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.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for
the Second Circuit

BRIEF OF PROFESSORS OF PUBLIC HEALTH AND ORGANIZATIONS WORKING IN PUBLIC HEALTH POLICY AND IMPLEMENTATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors of public health and organizations working in the public health sector, either by delivering public health services to individuals and communities or by advocating for public health policies. *Amici* believe that enforcing the government-mandated anti-prostitution pledge known as the Policy Requirement against foreign affiliates of U.S. based nongovernmental organizations ("NGOs") will result in undermining the public health goals set forth in the Leadership Act by precluding public health organizations, including some *amici*, from reaching the populations and doing the work necessary to achieve those goals. *Amici* include the following individuals and organizations:

Chris Beyrer, MD, MPH, Desmond M. Tutu Professor in Public Health and Human Rights at the Johns Hopkins Bloomberg School of Public Health.

Charles B. Holmes, MD, MPH, Professor of Medicine at Georgetown University Medical Center and Faculty Co-Director of the Center for Global Health Practice and Impact.

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[1] All parties have provided written consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*'s counsel made a monetary contribution to the preparation or submission of this brief. Some *amici* are members of Respondent InterAction.

Matthew M. Kavanagh, PhD, Assistant Professor of Global Health at Georgetown University and Director of the Global Health Policy & Governance Initiative.

Maeve McKean, JD/MSFS, Executive Director of the Georgetown Global Health Initiative.

amfAR, The Foundation for AIDS Research, which was founded in 1985 and is dedicated to ending the global AIDS epidemic through innovative research. Since 1985, amfAR has invested more than $550 million in its programs and has awarded more than 3,300 grants to research teams worldwide.

AIDS United, which seeks to end the AIDS epidemic in the United States through national, regional, and local policy/advocacy, strategic grant-making, and organizational capacity building. AIDS United programs and initiatives include the development and implementation of sound public health policy in response to the HIV/AIDS epidemic.

International Women's Health Coalition ("IWHC"), which advances the sexual and reproductive health and rights of women and adolescent girls worldwide.

Health GAP, which works to eliminate barriers to HIV treatment for people around the world. Health GAP seeks to strengthen and enhance United States leadership and the effectiveness of the United States' response to the HIV/AIDS, tuberculosis, and malaria pandemics, by advocating for increased resources and sound public policies.

American Jewish World Service ("AJWS"), which, inspired by Judaism's commitment to justice, works to realize human rights and end poverty in Global South. Based on its experience working with organizations across three continents, AJWS knows that the anti-prostitution pledge harms the rights of sex workers across the globe and undermines efforts to stem the tide of HIV/AIDS by limiting prevention outreach targeting high-risk and marginalized populations.

Center for Health and Gender Equity d.b.a. CHANGE, which is a U.S.-based nongovernmental organization that promotes the sexual and reproductive health and human rights as a means to achieve gender equality and empowerment of all women and girls, by shaping public discourse, elevating women's voices, and influencing U.S. and global policies.

Elizabeth Glaser Pediatric AIDS Foundation ("EGPAF"), which is a proven leader in the global fight to end HIV/AIDS, and an advocate for children to live full and healthy lives into adulthood. Founded over 30 years ago, EGPAF is committed to a comprehensive response to fighting HIV/AIDS through research, global advocacy, strengthening of local health care systems, and growing the capacity of governments and communities.

Planned Parenthood Federation of America ("PPFA"), which is the nation's leading provider and advocate of high-quality, affordable reproductive health care, as well as the nation's largest provider of sex education. Planned Parenthood Global is the international arm of Planned Parenthood. For more

than 45 years, Planned Parenthood Global has supported and advocated for access to sexual and reproductive health care, including HIV/AIDS prevention and treatment, around the world and in partnership with more than 100 organizations across nine focus countries in Africa and Latin America.

SUMMARY OF ARGUMENT

The President's Emergency Plan for AIDS Relief ("PEPFAR") is the largest commitment by any nation in history to combat disease. PEPFAR represents a massive infusion of funds into the public health sector. In 2013, this Court held that the government could not condition that funding on an organization's agreement to the anti-prostitution pledge. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 221 (2013) ("*AOSI I*"). The Court rightly determined that the anti-prostitution pledge forces funding recipients to espouse the government's view, depriving organizations of the freedom to determine and share their own beliefs and methods in the global fight against HIV/AIDS.

Nevertheless, the government continued to enforce the pledge against the foreign affiliates of U.S.-based organizations until the district court entered a permanent injunction barring the government from doing so. Pet. App. 61a-71a. As the district court and Second Circuit correctly determined, enforcing the anti-prostitution pledge against the foreign affiliates of U.S.-based NGOs—when those organizations and their affiliates share consistent branding, mission, and voice—infringes on the U.S. NGO's First Amendment rights.

