

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
**ALLIANCE FOR OPEN SOCIETY
INTERNATIONAL, INC. and OPEN SOCIETY
INSTITUTE,**

Plaintiffs,

Civil Action No. 05-cv-8209

v.

**UNITED STATES AGENCY FOR
INTERNATIONAL DEVELOPMENT and
ANDREW S. NATSIOS, in his official
capacity as Administrator of the United States
Agency for International Development,**

Defendants

-----X

**Lenora M. Lapidus (LL 6592)
Emily J. Martin
Claudia Flores (CF 4932)
Women's Rights Project
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, N.Y. 10004
Telephone: (212) 519-7816
Facsimile: (212) 549-2580**

**Christine I. Magdo (CM 2336)
COVINGTON & BURLING
1330 Avenue of the Americas
New York, N.Y. 10019
Telephone: (212) 841-1000
Facsimile: (646) 441-9252**

**Caroline M. Brown (CB 0659)
Karin L. Kizer
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Facsimile: (202) 662-6291**

Counsel for Amici

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF THE <i>AMICI CURIAE</i>	1
BACKGROUND	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. The U.S. Government May Not Condition Funding So As To Restrict A Recipient’s Private Speech Unless It Demonstrates That Such Restrictions Are Narrowly Tailored To Serve A Substantial Government Interest.	6
II. Compelling Organizations To Adopt The Anti-Prostitution Pledge Conflicts With The U.S. Government’s Long-Standing Opposition To Stigmatization Related To HIV/AIDS.	7
III. Compelling Organizations To Adopt A Pledge That Stigmatizes Sex Workers And That Limits Privately Funded Speech and Activities Runs Contrary To Public Health Policy And Best Practices In The Field.	13
IV. USAID’s Pledge Requirement And Restriction Of Privately Funded Speech Does Not Advance The Public Health Objectives Enshrined In The AIDS Leadership Act.	22
CONCLUSION	25
APPENDIX A	a

TABLE OF AUTHORITIES

Page

FEDERAL CASES

FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984).....6

FEDERAL STATUTES

22 U.S.C. § 2151b-24, 23
22 U.S.C. § 7601 *passim*
22 U.S.C. § 76033
22 U.S.C. § 7631(e)23
22 U.S.C. § 7631(f).....1, 4, 23
H.R. Rep. No. 108-60 (Apr. 7, 2003), *reprinted in* 2003 U.S.C.C.A.N. 71223

INTERNATIONAL AGREEMENTS

International Covenant on Civil and Political Rights (ICCPR) Dec. 19, 1966,
999 U.N.T.S. 17115

MISCELLANEOUS

Centers for Disease Control and Prevention, Divisions of HIV/AIDS Prevention, *HIV
Prevention Strategic Plan Through 2005*.....9

Centers for Disease Control and Prevention, *Stigma and Discrimination: World AIDS
Day 2002* (Press Release Dec. 1, 2002)8

Centers for Disease Control and Prevention, *Testimony of Dr. Eugene McCray, Director,
CDC’s Global AIDS Program Before the Senate Committee on Foreign Relations,
Subcommittee on African Affairs* (Feb. 14, 2002).....8

Centers for Disease Control and Prevention, *Training Module 5 for Reducing Mother-
To-Child-Transmission of HIV/AIDS* (undated).....9

Central and Eastern European Harm Reduction Network (CEEHRN), *Sex work,
HIV/AIDS and Human Rights in Central Europe*17

EngenderHealth, *Reducing Stigma and Discrimination Related to HIV and AIDS –
Training for Health Care Workers* (2004)11

Human Rights Watch *Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach
Workers in India* (July 2002)16, 17

Human Rights Watch, *Fanning the Flames: How Human Rights Abuses Are Fueling the
AIDS Epidemic in Kazakhstan* (June 2003)17

Human Rights Watch, <i>Ravaging the Vulnerable: Abuses Against Persons at High Risk of HIV in Bangladesh</i> (Aug. 2003)	16, 17
Human Rights Watch, <i>Unprotected: Sex, Condoms, and the Human Right to Health in the Philippines</i> (May 2004).....	16, 17
Joint United Nations Programme on HIV/AIDS, <i>AIDS Epidemic Update 2004</i>	2
NGO Letter to George Bush (May 18, 2005) , available at http://hrw.org/campaigns/hivaids/hiv-aids-letter/	21
Pres. George W. Bush, <i>State of the Union Address</i> (Jan. 28, 2003)	3
Saunders, Penelope <i>Prohibiting Sex Work Projects, Restricting Women's Rights: The International Impact of the 2003 U.S. Global AIDS Act,</i>	7, 20
UNAIDS Best Practice Collection Key Material, <i>Innovative Approaches to HIV Prevention: Selected Case Studies 38</i> (Oct. 2000).....	14
UNAIDS Case Study, <i>Female Sex Worker HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India and Bangladesh</i> 9 (Nov. 2000)	14, 19, 20
UNAIDS Technical Update, <i>Sex Work and HIV/AIDS</i>	15, 16, 19, 20
U.S. Agency for International Development, <i>Cambodia HIV/AIDS Strategic Plan: 2002-2005</i> (Mar. 2004).....	9
U.S. Agency for International Development, <i>Expanded Response Guide to Core Indicators for Monitoring and Reporting on HIV/AIDS Programs</i> (Jan. 2003)	10
U.S. Agency for International Development, <i>Leading the Way: USAID Responds to HIV/AIDS – 1997-2000</i> (Sept. 2001).....	9, 10
U.S. Agency for International Development, <i>Remarks by Andrew S. Natsios, Administrator, HIV Prevention Symposium, Academy for Educational Development</i> (Jan. 14, 2004).....	10
U.S. Agency for International Development, <i>USAID's Expanded Response to HIV/AIDS</i> (June 2002).....	10
U.S. Agency for International Development, <i>Working Report Measuring HIV Stigma: Results of a Field Test in Tanzania</i> (June 2005)	10
U.S. Department of State, Office of the Global AIDS Coordinator, <i>Engendering Bold Leadership - The President's Emergency Plan for AIDS Relief: First Annual Report to Congress</i> (Mar. 4, 2005)	12

