requires a departure from those principles. This Court held that

Section 7631(f) cannot be constitutionally applied to respondents, and the government no longer applies Section 7631(f) to respondents. But this Court said nothing about the permissibility of applying Section 7631(f) to foreign entities operating abroad with which respondents might claim some affiliation. To the extent foreign entities were even considered in the case, it was because respondents asserted that creating such affiliates would be overly burdensome. But respondents did not contend, and this Court certainly did not hold, that the First Amendment bars application of Section 7631(f) to foreign entities operating abroad.

Respondents' position, like that of the court of appeals, ultimately turns almost entirely on the passage of this Court's prior decision discussing the potential use of affiliates as a means to comply with Section 7631(f). The Court concluded that creating such affiliates would not alleviate the First Amendment problem with applying Section 7631(f) to respondents, because such affiliates would not provide a way for respondents to express differing views on prostitution and sex trafficking outside the funding program without facing a risk of evident hypocrisy. That analysis is inapplicable now that respondents are not subject to Section 7631(f). Because respondents can receive Leadership Act funds without adopting a policy on prostitution or sex trafficking, they have no need to create affiliates to express differing views on those topics outside the funding program. And any hypocrisy that would have resulted from the use of such affiliates has no bearing on the question remaining in the case. The court of appeals' contrary holding rests on mistaken premises, and it would permit respondents to bootstrap their prior victory beyond what this Court contemplated or the Constitution supports.

D. No other basis exists to invalidate the application of Section 7631(f) to foreign entities operating abroad. Respondents suggest that requiring a policy opposing prostitution and sex trafficking undermines the goals of the Leadership Act. But that contention simply second-guesses Congress's policy judgment on a matter it has broad discretion to resolve. In any event, sound reasons support Congress's choice. Prostitution and sex trafficking are "degrading to women and children," and fuel "the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23). Efforts to eradicate those practices affirm the rights and dignity of women and children, and they are fully consistent with Congress's objective to advance the fight against HIV/AIDS. Indeed, the government has applied Section 7631(f) to foreign entities operating abroad ever since the Leadership Act was enacted. In all that time, respondents have not demonstrated that the funding condition has hampered the effectiveness of the program or created confusion about respondents' own beliefs. The decision below should be reversed.

ARGUMENT

THE LEADERSHIP ACT'S FUNDING CONDITIONS MAY CONSTITUTIONALLY BE APPLIED TO FOREIGN ENTITIES OPERATING ABROAD, INCLUDING THOSE HAVING AN AFFILIATION WITH DOMESTIC ENTITIES

The Leadership Act is the cornerstone of the United States' response to the global HIV/AIDS crisis. Through the Act, Congress has allocated billions of dollars for nongovernmental organizations to fight HIV/AIDS abroad, subject to certain conditions. Respondents are United States-based organizations that have been "steadfast partners," Br. in Opp. 23, in the fight against HIV/AIDS. They deserve credit and gratitude for their role in the success of the Leadership Act.

For nearly a decade, respondents and the government litigated whether respondents have a First Amendment right to receive Leadership Act funds without complying with the statutory condition that they “have a policy explicitly opposing prostitution and sex trafficking.” 22 U.S.C. 7631(f). Respondents prevailed in that litigation before this Court, and the government no longer enforces Section 7631(f) against them. The only question in this case now is whether the First Amendment bars the government from continuing to enforce Section 7631(f) against *foreign* recipients of Leadership Act funds that *operate abroad*.

No basis exists to bar such enforcement. Foreign entities that operate abroad have no First Amendment rights, so they cannot rely on the holding of this Court’s prior decision. And respondents, who are themselves no longer bound by Section 7631(f), have no constitutional basis to object to the application of the funding condition to *legally distinct* foreign entities operating abroad. Nothing in this Court’s prior decision, which did not consider the status of foreign recipients, suggests otherwise. And practical considerations strongly support continued enforcement of Section 7631(f), which affirms the rights and dignity of women and children, advances the fight against HIV/AIDS by attacking its root causes, and has been applied to foreign recipients of Leadership Act funds for more than 15 years without any showing of confusion about respondents’ views on prostitution or sex trafficking.

A. Foreign Entities Operating Abroad Have No First Amendment Right To Receive Leadership Act Funds Free From The Conditions Congress Established

The question now before the Court is limited but important—whether Congress’s directive that recipients of Leadership Act funds “have a policy explicitly opposing prostitution and sex trafficking,” 22 U.S.C. 7631(f), can continue to be enforced against foreign entities operating abroad. That question is governed by settled constitutional principles. Congress has the power under the Constitution to impose conditions on the acceptance of federal funds. And foreign entities operating abroad have no constitutional right to receive such funds without complying with the conditions Congress has imposed. The First Amendment limitations that formed the basis for the Court’s prior decision with respect to domestic recipients thus have no force with respect to foreign recipients.

1. a. The Constitution confers on Congress the power to collect and spend money to “provide for the common Defence and general Welfare of the United States.” U.S. Const. Art. I, § 8, Cl. 1. As this Court explained in its prior decision in this case, that “Clause provides Congress broad discretion to” fund government “programs or activities” designed to advance the national interest. 570 U.S. at 213. The Leadership Act’s authorization of funds to address the global HIV/AIDS crisis undisputedly is such a measure. See, *e.g.*, 22 U.S.C. 2151b-2(b)(1) (describing global HIV/AIDS relief as “a major objective of the foreign assistance program of the United States”).

Congress’s spending power also “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; see, e.g., *Rumsfeld v. Forum for Academic & 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). Congress's limitation of Leadership Act funds to recipients that "have a policy explicitly opposing prostitution and sex trafficking," 22 U.S.C. 7631(f), falls squarely within that authority. Providing funding only to organizations that oppose prostitution and sex trafficking directly advances the Act's objective "to eradicate" the practices of "[p]rostitution and other sexual victimization" that Congress identified as "causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23).

b. "As a general matter," an entity that seeks government funding but "objects to a condition" Congress has placed on that funding has only one "recourse"—"to decline the funds." 570 U.S. at 214; see, e.g., *FAIR*, 547 U.S. at 59; *Rust*, 500 U.S. at 199 n.5. The "receipt of federal funds under typical Spending Clause legislation is" thus "a consensual matter: [the] grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 596 (1983) (opinion of White, J.).