Amici, who are organizations active in the field of public health, respectfully urge the Court to affirm the Second Circuit, allowing the marketplace of ideas to continue generating best practices in the fight against HIV/AIDS, regardless of ideology. The public health field is empirically driven and depends upon access to information. When the marketplace of ideas in public health operates without ideological restrictions, researchers and organizations on the ground can work hand-in-hand to develop best practices and to disseminate information about those best practices. This free circulation of ideas is particularly critical in the fight against HIV/AIDS, where public health researchers have found that some of the most effective strategies for combating the disease involve actively engaging sex workers as partners in the fight. Enforcing the anti-prostitution pledge against the foreign affiliates of domestic NGOs would chill research, development, and discussion of some of these best practices. Domestic NGOs whose affiliates accept PEPFAR funding would be forced to choose between limiting their own speech or engaging in "evident hypocrisy." *See* Pet. App. 8a-11a. Thus, the pledge requirement is not only antithetical to First Amendment values, but also undermines the Leadership Act's goal of eradicating HIV/AIDS.

ARGUMENT

I. The Anti-Prostitution Pledge Distorts the Marketplace of Ideas in Public Health.

The "First Amendment creates 'an open marketplace' in which differing ideas about political,

economic, and social issues can compete freely for public acceptance without improper government interference." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012). In that open marketplace, "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Id.* When this Court held in 2013 that the anti-prostitution pledge requirement violated the First Amendment, it reinforced these core constitutional principles. *AOSI I*, 570 U.S. at 219-20. This case raises the same fundamental constitutional question: Whether the government can circumvent the First Amendment in order to advance its preferred viewpoint. If the government prevails, domestic NGOs whose foreign affiliates receive PEPFAR funds will be able to disagree with the government's preferred viewpoint "only at the price of evident hypocrisy." *Id.* at 219. This distortion of the marketplace of ideas is constitutionally intolerable.

Compelled speech is particularly dangerous in the context of public health. Determining the most effective ways to prevent and treat disease requires that differing viewpoints be expressed, different methods be tested, and different results be discussed. Yet the compulsory pledge disrupts this process of deliberation. Most directly, it compels foreign affiliates to affirm the government's viewpoint, and forego testing methods, implementing programs, or sharing results that could contradict the government's view. The government is wrong to argue that the impact of this limitation can be cabined to those foreign affiliates.

Typically, public health organizations and their foreign affiliates are so closely aligned that they speak with one voice. If the government is allowed to compel foreign affiliates to abide by the pledge, the domestic NGOs are necessarily limited in what they are able to say—either they remain silent and tacitly endorse the government's position, or they contradict themselves and suffer the corresponding harm to their legitimacy in the eyes of the populations they serve. This necessarily distorts the marketplace of available public health information and undermines the First Amendment's interest "in affording the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

When the government interferes with the marketplace of ideas, whether by restricting speech or by compelling speech, it "dampens the vigor and limits the variety of public debate." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (quotation marks omitted); *see also Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2463 (2018). This Court previously rejected the government's attempt to distort the marketplace of ideas, and it should do so again here. *See AOSI I*, 570 U.S. at 220; *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001) ("The private nature of the speech involved here, and the extent of [the] regulation of private expression, are indicated further by the circumstance that the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning.").

A. Public Health's Marketplace of Ideas Depends on a Diversity of Views.

The science-driven field of public health encompasses many disciplines—from epidemiology and biostatistics to medicine and nursing—and many times more perspectives, including those of academics, umbrella organizations, and NGOs on the ground. The methods used in public health are common to all applied sciences, but they take on a particular sense of urgency in the fight against HIV/AIDS, a global epidemic that claims 5,000 new infections every day.[2] Participants in the public health sector examine empirical data, form hypotheses, implement programs, and collect yet more data to refine their prevention and treatment strategies. Meanwhile, NGOs on the ground, especially foreign affiliates of domestic NGOs operating in sub-Saharan Africa, South East Asia, and eastern Europe, where the burden of HIV is heaviest, adopt "best practices," working to stem the spread of infection even as newer approaches are tested.[3]

These characteristics mark public health as a marketplace of ideas, where diversity of opinion is not only inherent, but also essential to the results it generates. Like speech on matters of public concern

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[2] Henry J. Kaiser Family Foundation, Fact Sheet: *The Global HIV/AIDS Epidemic* (Sept. 9, 2019), http://www.kff.org/global-health-policy/fact-sheeet/the-global-hivaids-epidemic/.

[3] *See* Kate Shannon et al., *Global Epidemiology of HIS Among Female Sex Workers: Influence of Structural Determinants*, 385 Lancet 55, 55 (July 22, 2014); UNAIDS, *Global AIDS Update 2019: Communities at the Centre* (2019), https://www.unaids.org/sites/default/files/media_asset/2019-global-AIDS-update_en.pdf.

more generally, debate over matters of public health functions best when it is "uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, the principles animating the field of public health are the same principles that underlie our constitutional democracy. The entire "theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *United States v. Alvarez*, 567 U.S. 709, 728 (2012) (plurality opinion) (citation omitted); *see id.* ("Society has the right and civic duty to engage in open, dynamic, rational discourse."). And the very "purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 573 U.S. U.S. 464, 476 (2014) (quotiation omitted). The government should never be in the business of "limiting the range of information and ideas to which the public is exposed." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986).