U.S. Department of State, *Global Fight Against HIV/AIDS: What Do We Need To Do Differently? Remarks to IMPACT Arena, Bangkok, Thailand* (July 14, 2004)11

U.S. Department of State, *Working Together as Partners in the Global HIV/AIDS Fight, Remarks at the Nat'l Ass'n of People With AIDS Staying Alive 2005: Positive Living Summit, Los Angeles, CA* (Aug. 21, 2005)11

World Health Organization, *The World Health Report: Changing History* (2004)15, 18

INTEREST OF THE *AMICI CURIAE*

Amici are nongovernmental organizations (“NGOs”) that provide services or conduct programs, research, or advocacy in the global effort to combat HIV/AIDS and to stop needless deaths through prevention and access to treatment for all affected persons. The individual statements of interest for each *amicus* are listed in Appendix A. *Amici* are united in striving to provide and/or promote the most effective interventions to prevent the spread of HIV/AIDS and provide access to treatment based on accepted best principles and practices of public health. As such, *amici* follow basic principles of public health that accept that both structural and individual behavioral change are core components of sustainable, effective health interventions, and that all public health interventions can be judged according to ethical principles of respect, beneficence, the obligation to do no harm and the principle of justice.

A number of the *amici* currently administer programs or provide health care services to people with HIV/AIDS or at high risk of transmission of the virus, or intend to administer such programs in the future. Some of these programs expressly target sex workers or include sex workers within their general scope. A number of these programs have a proven track record in reducing HIV infection and providing treatment to those with the virus and have led to significant advances in understanding the physical, cultural, and socioeconomic underpinnings of the AIDS epidemic.

Amici's mission in combating HIV/AIDS is seriously threatened by the condition attached to funding provided by the U.S. Agency for International Development (“USAID”) for international AIDS programs that NGOs must adopt a “policy explicitly opposing prostitution.” See 22 U.S.C. § 7631(f). That condition compels public health service providers in the global

fight against AIDS to choose between forgoing U.S. funding or adopting a policy that alienates and marginalizes the high-risk communities with which they work and restricts speech and activities supported by non-USAID funds. For those *amici* who do not accept or receive U.S. funding, their ability to research and advocate on HIV/AIDS in these high-risk communities is also harmed as fewer partnering public health providers are willing to take the risk that their activities will be misconstrued as “support” for “prostitution.”

Like the plaintiffs, *amici* believe that the compelled adoption of the USAID policy statement, applied to U.S. organizations, is a violation of the First Amendment. They submit this brief not to repeat the constitutional arguments, but to provide the Court with the public health context in which this restriction on speech occurs and to emphasize its potentially devastating effects on public health.

BACKGROUND

The crisis posed by the HIV/AIDS global epidemic is large, immediate and growing. In 2000, there were an estimated 34 million people living with HIV. In 2002, their ranks increased to 36 million. In 2004, the total had grown to an estimated 39.4 million. The number of people living with HIV in Eastern Europe and Central Asia increased by 40 percent in just two years; in East Asia the increase was almost 50 percent between 2002 and 2004. Last year, an estimated 3.1 million people died of AIDS. At the same time, some 4.9 million people became newly infected with the virus: an average of over 13,000 people a day.¹ The rapid increase in HIV infection worldwide and the tragedy of its human toll demands the

¹ All statistics from Joint United Nations Programme on HIV/AIDS, *AIDS Epidemic Update 2004*, at 2 (Dec. 2004), available at <http://www.unaids.org/wad2004/report.html>.

comprehensive attention of governments and nongovernmental public health service providers around the world.