As this Court explained in its prior decision, the unconstitutional-conditions doctrine is an exception to that general rule. 570 U.S. at 214. Under that doctrine, 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.* (quoting *FAIR*, 547 U.S. at 59). In the context of funding conditions, "the relevant distinction

* * * is between conditions that define the limits of the government spending program,” which are permissible, and “conditions that seek to leverage funding to regulate speech outside the contours of the program itself,” which are unconstitutional. *Id.* at 214-215. Thus, a funding condition that left an affected entity free to exercise its First Amendment rights outside the government program was valid, see *id.* at 215-217 (citing *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544-545 (1983), and *Rust*, 500 U.S. at 180-181, 196-197), while a condition that left open no such channel for First Amendment expression was not, see *id.* at 215-216 (citing *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984)).

In applying the unconstitutional-conditions doctrine to “domestic organizations” that receive Leadership Act funds, the Court concluded that Section 7631(f) “falls on the unconstitutional side of the line.” 570 U.S. at 210, 217. The Court reasoned that, “[b]y demanding that funding recipients adopt—as their own—the Government’s view on an issue of public concern,” Section 7631(f) “by its very nature affects ‘protected conduct outside the scope of the federally funded program,’” and thereby exceeds the limit established by the Court’s prior “‘unconstitutional conditions’ cases.” *Id.* at 218 (quoting *Rust*, 500 U.S. at 197). In light of that holding, the government no longer applies Section 7631(f) to respondents or other domestic recipients of Leadership Act funds, each of which could assert the same constitutional claim as respondents. Pet. App. 118a, 130a.

2. Critically, however, the unconstitutional-conditions doctrine can be invoked only by an entity that has constitutional rights. See, e.g., *Koontz v. St. Johns River*

Water Mgmt. Dist., 570 U.S. 595, 612 (2013) (“A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.”). That understanding follows from this Court’s definition of the doctrine. The rule that “the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech,’” 570 U.S. at 214 (quoting *FAIR*, 547 U.S. at 59), does not extend to a person whose freedom of speech is not “constitutionally protected,” *ibid.*; cf. *Braswell v. United States*, 487 U.S. 99, 102 (1988) (holding that the Fifth Amendment right against self-incrimination could not be invoked by an entity that is “not protected by the Fifth Amendment”). The constitutional barrier that prevented enforcement of Section 7631(f) to respondents in this Court’s prior decision thus does not prevent enforcement of Section 7631(f) against “entities [that] do not have First Amendment rights.” *American Library Ass’n*, 539 U.S. at 210 (plurality opinion).

Under well-settled principles of constitutional law, foreign entities operating overseas—such as the foreign funding recipients at issue here—do not have First Amendment rights. “The Preamble declares that the Constitution is ordained and established by ‘the People of the United States,’” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), and goes on to state that the purposes of the Constitution include securing “the Blessings of Liberty to *ourselves* and our Posterity,” U.S. Const. Pmbl. (emphasis added). This Court has long read the Constitution’s “text, * * * its history, and [precedents] discussing the application of the Con-

stitution to aliens and extraterritorially” to preclude extension of constitutional rights to foreign persons or entities overseas. *Verdugo-Urquidez*, 494 U.S. at 274. “Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment.” *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950). Yet “[n]o decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. [And t]he practice of every modern government is opposed to it.” *Id.* at 784-785 (citation omitted); see *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring) (“The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create * * * any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory.”).

Those general principles apply with full force to the First Amendment. In *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904), the Court rejected the First Amendment claim of an alien seeking to enter the United States from abroad because such an alien is not “one of the people to whom” the First Amendment freedoms of “worshipping or speaking or publishing or petitioning * * * are secured by our Constitution.” *Id.* at 292. Likewise, the Court in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), explained that a nonresident alien who had been denied admission based on his political expression “had no constitutional right of entry to this country as a nonimmigrant or otherwise.” *Id.* at 762 (citing *Turner*, 194 U.S. at 292); see *id.* at 771 (Douglas, J., dissenting) (stating that an alien “has no First Amendment rights while outside the Nation”). And in

the cases most analogous to this one, lower courts considering First Amendment challenges to funding conditions imposed on foreign entities operating abroad have explained that “aliens beyond the territorial jurisdiction of the United States are generally unable to claim the protections of the First Amendment.” *DKT Mem’l Fund Ltd. v. Agency for Int’l Dev.*, 887 F.2d 275, 284 (D.C. Cir. 1989); cf. *Planned Parenthood Fed’n of Am., Inc. v. Agency for Int’l Dev.*, 915 F.2d 59, 66 (2d Cir. 1990) (finding “no constitutional rights implicated” by a funding condition applied to foreign entities operating abroad), cert. denied, 500 U.S. 952 (1991); *Center for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 190 (2d Cir. 2002) (*CRLP*) (Sotomayor, J.) (same).

3. The court of appeals appeared to accept “that foreign organizations” operating abroad “do not possess First Amendment rights.” Pet. App. 10a. And respondents not only decline to dispute that premise, see Br. in Opp. 3, 23, but have implicitly endorsed it by emphasizing throughout this litigation that “only U.S. NGOs are parties to this case,” *id.* at 23; see Pet. App. 15a-29a (Straub, J., dissenting) (recounting respondents’ prior litigation positions in detail). Indeed, as noted above, respondents declined to challenge Section 7631(f) when the government initially applied it to foreign entities but not domestic entities—the same position the government takes now. See pp. 8-9, *supra*. And the court of appeals decision that respondents defended and this Court affirmed rested on the distinction between restrictions “on the First Amendment activities of *foreign* NGOs receiving U.S. government funds” and respondents’ “challenge * * * to the impact of” Section 7631(f) “on *domestic* NGOs.” 651 F.3d at 238.