The vitality of the marketplace of ideas in public health depends on attracting more voices, not fewer. At times ideas in public health may spark controversy,[4] or even draw derision.[5] But a steady infusion of new

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[4] *See, e.g.*, David Brown, *GAO Criticizes Bush's AIDS Plan*, Wash. Post (Apr. 5, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/04/04/AR2006040401628.html (noting that PEPFAR's abstinence policies were "the most controversial aspect of the giant AIDS plan").

[5] *See, e.g.*, Ramou Sarr, *Bill Gates Wants to Pay You $100,000 to Build a Condom that Feels Good, Man*, Gawker (Mar. 24, 2013, 10:45 AM), http://gawker.com/ 5992138/bill-gates-wants-to-pay-

concepts is necessary to stay ahead of an epidemic. Congress recognized as much in passing the Leadership Act. Government alone cannot do the work. Rather, as Congress found, partnerships with NGOs are "critical to the success of … efforts to combat HIV/AIDS," 22 U.S.C. §§ 7603(4), 7621(a)(4), because such partnerships result in "combining financial and other resources, scientific knowledge, and expertise," *id.* § 7621(a)(3).

This leveraging of public and private resources to increase scientific knowledge and expertise is just what has happened in the years since the Leadership Act was passed. For over a decade, NGOs have worked with the government to implement successful strategies in combating HIV/AIDS. Because of this Court's decision in *AOSI I*, U.S.-based NGOs have done so without taking the anti-prostitution pledge. Thus, academics, umbrella organizations, and some U.S. NGOs working on the ground have been free to engage in vigorous debate and practice on a wide array of issues, from the most promising avenues for HIV/AIDS research to the most effective ways to reach at-risk populations, including sex workers.

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you-100000-to-build-a-condom-that-feels-good-man (describing a 2013 initiative by the Gates Foundation which offers a monetary prize to develop a condom that men will want to use on a consistent basis—an initiative motivated in part by the fact that the "need for [condom negotiation precisely illustrates the barrier preventing greater use that we seek to address through this call."); Bill & Melinda Gates Foundation, *Develop the Next Generation of Condom (Round 11)*, https://gcgh.grandchallenges.org/challenge/develop-next-generation-condom-round-11 (last visited Mar. 3, 2020).

As just one example of how the marketplace of ideas is working to generate best practices in the prevention and treatment of HIV/AIDS, several years ago, PEPFAR programs began integrating maternal and child health by creating a one-stop shop at many primary health care facilities. The idea spread such that a pregnant woman at a PEPFAR-funded clinic now routinely receives HIV counseling and testing, prevention of mother to child transmission measures if she is HIV-positive, and information on family planning. This has created a generation of women more educated and engaged in their pregnancies and more receptive to facility-based deliveries, resulting in healthier mothers, healthier children, and a marked improvement in the survival of both.[6] It has also created a model for delivering care that researchers continue to study to determine its effectiveness.[7]

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[6] U.S. President's Emergency Plan for AIDS Relief, *Examples of PEPFAR Platforms Strengthening the Effectiveness and Sustainability of Country Efforts on Health*, http://www.pepfar.gov/documents/organization/176785.pdf.

[7] *See, e,g.*, Lisa M. Puchalski Ritchie, et al., *What Interventions are Effective in Improving Uptake and Retention of HIV-positive Pregnant and Breastfeeding Women and Their Infants in Prevention of Mother to Child Transmission Care Programmes in Low-income and Middle-income Countries? A Systematic Review and Meta-analysis*, 29 BMJ Open (2019) (finding a "significant increase in antiretroviral therapy (ART) use during pregnancy for integration of HIV and antenatal care relative to standard non-integrated care"); Manjulaa Narasimhan, et al., *Integration of HIV Testing Services into Family Planning Services: a Systematic Review*, Reprod. Health 16, 61 (2019) (finding both increased uptake of HIV testing services and higher satisfaction of services in sites integrating family planning and HIV testing services

But Respondents and some *amici* organizations will not be able to fully participate in this marketplace of ideas if the government is allowed to enforce the pledge against foreign affiliates. In the field of public health, domestic NGOs often rely on foreign affiliates in order to achieve their aims. Indeed, by the end of 2020, PEPFAR hopes to transition 70% of HIV prevention and treatment services to local organizations, including local affiliates of larger, multinational organizations.[8] And in order to best advance their respective organizational missions, it is crucial that domestic NGOs and their foreign affiliates coordinate the positions they put forth to the world. In the eyes of the people who rely on them, the domestic organizations and their foreign affiliates are one and the same. These affiliated organizations—which are understood as one global organization—can contradict each other's messages only at the price of losing the trust of the populations they serve. *See AOSI I*, 570 U.S. at 219. The unavoidable specter of misattribution will itself further distort the marketplace of ideas, forcing domestic NGOs to accommodate the government's professed viewpoint at the expense of their own.