Those settled and largely undisputed constitutional principles resolve this case. Respondents acknowledge that Congress may impose conditions on the receipt of Leadership Act funds by foreign entities operating abroad. And respondents acknowledge that foreign entities operating abroad have no First Amendment right to receive such funds without complying with the conditions Congress established. The constitutional obstacle that barred enforcement of Section 7631(f) in this case last time thus does not bar its enforcement this time. Instead, the “general” rule applies: a foreign entity operating abroad that seeks Leadership Act funds must either comply with Congress’s condition that it have a policy opposing prostitution and sex trafficking, or it must “decline the funds.” 570 U.S. at 221.

B. Respondents’ Own First Amendment Rights Do Not Bar Enforcement Of Funding Conditions Against Legally Distinct Foreign Entities Operating Abroad

Rather than relying on any asserted First Amendment rights of foreign entities operating abroad, the court of appeals held that Section 7631(f) cannot be applied to such entities because doing so would violate respondents’ *own* First Amendment rights where the foreign entity has some affiliation with respondents. Pet. App. 10a. No legal principle supports that conclusion. Respondents acknowledge that they and the foreign entities to which the government applies Section 7631(f) are “legally distinct.” Br. in Opp. 6; see *id.* at 23, 27-29; Pet. App. 4a, 7a. Given that legal distinction, respondents have no basis to claim that their *own* speech is subject to an unconstitutional condition. Nor do they have a basis to assert that they and the legally distinct organizations they claim as affiliates should be considered a single “unified” entity simply because they “share their

names, logos, and brands.” Pet. App. 11a. Respondents and the legally distinct foreign entities to which the government applies Section 7631(f) have made the choice to be just that—legally distinct. They should be treated as such.

1. It is a “basic tenet of American corporate law” that distinct legal entities exercise distinct legal rights and responsibilities. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003); see, e.g., *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (explaining that a parent organization and its separately incorporated subsidiary have “different rights and responsibilities due to [their] different legal status”). Such legal separation brings both benefits and burdens. For instance, a legal entity is generally not liable for wrongful conduct by a distinct, separately incorporated entity, even if the two entities have some affiliation. See, e.g., *United States v. Bestfoods*, 524 U.S. 51, 61 (1998); cf. *Daimler AG v. Bauman*, 571 U.S. 117, 134-136 (2014) (distinguishing a parent corporation and its legally distinct subsidiary for purposes of personal-jurisdiction analysis); *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 144-146 (2011) (distinguishing between separate legal entities in determining liability for securities fraud); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 188 (1982) (distinguishing separately incorporated entities under a treaty). By the same token, imposition of a legal burden on one person or entity generally does not directly implicate the legal rights of a different person or entity. See, e.g., *Braswell*, 487 U.S. at 102; see also *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (“A party ‘generally must assert his own legal rights and interests, and cannot rest

his claim to relief on the legal rights or interests of third parties.”) (citation omitted).

This Court has applied those basic principles of corporate separateness to funding-condition cases. In *Regan*, for example, the Court upheld a statutory condition barring nonprofit organizations that claimed tax-exempt status under 26 U.S.C. 501(c)(3) from engaging in lobbying. 461 U.S. at 543-545. The court explained, however, that a closely affiliated—indeed, almost identically named—entity “separately incorporated” under 26 U.S.C. 501(c)(4) *could* engage in lobbying. *Id.* at 545 n.6; see *id.* at 543-544 (describing the “dual structure” of organizations named “Taxation With Representation” and “Taxation With Representation Fund”). Critically, the Court did not suggest that the two affiliated entities shared the same rights. Quite the opposite, the legal separateness of the Section 501(c)(4) affiliate that could engage in lobbying was the reason the Court *upheld* enforcement of the funding condition against the Section 501(c)(3) entity. See *id.* at 543-545.

Those same principles apply here. Because respondents and the foreign funding recipients at issue are legally distinct, requiring the foreign recipients to have a policy opposing prostitution and sex trafficking does not place any unconstitutional condition on respondents’ own speech. The government’s current enforcement of Section 7631(f) does not, as its prior application of Section 7631(f) did, require respondents to “adopt—as *their own*—the Government’s view on an issue of public concern.” 570 U.S. at 218 (emphasis added). And to the extent Section 7631(f) “goes beyond defining the limits of the federally funded program to defining the recipient,” it does so only for recipients *other than respondents*. *Ibid.* Enforcing Section 7631(f) against foreign

recipients therefore does not violate respondents' own First Amendment rights.

2. The court of appeals rested its contrary conclusion primarily on the view that respondents and the legally distinct foreign entities with which they claim an affiliation should be treated as the "same[]." Pet. App. 11a; see Br. in Opp. 27-29. That novel conclusion lacks merit. Neither respondents nor the court of appeals identified any 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.

American law includes limited and well-established mechanisms for disregarding formal distinctions between legal entities. Most prominently, in a "case of fraud or certain other exceptional circumstances," a court may "pierc[e] the corporate veil" between legally separate entities. *Dole*, 538 U.S. at 475; see, e.g., *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 168 (2d Cir. 2015) (explaining that veil-piercing may be appropriate where a "corporate parent excessively dominates its subsidiary in such a way as to make it a mere instrumentality of the parent") (citation and internal quotation marks omitted), cert. denied, 136 S. Ct. 2485 (2016). The court of appeals did not apply anything like that standard in concluding that respondents and the legally distinct foreign entities that they claim as affiliates should be treated as the "same[]." Pet. App. 11a. The court instead observed only that the entities "share their names, logos, and brands," and "present a unified front." *Ibid.*; see Br. in Opp. 7 (noting that respondents and foreign entities use the "same font, style, and colors"). Even setting aside the indeterminacy of a test that makes constitutional rights turn on the degree of overlap in

“logos” or “brands,” Pet. App. 11a, that overlap does not come close to the “exceptional circumstances” that would typically be required to disregard the legal distinction between separate entities, *Dole*, 538 U.S. at 475.

Nor does any decision of this Court support treating respondents and their claimed affiliates as a single entity. As noted above, this Court in *Regan* distinguished between—indeed, based its holding on the distinction between—legally separate organizations, even though those organizations were closely affiliated and shared substantially the same name. See 461 U.S. at 543; p. 29, *supra*. Likewise, in *Janus Capital*, the Court based its determination of the “maker of a statement” for purposes of the securities laws on distinctions between corporate entities that were part of the same “family” of corporations and shared similar names. 564 U.S. at 138, 142; see *id.* at 138 (distinguishing “Janus Capital Group” and “Janus Investment Fund,” a “separate legal entity”). Respondents provide no basis to conclude that the trademark and other similarities they highlight here should yield a different result than the analogous (if not closer) similarities in those cases.

3. Respondents’ theory that domestic entities can exercise their own First Amendment rights to exempt foreign entities from otherwise-valid funding conditions would have untenable consequences. Congress and the President may condition the provision of foreign aid to foreign recipients on adherence to particular viewpoints, such as a commitment to democracy or opposition to terrorism, that may not be enforceable against domestic organizations that have First Amendment rights. See, *e.g.*, Department of State, Foreign Operations, and Related Programs Appropriations Act, 2020, Pub. L. No. 116-94, Div. G, Tit. VII § 7043(a)(3), 133 Stat.

2895 (“None of the funds appropriated * * * may be made available to * * * any individual or organization that advocates violence against ethnic or religious groups or individuals in Burma.”); see also 22 U.S.C. 2271, 2272, and 2371. Lower courts have rejected challenges to similar speech-related funding conditions, either because a foreign challenger lacks First Amendment rights or because a domestic challenger’s free-speech rights are not implicated by imposition of the condition on a foreign entity. See *CRLP*, 304 F.3d at 190; *Planned Parenthood*, 915 F.2d at 64-66; *DKT Mem’l*, 887 F.2d at 284-289.

Under respondents’ position, however, challenges to such conditions could succeed. For example, a white supremacist group in the United States could affiliate with a South African entity operating in South Africa to challenge a funding condition requiring the foreign entity to have a policy against apartheid. Based on the reasoning of the decision below, the U.S.-based group could assert its own First Amendment right to invalidate the funding condition because it “requires contrasting, hypocritical messages between domestic and foreign affiliates by making one speak the Government’s message.” Pet. App. 10a. Respondents do not dispute that their position would permit such a “startling” result. *Id.* at 14a (Straub, J., dissenting). They suggest only that it is unlikely to occur. See Br. in Opp. 34.

No reason exists to allow domestic entities to export their First Amendment rights in such an unprecedented way. Respondents and the legally distinct foreign entities that they claim as affiliates have made a conscious choice to maintain legal independence from each other. They are entitled to enjoy the benefits of that choice. But they may not “disregard[] the corporate entity in

order to avoid the obligations” that come with that same decision. *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946) (per curiam).

C. This Court’s Prior Decision In This Case Does Not Support The Constitutional Right Respondents Assert

Respondents’ position, like that of the court of appeals, ultimately comes down to the proposition that this Court “already resolved the only constitutional claim in this case.” Br. in Opp. 22; see *id.* at 2-4, 22-25, 35; Pet. App. 7a (stating that this Court “considered th[e] question” presented and “resolved it in [respondents’] favor”). That understanding is mistaken. This Court held that Section 7631(f) cannot be applied to respondents, and the government no longer applies Section 7631(f) to respondents. The Court neither considered the question presented nor provided any basis for resolving it in respondents’ favor.

1. As an initial matter, this Court plainly did not *expressly* hold that the First Amendment bars application of Section 7631(f) to both respondents and legally separate foreign entities with which they have some association. All agreed that 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 government’s petition for a writ of certiorari stated that the courts below had “effectively enjoin[ed] the operation of Section 7631(f) *with respect to domestic organizations.*” 12-10 Pet. 12 (emphasis added); see 12-10 Cert. Reply Br. 4 (similar). Respondents similarly emphasized their status as “U.S.-based” recipients of Leadership Act funds, 12-10 Br. in Opp. 5;

12-10 Resp. Br. 4-5, 10, as they had throughout the litigation, see pp. 8-11, *supra*. And as noted, the decision under review rested on the distinction between restrictions “on the First Amendment activities of *foreign* NGOs receiving U.S. government funds” and respondents’ “challenge * * * to the impact of” Section 7631(f) “on *domestic* NGOs.” 651 F.3d at 238.

Indeed, to the extent consideration of foreign entities played any role in the briefing and argument of the case in this Court, it was because *respondents* asserted that creating new foreign entities to comply with Section 7631(f) would create administrative difficulties. See 12-10 Resp. Br. 53-56; 12-10 J.A. 105-109, 128-130, 141-144, 156-158, 172-188, 198-220 (declarations to support this point). Critically, however, respondents did not suggest that such foreign affiliates, if created, would have a right to receive Leadership Act funds without complying with Section 7631(f). Rather, respondents’ objection was that creating such foreign affiliates would be “too burdensome.” J.A. 464. If anything, that argument appears to accept that foreign affiliates *would* be subject to Section 7631(f).¹

Given the litigation history, it is unsurprising that this Court began its discussion of respondents by describing them as “a group of domestic organizations,”

¹ Respondents’ suggestion (Br. in Opp. 15-16; see Pet. App. 8a n.3) that oral-argument questions support their current position is unavailing for the same reasons. The questions respondents identify reflect the assertion respondents made in their submissions to this Court—that creating affiliated entities in “foreign countries is no simple thing to accomplish.” 12-10 Oral Arg. Tr. 18 (Ginsburg, J.); accord *id.* at 27 (Kennedy, J.). That position does not suggest that such foreign affiliates would not have to comply with Section 7631(f); if anything, it appears to assume that they would.