These organizations would face an impossible bind: either they would have to remain silent, or they would have to put forth "contrasting, hypocritical messages between domestic and foreign affiliates"—at great cost

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compared to non-integrated services).

[8] U.S. Dep't of State, *PEPFAR 2019 Country Operational Plan Guidance for all PEPFAR Countries*, at 79-80, https://www.state.gov/wp-content/uploads/2019/08/PEPFAR-Fiscal-Year-2019-Country-Operational-Plan-Guidance.pdf.

to their legitimacy. Pet. App. 9a. Faced with this scenario, many organizations will be coerced into silence. Inevitably, the marketplace of ideas will be distorted. *See Legal Servs. Corp.*, 531 U.S. at 543; *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831–32 (1995) (the contention that "debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways"). Here, the risk is magnified because the United States government, through PEPFAR and other programs, provides more than half of global funding for HIV/AIDS treatment and prevention by donor governments.[9] And PEPFAR alone constitutes more than one quarter of total annual resources available for the fight against HIV/AIDS in low- and middle-income countries.[10] Thus, the danger of distortion has practical, real world consequences.

B. The Public Health Marketplace Depends on the Right of the Public to Receive Information.

This Court has long recognized that the First Amendment protects not only the rights of the speaker, but also the rights of the audience to receive speech.

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[9] Press Release, Kaiser Family Foundation & UNAIDS, *Kaiser/UNAIDS Analysis Finds Donor Governments Spent US$8 Billion for HIV in 2018, Similar to a Decade Ago* (July 16, 2019), https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2019/july/20190716_donor-government-disbursements.

[10] UNAIDS, *Welcome to the HIV Financial Dashboard*, http://hivfinancial.unaids.org/hivfinancialdashboards.html# (last visited Mar. 1, 2020).

See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."); *Red Lion Broad Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("It would be a barren marketplace of ideas that had only sellers and no buyers.").

This right to receive information is of particular importance in practical, science-based fields such as public health. Access to information is the very engine of empiricism. That means access to *all* information, not just the information the government wants listeners to hear. Indeed, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011) (quoting *44 Liquormart v. Rhode Island*, 517 U.S. 484, 503 (1996) (opinion of Stevens, J.)). Receiving accurate information, in turn, allows experts, academics, and organizations to learn from each other, to debate best practices, and to disseminate their findings.

Information sharing is the lifeblood of the public health community. NGOs that implement programs on the ground often do not have the time or resources to independently investigate competing views about the best way to access at-risk populations. Instead, they take their cues from umbrella organizations whose

resources are devoted to distilling the latest research and pointing out best practices. These umbrella organizations in turn depend on academics and researchers to aggregate data and publish studies on what is working and what is not working in the field. In line with this, local affiliates contribute important perspectives on what is needed to implement these proposals in their respective countries. For information sharing to be effective, it is necessary that each of these actors can speak without the threat of losing funding.

This collaborative dynamic points to a central misconception in the government's brief. Some domestic organizations operate through a network of co-branded affiliates that work as a unified entity across the globe. The effect of an affiliate's reluctant "choice" to endorse the government's viewpoint in exchange for PEPFAR funds cannot be confined to that affiliate just because it is technically a separate corporate entity. *Cf.* Pet'r's Br. at 27-31. Under this regime, the foreign affiliate can no longer speak freely about public health issues that touch on prostitution, and it cannot implement any programs that could be deemed "inconsistent" with the pledge. The anti-prostitution pledge thus limits the information that the *domestic* NGOs receive as they work to formulate the best practices of the future. Conversely, the pledge and its effects can also mislead NGOs that may refuse PEPFAR funds for themselves, but look to a grantee for forthright guidance on best practices in HIV/AIDS prevention and treatment. Each of these interventions is an affront to the First Amendment's role "in

affording the public access to discussion, debate, and the dissemination of information and ideas." *Bellotti*, 435 U.S. at 783.

In a field where empirical conclusions should be prioritized over policy debates, the government's insistence that foreign affiliates and subsidiaries must affirmatively adopt its viewpoint is really an attempt by the government to co-opt some of the most credible institutions in the public health field and make it appear that no one disagrees with the government's viewpoint. An organization that has foreign affiliates that take the anti-prostitution pledge in order to receive PEPFAR funding may well risk its own credibility, as it must choose between remaining silent or contradicting itself.

This Court has already determined that the government cannot compel domestic organizations to take the anti-prostitution pledge. Applying the anti-prostitution pledge requirement to foreign affiliates with the same name, logo, branding, message, and mission as their affiliated domestic organizations, effectuates the very harms this Court sought to address the first time it decided this case. The pledge's burden on speech reduces the information that will be shared in the public health sphere, distorts the empirical process of gathering data and adapting best practices, and ultimately harms the very population that PEPFAR funds were meant to help. The anti-prostitution pledge cannot be applied against the foreign affiliates of domestic NGOs without running afoul of the First Amendment.