570 U.S. at 210, and proceeded to resolve the case without reference to foreign entities. In analyzing “respondents’ First Amendment rights,” the Court concluded that Section 7631(f) required “funding recipients [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 218-219 (citation omitted). In the context of the case, it is clear what that holding meant: Section 7631(f) could no longer be applied to respondents. Respondents had accordingly obtained the relief they sought in their “as-applied challenge to” Section 7631(f). 12-10 Resp. Br. 42 n.11.²

2. Respondents, however, then sought more. Although they had tailored their requested relief throughout the litigation to U.S.-based entities, see pp. 9-11, *supra*, they asked the district court to also apply the injunction to foreign entities with which they claim an affiliation. Respondents requested that relief, and the courts below approved it, based almost entirely on this Court’s statement that the First Amendment problems

² Respondents observe (Br. in Opp. 2, 4, 16, 34) that the Court stated in its final paragraph that Section 7631(f) “violates the First Amendment and cannot be sustained.” 570 U.S. at 221. But, especially when considered in the context of respondents’ “as-applied” challenge, 12-10 Resp. Br. 42 n.11, nothing in the Court’s summation suggests that it extended relief beyond the activities of “domestic” funding recipients, 570 U.S. at 210, so as to preclude application of Section 7631(f) to foreign non-parties that lack constitutional rights. To the extent the sentence could be read in isolation to have broader implications, this Court has cautioned against such inferences based on “[q]uestions which merely lurk in the record.” *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (citation omitted); see *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) (similarly cautioning that “the language of an opinion is not always to be parsed as though we were dealing with language of a statute”).

created by enforcing Section 7631(f) against respondents could not be alleviated through respondents' creation of affiliated entities without producing "evident hypocrisy." 570 U.S. at 219; see Pet. App. 8a-11a (quoting this passage and describing this Court's "articulation of 'evident hypocrisy' as [its] lodestar"); *id.* at 53a-55a (similar analysis by the district court). That reading reflects a misunderstanding of this Court's decision.

The central question before the Court in 2013 was whether Section 7631(f) put respondents to an impermissible choice between accepting government funding for a particular program and sacrificing their right to free speech "outside the contours of the program." 570 U.S. at 215. The government's principal argument was that Section 7631(f)'s requirement of a policy against prostitution and sex trafficking fell within the contours of the Leadership Act's funding program given Congress's emphasis on eradicating prostitution. See *id.* at 218; 12-10 Gov't Br. 19-36, 40-43. The government separately contended that its "affiliate guidelines, established while this litigation was pending, save the program" from any constitutional defect. 570 U.S. at 219; see 12-10 Gov't Br. 44 ("To the extent that Section 7631(f) poses any constitutional difficulty, the agencies' affiliation guidelines dispel it."); *id.* at 44-49.

The Court rejected the government's principal argument, concluding that Section 7631(f)'s requirement that respondents have a policy opposing prostitution and sex trafficking "by its very nature affects 'protected conduct outside the scope of the federally funded program.'" 570 U.S. at 218 (citation omitted). Having reached that conclusion, the Court then rejected the government's contention that "the guidelines alleviate any unconstitutional burden on respondents' First Amendment rights"

by allowing them to express their beliefs or accept funding through affiliated entities that maintain objective integrity and independence from each other. *Id.* at 219. In that discussion, the Court explained that reliance on an affiliate would not cure the violation of respondents' right to free speech because respondents would be able to express their own beliefs outside the program "only at the price of evident hypocrisy." *Ibid.*; see pp. 12-13, *supra* (reproducing the discussion in full).

By its own terms, the Court's discussion of "evident hypocrisy" served only to foreclose the government's contention that affiliates could "alleviate any unconstitutional burden" Section 7631(f) otherwise imposed on respondents' free-speech rights. 570 U.S. at 219. That conclusion has no continuing relevance now that respondents *are not subject* to Section 7631(f). Because respondents can accept Leadership Act funds without complying with Section 7631(f), there is no prospect that Section 7631(f) will impose an "unconstitutional burden" on their free-speech rights. *Ibid.* There is accordingly no need to consider whether affiliates could "alleviate" such a burden. *Ibid.* And the Court's conclusion that affiliates could not do so without creating "evident hypocrisy" has no bearing on the question left in the case. *Ibid.*

The court of appeals failed to perceive the consequences of this Court's holding that respondents are no longer subject to Section 7631(f). The court described respondents as facing a choice "between forced speech and paying 'the price of evident hypocrisy.'" Pet. App. 10a (citations omitted); see *id.* at 9a n.4 (similar). But as just explained, respondents are no longer put to that choice. Respondents are now free to accept Leadership Act funds without having any policy on prostitution or

sex trafficking, and even to express positions on prostitution and sex trafficking that contradict the government's, as long as they do so without federal funds. Cf. 22 U.S.C. 7631(e) (providing that no Leadership Act funds “may be used to promote or advocate the legalization or practice of prostitution or sex trafficking”). Respondents thus have no need to form affiliates as a means to comply with Section 7631(f). And any hypocrisy that might have arisen from the creation of such affiliates is now beside the point.

To be sure, respondents might prefer that foreign funding recipients with which they have an affiliation did not have to comply with Section 7631(f). But for the reasons explained above, the First Amendment does not create a right for those entities to avoid compliance or for respondents to exempt them from compliance. See pp. 21-33, *supra*. To the extent respondents have concerns about affiliated foreign entities taking positions on prostitution or sex trafficking that conflict with their own, respondents have several options. Respondents can exercise their own speech rights to make clear that no other entity speaks for them on these issues. Respondents can operate directly in foreign countries, rather than through affiliates, as some respondents already do. See Br. in Opp. 5-6. Or respondents can select affiliates that do not accept Leadership Act funds and therefore are not subject to Section 7631(f). But respondents cannot bootstrap their prior victory with respect to their own right to receive Leadership Act funds without complying with Section 7631(f) into an additional entitlement to permit foreign entities operating abroad to receive such funds without complying with Section 7631(f). The contrary decision below is erroneous and should be reversed.

D. No Other Ground Forecloses Application Of The Leadership Act's Funding Conditions To Foreign Entities Operating Abroad

No other ground exists to invalidate enforcement of Section 7631(f) to foreign entities operating abroad. Respondents contend (Br. in Opp. 34) that Congress's decision to require recipients of Leadership Act funds to have a policy opposing prostitution and sex trafficking "impedes, rather than advances" the Act's "public-health goals." But that position amounts to a disagreement with Congress's judgment on a policy question that it has "broad discretion" to resolve. 570 U.S. at 213; see *FAIR*, 547 U.S. at 58; *Rust*, 500 U.S. at 196. As the district court observed more than a decade ago, "Congress is free to choose which strategies best serve the goal to fight HIV/AIDS," and "eradicating prostitution"—along with sex trafficking—"is an integral part of the comprehensive strategy Congress envisioned in the fight against HIV/AIDS." 430 F. Supp. 2d at 243 (emphasis omitted).

Sound reasons support Congress's choice. As explained above, Congress enacted into law detailed factual findings on both the "degrading" nature of prostitution and sex trafficking for "women and children," and the role of those practices as "causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23). Based on those findings, Congress directed that "the reduction of HIV/AIDS behavioral risks" must be "a priority of all prevention efforts," and that such efforts must "particularly address[] the heightened vulnerabilities of women and girls." 22 U.S.C. 7611(a)(12)-(13). Section 7631(f)'s requirement that recipients of Leadership Act funds have a policy opposing prostitution and sex trafficking is thus one aspect of Congress's broader strategic judgment that opposing

such practices is necessary to protect the rights and dignity of women and children, and to fight HIV/AIDS. See p. 5, *supra* (citing numerous related provisions).

Although Section 7631(f) can no longer be applied to respondents in light of this Court’s prior holding, the policy considerations that led Congress to enact the provision strongly support its continued application to foreign entities operating abroad. Indeed, when foreign entities are chosen to carry out a U.S.-funded program abroad—where oversight by the U.S. Government may be more limited—it is especially important to ensure that the recipients will advance Congress’s goals for program. Applying Section 7631(f) to foreign entities operating abroad helps to provide such assurances with respect to Congress’s goals to eradicate prostitution and sex trafficking. See 22 U.S.C. 7601(23).

To be sure, policy disagreements continue to exist about the most effective ways to engage prostitutes and victims of sex trafficking. But Congress’s decision to support the eradication of prostitution and sex trafficking in the Leadership Act was the result of a broad bipartisan consensus, see, *e.g.*, H.R. Rep. No. 60, 108th Cong., 1st Sess. 28 (2003), and it has been carried forward through three reauthorizations signed by three Presidents, see p. 6, *supra*. Particularly in the context of a foreign-policy initiative that applies to foreign entities operating abroad, that legislative and executive record deserves weight. See, *e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 29-33 (2010).

Other knowledgeable authorities support Congress’s judgment. In an amicus brief filed with this Court in 2013, a coalition of 46 individuals and organizations, “many led by survivors of prostitution and sex trafficking,” endorsed Congress’s enactment of Section 7631(f).

12-10 Amici Br. of Coalition Against Trafficking in Women et al. 1. They explained in “firsthand” detail how “prostitution and sex-trafficking * * * rapidly and tragically spread [HIV/AIDS] among unknowing and powerless victims.” *Id.* at 4; see *id.* at 10-36 (citing extensive academic and other research). The Leadership Act, moreover, is not the only federal statute that reflects Congress’s opposition to prostitution in light of its connection to sex trafficking. The Trafficking Victims Protection Act of 2000, 22 U.S.C. 7101 *et seq.*, prohibits the use of federal funding “to promote, support, or advocate the legalization or practice of prostitution,” and provides that federal funding to assist the victims of severe forms of trafficking will be provided only to organizations that state that they do not “promote, support, or advocate the legalization or practice of prostitution,” 22 U.S.C. 7110(g)(1)-(2) (2012 & Supp. V 2017).

Finally, the real-world effects of the Leadership Act are not in doubt. The government has applied Section 7631(f) to foreign recipients of Leadership Act funds operating abroad—including recipients that respondents claim as affiliates through common use of names, logos, and brands—for the entire 17 years that the Act has been in effect. See pp. 8-11, 14-16, *supra* (noting that Section 7631(f) was applied to foreign entities operating abroad without challenge until 2014, and that the subsequent injunction has been stayed). The efforts of those foreign recipients, along with respondents and others, have “changed the course of the HIV/AIDS pandemic,” 2018 House Report 4, collectively saving “more than 17 million lives,” 2019 PEPFAR Report 3. Over all that time, no one has shown that application of Section 7631(f) to foreign recipients has hampered the effectiveness of the Leadership Act or created confusion

about the policy views of domestic entities with which those foreign recipients have an affiliation. Indeed, the effectiveness of foreign recipients operating in their own countries has prompted the government to increase the portion of Leadership Act funds distributed to such organizations. 2019 PEPFAR Report 3.

The government’s enforcement of Section 7631(f) to foreign entities operating abroad should be allowed to continue. In 2013, respondents argued to this Court that the “implementation history” of the Leadership Act—namely the real-world success achieved while Section 7631(f) was *not* applied to domestic recipients—“belie[s]” any assertion of practical harm. 12-10 Resp. Br. 43. That reasoning supports the government here. Foreign recipients of Leadership Act funds have achieved extraordinary results in the fight against HIV/AIDS while complying with Section 7631(f). No reason exists to disturb that ongoing record of success, which closely reflects Congress’s design and fully complies with the Constitution.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 22 U.S.C. 2151b-2(a)-(d) 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 pursuant to paragraphs (1) through (3) of section 7673(d)¹ of this title; and

¹ See References in Text note below.

(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

² So in original.

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.