II. The Anti-Prostitution Pledge Hinders the Public Health Community from Achieving the Leadership Act's Goal of Eradicating HIV/AIDS.

The anti-prostitution pledge requirement is not just bad law. It is also bad policy. The requirement actually hinders the public health community from achieving the goals set forth in the Leadership Act. The purpose of that Act is "to strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics," by "providing increased resources" and "intensifying efforts to prevent HIV infection; ensure the continued support for, and expanded access to, treatment and care programs; enhance the effectiveness of prevention, treatment, and care programs; and address the particular vulnerabilities of girls and women." 22 U.S.C. § 7603, (2), (3)(A)–(D). Congress further required that PEPFAR participants respond to "evidence-based improvements and innovations in the prevention" of HIV/AIDS. 22 U.S.C. § 7611(a)(2)(C).

Each of these central purposes is stymied by requiring foreign affiliates of domestic NGOs to take the anti-prostitution pledge. First, the pledge thwarts the use of proven strategies in HIV/AIDS prevention that entail nonjudgmental approaches to sex workers, such as community empowerment and mobilization strategies that directly engage sex workers in the fight against HIV/AIDS. Second, the pledge chills all speech and activities that grantees fear could be perceived by

the government as "inconsistent" with a policy explicitly opposing prostitution, thus preventing organizations from even trying out new approaches that may eventually prove effective in treating and preventing HIV/AIDS.

A. Proven Strategies in HIV/AIDS Prevention and Treatment Include Nonjudgmental Engagement with Sex Workers.

On the urgency of reaching sex workers in order to combat the spread of HIV/AIDS, the parties are in agreement. As the United States government itself acknowledges, evidence-based interventions to provide HIV services to sex workers are a "smart investment."[11] Indeed, the State Department recommends that "[p]revention services should be focused on key populations," including "sex workers."[12] Different views remain, however, on the most effective means of curtailing the spread of HIV among sex workers. To answer that question, the government is "expend[ing] funds to encourage a diversity of views

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[11] U.S. Dep't of State, *PEPFAR Blueprint: Creating an AIDS-Free Generation*, Nov. 2012, at 26 ("What does the term smart investments mean for PEPFAR? First, it means prioritizing interventions that science indicates will save the most lives as outlined in the previous chapter: Road Map to Saving Lives. Second, it means going where the virus is—targeting those key populations at most risk and in most need of HIV services. Third, it means maximizing the impact of each dollar invested."); *id.* at 29 (describing "sex workers" as a "key population").

[12] U.S. Dep't of State, *PEPFAR 2020 Country Operational Plan Guidance for all PEPFAR Countries*, at 494, https://www.state.gov/wp-content/uploads/2020/01/COP20-Guidance_Final-1-15-2020.pdf.

from private speakers," about the best ways to engage and treat this population. *Rosenberger*, 515 U.S. at 834.

Female sex workers around the world face a 21 times higher risk of HIV acquisition compared to the general population, and are among the most marginalized populations in the world.[13] Fifty-four percent of all new HIV infections globally are estimated to be with members of key populations and their sexual partners.[14] In addition to facing elevated levels of HIV infection, sex workers battle stigma, discrimination, and violence—factors that frustrate access to HIV/AIDS services. Many of the strategies that have proven effective in the fight against HIV/AIDS are those that address sex-worker stigma directly, including through the use of drop-in centers, peer educators, and programs that help sex workers gain the determination to negotiate consistent condom use with their clients. In the public health field, such strategies are often known as "community mobilization" or "empowerment" efforts.[15] For many NGOs, it is vital to their mission and success that they

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[13] *See, e.g.*, UNAIDS, *Fact Sheet – World AIDS Day* 2019 (Dec. 1, 2019), https://www.unaids.org/sites/default/files/media_asset/UNAIDS_FactSheet_en.pdf.

[14] *Id.*

[15] *See, e.g.*, *Services for Sex Workers*, UNAIDS Guidance Note (2014), https://www.unaids.org/sites/default/files/media_asset/SexWorkerGuidanceNote_en.pdf; Karnataka Health Promotion Trust, *Evaluation of Community Mobilization and Empowerment in Relation to HIV Prevention Among Female Sex Workers in Karnataka State, South India* (2012), http://strive.lshtm.ac.uk/system/files/attachments/KHPT%20Evaluation%20of%20Community%20Mobilization.pdf.

actively engage key populations including sex workers. That requires not alienating them with views that actually do not reflect the organization's beliefs, informed by evidence and practice.

There is no question that the goals of the Leadership Act cannot be achieved without addressing the epidemic of HIV/AIDS in the sex worker population. The prevalence of HIV infection among female sex workers globally is 10.4 percent.[16] In the regions PEPFAR focuses on,[17] the figures are even graver. The prevalence of HIV infection among sex workers in East and Southern Africa, for example, is 40.7 percent.[18] As these numbers demonstrate, there is an urgent need to engage with sex workers if there is any hope of stemming the tide of the global HIV/AIDS epidemic. As two scholars noted, "the role of sex work can no longer be dismissed as marginal. Sex workers are central to African HIV epidemics."[19]

Yet public health organizations face serious obstacles in engaging sex workers to obtain HIV/AIDS services, including prevention, testing, and treatment. According to UNAIDS—an organization that is statutorily exempted from taking the pledge—"In

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[16] Kate Shannon, et al., *The Global Response and Unmet Actions for HIV and Sex Workers*, 392 Lancet 698, 698 (Aug. 2018).