(d) Activities supported

Assistance provided under subsection (c) of this section shall, to the maximum extent practicable, be used to carry out the following activities:

(1) Prevention

Prevention of HIV/AIDS through activities including—

(A) programs and efforts that are designed or intended to impart knowledge with the exclusive purpose of helping individuals avoid behaviors that place them at risk of HIV infection, including integration of such programs into health programs and the inclusion in counseling programs of information on methods of avoiding infection of HIV, including delaying sexual debut, abstinence, fidelity and monogamy, reduction of casual sexual partnering and multiple concurrent sexual partner-

ing,² reducing sexual violence and coercion, including child marriage, widow inheritance, and polygamy, and where appropriate, use of male and female condoms;

(B) assistance to establish and implement culturally appropriate HIV/AIDS education and prevention programs that are designed with local input and focus on helping individuals avoid infection of HIV/AIDS, implemented through nongovernmental organizations, including faith-based and community-based organizations, particularly those locally based organizations that utilize both professionals and volunteers with appropriate skills, experience, and community presence;

(C) assistance for the purpose of encouraging men to be responsible in their sexual behavior, child rearing, and to respect women;

(D) assistance for the purpose of providing voluntary testing and counseling (including the incorporation of confidentiality protections with respect to such testing and counseling) and promoting the use of provider-initiated or “opt-out” voluntary testing in accordance with World Health Organization guidelines;

(E) assistance for the purpose of preventing mother-to-child transmission of the HIV infection, including medications to prevent such transmission and access to infant formula and other alternatives for infant feeding;

(F) assistance to—

(i) achieve the goal of reaching 80 percent of pregnant women for prevention and treatment of mother-to-child transmission of HIV in countries in which the United States is implementing HIV/AIDS programs by 2013; and

(ii) promote infant feeding options and treatment protocols that meet the most recent criteria established by the World Health Organization;

(G) medical male circumcision programs as part of national strategies to combat the transmission of HIV/AIDS;

(H) assistance to ensure a safe blood supply and sterile medical equipment;

(I) assistance to help avoid substance abuse and intravenous drug use that can lead to HIV infection;

(J) assistance for the purpose of increasing women's access to employment opportunities, income, productive resources, and microfinance programs, where appropriate.³

(K) assistance for counseling, testing, treatment, care, and support programs, including—

(i) counseling and other services for the prevention of reinfection of individuals with HIV/AIDS;

(ii) counseling to prevent sexual transmission of HIV, including—

³ So in original. The period probably should be “; and”.

- (I) life skills development for practicing abstinence and faithfulness;
 - (II) reducing the number of sexual partners;
 - (III) delaying sexual debut; and
 - (IV) ensuring correct and consistent use of condoms;
- (iii) assistance to engage underlying vulnerabilities to HIV/AIDS, especially those of women and girls;
 - (iv) assistance for appropriate HIV/AIDS education programs and training targeted to prevent the transmission of HIV among men who have sex with men;
 - (v) assistance to provide male and female condoms;
 - (vi) diagnosis and treatment of other sexually transmitted infections;
 - (vii) strategies to address the stigma and discrimination that impede HIV/AIDS prevention efforts; and
 - (viii) assistance to facilitate widespread access to microbicides for HIV prevention, if safe and effective products become available, including financial and technical support for culturally appropriate introductory programs, procurement, distribution, logistics management, program delivery, acceptability studies, provider training, demand generation, and postintroduction monitoring.

(2) Treatment

The treatment and care of individuals with HIV/AIDS, including—

(A) assistance to establish and implement programs to strengthen and broaden indigenous health care delivery systems and the capacity of such systems to deliver HIV/AIDS pharmaceuticals and otherwise provide for the treatment of individuals with HIV/AIDS, including clinical training for indigenous organizations and health care providers;

(B) assistance to strengthen and expand hospice and palliative care programs to assist patients debilitated by HIV/AIDS, their families, and the primary caregivers of such patients, including programs that utilize faith-based and community-based organizations;

(C) assistance for the purpose of the care and treatment of individuals with HIV/AIDS through the provision of pharmaceuticals, including anti-retrovirals and other pharmaceuticals and therapies for the treatment of opportunistic infections, pain management, nutritional support, and other treatment modalities;

(D) as part of care and treatment of HIV/AIDS, assistance (including prophylaxis and treatment) for common HIV/AIDS-related opportunistic infections for free or at a rate at which it is easily

affordable to the individuals and populations being served;⁴

(E) as part of care and treatment of HIV/AIDS, assistance or referral to available and adequately resourced service providers for nutritional support, including counseling and where necessary the provision of commodities, for persons meeting malnourishment criteria and their families;⁵

(3) Preventative intervention education and technologies

(A) With particular emphasis on specific populations that represent a particularly high risk of contracting or spreading HIV/AIDS, including those exploited through the sex trade, victims of rape and sexual assault, individuals already infected with HIV/AIDS, and in cases of occupational exposure of health care workers, assistance with efforts to reduce the risk of HIV/AIDS infection including post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(B) Bulk purchases of available test kits, condoms, and, when proven effective, microbicides that are intended to reduce the risk of HIV/AIDS transmission and for appropriate program support for the introduction and distribution of these commodities, as well as education and training on the use of the technologies.

⁴ So in original. The word “and” probably should appear.

⁵ So in original. The semicolon probably should be a period.

(4) Monitoring

The monitoring of programs, projects, and activities carried out pursuant to paragraphs (1) through (3), including—

(A) monitoring to ensure that adequate controls are established and implemented to provide HIV/AIDS pharmaceuticals and other appropriate medicines to poor individuals with HIV/AIDS;

(B) appropriate evaluation and surveillance activities;

(C) monitoring to ensure that appropriate measures are being taken to maintain the sustainability of HIV/AIDS pharmaceuticals (especially antiretrovirals) and ensure that drug resistance is not compromising the benefits of such pharmaceuticals;

(D) monitoring to ensure appropriate law enforcement officials are working to ensure that HIV/AIDS pharmaceuticals are not diminished through illegal counterfeiting or black market sales of such pharmaceuticals;

(E) carrying out and expanding program monitoring, impact evaluation research and analysis, and operations research and disseminating data and findings through mechanisms to be developed by the Coordinator of United States Government Activities to Combat HIV/AIDS Globally, in coordination with the Director of the Centers for Disease Control, in order to—

(i) improve accountability, increase transparency, and ensure the delivery of evidence-

based services through the collection, evaluation, and analysis of data regarding gender-responsive interventions, disaggregated by age and sex;

(ii) identify and replicate effective models; and

(iii) develop gender indicators to measure outcomes and the impacts of interventions; and

(F) establishing appropriate systems to—

(i) gather epidemiological and social science data on HIV; and

(ii) evaluate the effectiveness of prevention efforts among men who have sex with men, with due consideration to stigma and risks associated with disclosure.