[17] *See* UNAIDS, *AIDSInfo*, https://aidsinfo.unaids.org.

[18] UNAIDS, *Data 2019* at 22-23, https://www.unaids.org/sites/default/files/media_asset/2019-UNAIDS-data_en.pdf (ten of the 19 countries in eastern and southern Africa with available data reported HIV prevalence among sex workers above 40%).

[19] Pamela Das & Richard Horton, Comment, *Bringing Sex Workers to the Centre of the HIV Response*, 385 Lancet 3, 4 (2015).

many countries, laws, policies, discriminatory practices, and stigmatizing social attitudes drive sex work underground, impeding efforts to reach sex workers and their clients with HIV prevention, treatment, care and support programs. Sex workers frequently have insufficient access to adequate health services; male and female condoms and water-based lubricants; post-exposure prophylaxis following unprotected sex and rape; management of sexually transmitted infections, drug treatment and other harm reduction services; protection from violence and abusive work conditions; and social and legal support. Inadequate service access is often compounded by abuse from law enforcement officers."[20]

These barriers are also acknowledged by the United States government: "Key populations (men who have sex with men (MSM), sex workers (SW), people who inject drugs (PWID)) typically have HIV prevalence rates that exceed those of the general population. However, stigma, discrimination and fear of violence or legal sanctions often undermine their access to health care, including HIV services. Breaking down these barriers is essential to achieving an AIDS-free

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[20] UNAIDS Guidance Note on HIV and Sex Work, 5 (2009–12) (footnote omitted); *see also* Fiona Scorgie, et al., *'We Are Despised in the Hospitals': Sex Workers' Experiences of Accessing Health Care in Four African Countries*, 15 Culture, Health & Sexuality: An Int'l J. for Res., Intervention & Care 450, 456–58, 461 (2013); MR Decker, et al., *Human Rights Violations Against Sex Workers: Burden and Effect on HIV*, 385 Lancet 186 (2015); Shannon et al., *supra* note 3; Christopher Beyrer, et al., *An Action Agenda for HIV and Sex Workers*, 385 Lancet 287 (2015).

generation."[21] The government recognizes the importance of community-based, non-stigmatizing approaches for these key populations: "PEPFAR programs support the creation of non-stigmatizing environments that enable all persons receiving services, to have consistent safe access to both clinical and community-based care and support."[22]

Additionally, pre-exposure prophylaxis (PrEP)—an intervention in which HIV negative individuals take medication that prevents HIV infection—is only beginning to roll-out for sex workers in many countries. Qualitative assessments with key populations have highlighted that "[a]ccess of PrEP through the non-health sector needs to be included in the model of PrEP delivery in order not to leave a group of […] [female sex workers] behind. Whatever the model of PrEP delivery is, then community should drive demand, and PrEP delivery should be integrated with access to other HIV prevention services, and be provided through a one-stop-shop model."[23] Community-led and peer-led programming has been identified as a key facilitator of PrEP access, education, and retention. Forcing affiliates to adopt a position that stigmatizes

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[21] *PEPFAR Blueprint*, supra note 11, at 29.

[22] U.S. Dep't of State, *PEPFAR 3.0, Controlling the Epidemic: Delivering on the Promise of an AIDS-free Generation* 25 (Dec. 2014), https://reliefweb.int/sites/reliefweb.int/files/resources/234744.pdf.

[23] *See e.g.*, G. Emmanuel, et al., *Community Perspectives on Barriers and Challenges to HIV Pre-exposure Prophylaxis Access by Men Who Have Sex With Men and Female Sex Workers Access in Nigeria*, 20 BMC Public Health 69 (2020), https://bmcpublichealth.biomedcentral.com/track/pdf/10.1186/s12889-020-8195-x.

the very populations they serve creates barriers to effective prevention.

Unconstrained by the anti-prostitution pledge and using private dollars, the Avahan India AIDS Initiative, funded by the Bill & Melinda Gates Foundation, has implemented ambitious strategies to engage sex workers in the fight against the spread of HIV/AIDS.[24] In addition to funding clinics and providing condoms, Avahan recruited sex workers to work as peer educators, paying them a stipend in an effort to reduce turnover.[25] Avahan also facilitated community services such as crisis-response teams to address violence and harassment, including at the hands of police.[26] Research on these efforts has found a strong correlation between community mobilization and empowerment strategies and improved health and social outcomes, including a reduction in the incidence of sexually transmitted infections.[27]

Other organizations explicitly exempted by the Leadership Act from the anti-prostitution pledge have

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[24] *See* AIDSTAR-ONE, *The Avahan-India AIDS Initiative: Promising Approaches to Combination HIV Prevention Programming in Concentrated Epidemics*, Mar. 2011, https://aidsfree.usaid.gov/sites/default/files/avahan_sw_india.pdf.