(5) Pharmaceuticals

(A) Procurement

The procurement of HIV/AIDS pharmaceuticals, antiviral therapies, and other appropriate medicines, including medicines to treat opportunistic infections.

(B) Mechanisms for quality control and sustainable supply

Mechanisms to ensure that such HIV/AIDS pharmaceuticals, antiretroviral therapies, and other appropriate medicines are quality-controlled and sustainably supplied.

(C) Mechanism to ensure cost-effective drug purchasing

Subject to subparagraph (B), mechanisms to ensure that safe and effective pharmaceuticals, including antiretrovirals and medicines to treat opportunistic infections, are purchased at the lowest possible price at which such pharmaceuticals may be obtained in sufficient quantity on the world market, provided that such pharmaceuticals are approved, tentatively approved, or otherwise authorized for use by—

- (i) the Food and Drug Administration;
- (ii) a stringent regulatory agency acceptable to the Secretary of Health and Human Services; or
- (iii) a quality assurance mechanism acceptable to the Secretary of Health and Human Services.

(D) Distribution

The distribution of such HIV/AIDS pharmaceuticals, antiviral therapies, and other appropriate medicines (including medicines to treat opportunistic infections) to qualified national, regional, or local organizations for the treatment of individuals with HIV/AIDS in accordance with appropriate HIV/AIDS testing and monitoring requirements and treatment protocols and for the prevention of mother-to-child transmission of the HIV infection.

(6) Related and coordinated activities

The conduct of related activities, including—

(A) the care and support of children who are orphaned by the HIV/AIDS pandemic, including services designed to care for orphaned children in a family environment which rely on extended family members;

(B) improved infrastructure and institutional capacity to develop and manage education, prevention, and treatment programs, including training and the resources to collect and maintain accurate HIV surveillance data to target programs and measure the effectiveness of interventions;

(C) vaccine research and development partnership programs with specific plans of action to develop a safe, effective, accessible, preventive HIV vaccine for use throughout the world; and⁶

(D) coordinated or referred activities to—

(i) enhance the clinical impact of HIV/AIDS care and treatment; and

(ii) ameliorate the adverse social and economic costs often affecting AIDS-impacted families and communities through the direct provision, as necessary, or through the referral, if possible, of support services, including—

(I) nutritional and food support;

(II) safe drinking water and adequate sanitation;

(III) nutritional counseling;

⁶ So in original. The “and” probably should not appear.

(IV) income-generating activities and livelihood initiatives;

(V) maternal and child health care;

(VI) primary health care;

(VII) the diagnosis and treatment of other infectious or sexually transmitted diseases;

(VIII) substance abuse and treatment services; and

(IX) legal services;

(E) coordinated or referred activities to link programs addressing HIV/AIDS with programs addressing gender-based violence in areas of significant HIV prevalence to assist countries in the development and enforcement of women's health, children's health, and HIV/AIDS laws and policies that—

(i) prevent and respond to violence against women and girls;

(ii) promote the integration of screening and assessment for gender-based violence into HIV/AIDS programming;

(iii) promote appropriate HIV/AIDS counseling, testing, and treatment into gender-based violence programs; and

(iv) assist governments to develop partnerships with civil society organizations to create networks for psychosocial, legal, economic, or other support services;

(F) coordinated or referred activities to—

(i) address the frequent coinfection of HIV and tuberculosis, in accordance with World Health Organization guidelines;

(ii) promote provider-initiated or “opt-out” HIV/AIDS counseling and testing and appropriate referral for treatment and care to individuals with tuberculosis or its symptoms, particularly in areas with significant HIV prevalence; and

(iii) strengthen programs to ensure that individuals testing positive for HIV receive tuberculosis screening and to improve laboratory capacities, infection control, and adherence; and

(G) activities to—

(i) improve the effectiveness of national responses to HIV/AIDS;

(ii) strengthen overall health systems in high-prevalence countries, including support for workforce training, retention, and effective deployment, capacity building, laboratory development, equipment maintenance and repair, and public health and related public financial management systems and operations; and

(iii) encourage fair and transparent procurement practices among partner countries; and

(iv) promote in-country or intra-regional pediatric training for physicians and other health professionals, preferably through public-

private partnerships involving colleges and universities, with the goal of increasing pediatric HIV workforce capacity.

(7) Comprehensive HIV/AIDS public-private partnerships

The establishment and operation of public-private partnership entities within countries in sub-Saharan Africa, the Caribbean, and other countries affected by the HIV/AIDS pandemic that are dedicated to supporting the national strategy of such countries regarding the prevention, treatment, and monitoring of HIV/AIDS. Each such public-private partnership should—

(A) support the development, implementation, and management of comprehensive HIV/AIDS plans in support of the national HIV/AIDS strategy;

(B) operate at all times in a manner that emphasizes efficiency, accountability, and results-driven programs;

(C) engage both local and foreign development partners and donors, including businesses, government agencies, academic institutions, non-governmental organizations, foundations, multilateral development agencies, and faith-based organizations, to assist the country in coordinating and implementing HIV/AIDS prevention, treatment, and monitoring programs in accordance with its national HIV/AIDS strategy;

(D) provide technical assistance, consultant services, financial planning, monitoring and evaluation, and research in support of the national HIV/AIDS strategy; and

(E) establish local human resource capacities for the national HIV/AIDS strategy through the transfer of medical, managerial, leadership, and technical skills.

(8) Compacts and framework agreements

The development of compacts or framework agreements, tailored to local circumstances, with national governments or regional partnerships in countries with significant HIV/AIDS burdens to promote host government commitment to deeper integration of HIV/AIDS services into health systems, contribute to health systems overall, and enhance sustainability, including—

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

(B) 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.

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 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 individuals 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 efforts 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;

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(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.