[25] *Id.* at 2, 6–7.

[26] *Id.* at 9.

[27] Karnataka Health Promotion Trust, *supra* note 15, at 25–27; *see also* Prabhakar Parimi et al., *Mobilising Community Collectivisation Among Female Sex Workers to Promote STI Service Utilisation from the Government Healthcare System in Andhra Pradesh, India*, 66 J. Epidemiology & Community Health 62 (2012), http://jech.bmj.com/content/ early/2012/04/05/jech-2011-200832.full.pdf.

also embraced best practices entailing nonjudgmental sex worker outreach. The World Health Organization, for example, "strong[ly] recommend[s]" community empowerment strategies as a means of HIV/AIDS prevention.[28] That position is also advocated by the World Bank. A recent study by the World Bank found that "[e]xpanding a community empowerment-based approach to comprehensive HIV prevention intervention among sex workers has demonstrable impact on the HIV epidemics among female sex workers, cumulatively averting up to 10,800 infections among sex workers across epidemic scenarios within a five-year time span" and averting up to an additional 20,700 infections in the general adult population during that same timeframe.[29] That same study also found that "[w]here sex worker organizations have partnered with government actors, the response to HIV among sex workers has been particularly effective and sustainable."[30] The study concluded with a recommendation that future research into this area allow sex worker organizations to meaningfully participate in the decision-making process regarding the research itself.

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[28] World Health Organization, *Prevention and Treatment of HIV and other Sexually Transmitted Infections for Sex Workers in Low- and Middle-income Countries: Recommendations for a Public Health Approach*, at 21 (Dec. 2012), http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf.

[29] World Bank, *The Global HIV Epidemics Among Sex Workers*, 2013, at xxvii-xxviii., https://www.unfpa.org/sites/default/files/resource-pdf/GlobalHIVEpidemicsAmongSexWorkers.pdf.

[30] *Id.* at xxxii.

Similarly, a report of the UNAIDS Advisory Group noted that "[e]fforts to empower sex workers as a way of improving difficult working conditions have resulted in measurable improvements in sex workers' quality of life, self-confidence and agency. Studies have documented good social and economic outcomes, increased social capital, [and] high rates of condom use."[31] The report recommended that policymakers "[s]upport the development of sex worker-led organisations that advocate for, and implement, programmes to reduce sex workers' economic and social vulnerability," and specifically cautioned that policymakers should "[e]nsure that access to economic empowerment programmes is not conditional on leaving sex work or reducing involvement in sex work."[32] Another study from 2015 found that interventions with strong empowerment elements increased the odds of consistent condom use and reduced the odds of HIV significantly.[33]

As these studies demonstrate, directly engaging and empowering sex workers in the fight against HIV/AIDS has proven tremendously successful. Yet if the pledge continues to be applied against their foreign affiliates, U.S.-based NGOs would likely be unable to engage any of these strategies without risking blatant

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[31] Report of the UNAIDS Advisory Group on HIV and Sex Work, at 22 (Dec. 2011).
[32] *Id.* at 24–25.
[33] Deanna Kerrigan et al., *A Community Empowerment Approach to the HIV Response Among Sex Workers: Effectiveness, Challenges, and Considerations for Implementation and Scale-up*, 385 Lancet 172, 176 (2015).

contradiction between the domestic NGOs and their foreign affiliates. The chilling effect alone will undermine the effectiveness of domestic NGOs' advocacy, which will in turn hinder their ability to advance the very goals the Leadership Act is trying to advance.

B. The Anti-Prostitution Pledge Threatens to Chill The Use of Best Practices by U.S. Organizations.

Plainly an organization may not use PEPFAR funds to advocate the legalization of prostitution, and neither Respondents nor *amici* contend otherwise. But beyond this prohibition, it is not entirely clear what speech or strategies an organization can engage in without running afoul of the governmental requirement that an organization not do anything "inconsistent" with an explicit policy opposing prostitution.[34] Consequently, enforcing the pledge requirement against foreign affiliates threatens to chill the speech and activities of domestic organizations engaged in the very strategies that have thus far proven effective in engaging sex workers in the fight against HIV/AIDS.

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[34] *See* Melissa Hope Ditmore & Dan Allman, *An Analysis of the Implementation of PEPFAR's Anti-Prostitution Pledge and Its Implications for Successful HIV Prevention Among Organizations Working with Sex Workers*, 16 J. Int'l AIDS Soc'y, 2013, at 8 ("Specific activities prohibited by this restriction have never been defined; rather, guidance has been vague. This vagueness has led to arbitrary and unsystematic interpretations of the pledge, contributing to self-censorship by grant recipients.").

Because organizations that take the pledge are not only at risk of losing future PEPFAR funding, but may also have to pay back past PEPFAR funding,[35] organizations will likely not come anywhere close to the line of perceived "inconsistency" with an anti-prostitution stance. "The mere potential for the exercise of [governmental] power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Alvarez*, 567 U.S. at 723 (plurality opinion); *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 621 (1998) (Souter, J., dissenting) ("We have explained before that the prospect of a denial of government funding necessarily carries with it the potential to 'chil[l] ... individual thought and expression.'") (alterations in original) (citation omitted). Effectively, domestic NGOs cannot use their foreign affiliates to carry out empowerment-based programs without the affiliate running the risk of losing PEPFAR funding.

Because engaging in potentially "inconsistent" speech can decimate the budget of an NGO and bring unwanted political attention, chilling effects are inevitable. Indeed, research suggests that scientists

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[35] *See, e.g.*, Doshi Sheetal, *Sex Workers on the Front Lines of Prevention*, International Consortium of Investigative Journalists, a Project of the Center for Public Integrity (Nov. 30, 2006), http://www.icij.org/projects/divine-intervention/sex-workers-front-line-prevention (describing how a settlement between the U.S. government and foreign NGO SANGRAM over its refusal to sign the pledge led to SANGRAM voluntarily returning a portion of the disputed grant that had already been disbursed).

often engage in self-censorship when political controversy threatens their funding. *See* Joanna Kempner, *The Chilling Effect: How Do Researchers React to Controversy?*, 5 PLoS Med. 1571 (2008). This study interviewed scientists whose NIH grants for analyzing aspects of sexual behavior or drug use (many related to HIV/AIDS) were the focus of a minor political controversy in Congress. None of the researchers' grants was withdrawn as a result of the controversy, but several years later, a majority of the respondents either strongly agreed or agreed with the statement that the "political controversy created a 'chilling effect' in research, dissuading scientists from studying controversial research." *Id.* at 1574. Half responded to the controversy by removing "red flag" words such as "sexual intercourse," "sex workers," and "harm-reduction" from titles and abstracts. *Id.* at 1575. Others abandoned lines of research for fear funding would be eliminated, and a few interviewees left scientific research altogether. *Id.* at 1575–76.

Before the district court enjoined enforcement of the anti-prostitution pledge against foreign affiliates, U.S. organizations had already felt the chilling effects of the pledge, as any international collaboration was necessarily constrained by the foreign organization's obligation not to be perceived as doing anything "inconsistent" with an anti-prostitution stance.

As just one example of the pledge's effects, in the early 2000s, Doctors without Borders embarked on a community empowerment approach to HIV/AIDS prevention among sex workers in a red-light district in

Svay Pak, outside of Phnom Penh, Cambodia, with USAID-supported operations research to evaluate the project's process and impact.[36] The program included a primary health clinic, condom distribution, and a drop-in center where sex workers could learn English and basic computing skills. After the pledge went into effect, "[p]ressure increased to avoid being seen to condone or promote prostitution" and "this threatened the project's ability to respond appropriately to changing circumstances in Svay Pak."[37] The project eventually closed down as it could no longer effectively serve its population. This is just one example of how "affected organizations are likely to take a low profile rather than confront donors and risk sudden loss of funds."[38]

Other foreign organizations have abandoned projects when they learned the funding would be conditioned on an anti-prostitution pledge. In one well-documented example, the organization SANGRAM, which works to address HIV/AIDS in rural parts of India where HIV prevalence levels are among the highest, returned its PEPFAR funding rather than sign the pledge, reversing a planned expansion of its peer education and condom distribution program.[39]

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[36] *See* Joanna Busza, *Having the Rug Pulled from Under Your Feet: One Project's Experience of the US Policy Reversal on Sex Work*, 21 Health Pol'y & Planning 329 (2006).
[37] *Id.* at 331.
[38] *Id.*
[39] Center for Health & Gender Equity, *Policy Brief: Implications of U.S. Policy Restrictions for HIV Programs Aimed at Commercial Sex Workers*, Aug. 2008, at 3; *see also* Priya Shetty,

SANGRAM determined that accepting PEPFAR funds would put at risk its strategy of engaging sex workers as agents of change for the community. Other organizations have not been scaled up at the rate they could have been if they had been able to accept PEPFAR funds.

Research examining the impact of the anti-prostitution pledge among foreign NGOs has concluded that "[a]s a result of the pledge, in many instances information sharing about successful programming with sex workers has nearly ceased. Sex work programming has become a taboo topic . . . . The anti-prostitution pledge has prevented the sharing of information about successful programming and prevented scaling up successful operations."[40] The drastic, organization-wide consequences for engaging in activities deemed "inconsistent" with the anti-prostitution pledge inevitably heightens the risk that the fight to eradicate HIV/AIDS—and the exchange of ideas toward that effort—will be chilled. Neither the objectives of the Leadership Act nor the First Amendment permits that result.

Profile: Meena Saraswhati Seshu: Tackling HIV for India's Sex Workers, 376 Lancet 17, 17 (2010).

[40] Ditmore & Allman, *supra* note 34, at 11.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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