In his State of the Union address in January 2003, President Bush recognized the “severe and urgent crisis abroad” posed by the HIV/AIDS pandemic, and proposed the President’s Emergency Plan for AIDS Relief (commonly known as “PEPFAR”), asking the Congress to commit \$15 billion over five years to “turn the tide against AIDS.”² Congress responded with the enactment of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“AIDS Leadership Act”), to authorize the appropriations requested by the President. Pub. L. No. 108-25, 117 Stat. 711, codified at 22 U.S.C. § 7601 et seq. The stated purpose of the AIDS Leadership Act is to strengthen U.S. leadership and the effectiveness of its response to HIV/AIDS by establishing a comprehensive five-year global strategy, providing increased resources for multilateral and bilateral efforts to fight the disease, and “encouraging the expansion of private sector efforts and expanding public-private sector partnerships to combat HIV/AIDS.” 22 U.S.C. § 7603. The central objective of the AIDS Leadership Act is the amelioration of the HIV/AIDS pandemic, which is reflected by the legislative conviction that “HIV/AIDS is *first and foremost* a health problem.” 22 U.S.C. § 7601(15) (emphasis added).

The AIDS Leadership Act authorizes the U.S. government to provide financial support for a number of education and prevention activities, including “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 . . . where appropriate, use of condoms.” 22 U.S.C. § 2151b-2(d)(1)(A). Congress further agreed to provide “assistance to

² Pres. George W. Bush, *State of the Union Address* (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030129-1.html>.

establish and implement culturally appropriate HIV/AIDS education and prevention programs that focus on helping individuals avoid infection of HIV/AIDS.” 22 U.S.C. § 2151b-2(d)(1)(B). Such programs are to be “implemented through nongovernmental organizations, including faith-based and community-based organizations, particularly those organizations that utilize both professionals and volunteers with appropriate skills, experience, and community presence.” 22 U.S.C. § 2151b-2(d)(1)(B). The legislation also authorizes “[b]ulk 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.” 22 U.S.C. § 2151b-2(d)(3)(B).

SUMMARY OF ARGUMENT

The imperatives of PEPFAR and the AIDS Leadership Act are placed in jeopardy by USAID’s requirement that public health organizations and other groups that receive funding under the AIDS Leadership Act *must* adopt a written policy “explicitly opposing prostitution and sex trafficking.”³ 22 U.S.C. § 7631(f) (“the pledge requirement”). The pledge requirement runs counter to U.S. and internationally recognized public health practice, and human rights standards protecting the right to health, by forcing organizations to adopt a policy opposing sex work⁴ and in doing so stigmatize the very individuals they are trying to help. As such, the pledge requirement is at odds with the federal government’s longstanding recognition that such stigmatization harms

³ Because plaintiffs do not challenge the requirement that organizations oppose sex trafficking, *amici* do not address herein that aspect of 22 U.S.C. § 7631(f).

⁴ Consistent with the internationally recognized conventions of the public health sector, this brief uses the terms “sex work” and “sex workers” to refer to prostitution and those individuals engaged in prostitution.

people most at risk of HIV/AIDS, and undermines efforts to prevent the spread of HIV/AIDS and to treat its victims. More importantly, the pledge requirement is at odds with public health policy and best practices in the field recognized internationally because it alienates the sex worker communities whose participation and cooperation in the fight against HIV/AIDS is crucial to the success of such efforts. Requiring NGOs that deal primarily with health and social services to take a political stance opposing sex work will negate their ability to approach sex workers with the non-judgmental and non-moralistic attitude that their years of experience have shown to be effective with these communities.

In addition, USAID has also made clear that not only must recipient organizations adopt an organization-wide policy, but that if they accept government funding, they must also refrain from using their own private funding to engage in speech and activities that USAID perceives as being insufficiently opposed to sex work. *See* Letter from Christopher D. Crowley, Mission Director, USAID, to Galina Karmanova, AOSI, (Oct. 7, 2005) (attached as Ex. A to the Declaration of Rebekah Diller in Support of Plaintiffs' Motion for a Temporary Restraining Order, dated Oct. 12, 2005) ("Plaintiffs' TRO Motion"). As implemented by USAID, the pledge requirement restricts the ability of service providers to engage in proven public health interventions even with their private funds. As a result, the pledge requirement undermines, rather than supports, the public health objectives of the AIDS Leadership Act because service providers must either adopt an anti-prostitution policy — thereby restricting their ability to engage in proven public health interventions even with their private funds — or they must forego government funding, which threatens to greatly reduce the reach and effectiveness of their public health efforts.

ARGUMENT

I. The U.S. Government May Not Condition Funding So As To Restrict A Recipient's Private Speech Unless It Demonstrates That Such Restrictions Are Narrowly Tailored To Serve A Substantial Government Interest.

It is axiomatic that government restrictions based on viewpoint are subject to strict scrutiny. “A regulation of speech that is motivated by nothing more than a desire to curtail expression on a particular point of view on controversial issues of general interest is the purest example of a ‘law . . . abridging the freedom of speech’” *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383-84 (1984) (citation omitted). In imposing viewpoint-based restrictions as a condition of funding, the government’s actions are subject to heightened scrutiny and it must demonstrate that such restrictions are narrowly tailored to further a substantial government interest. *See id.* at 380.

The funding condition is particularly problematic here because it extends to the plaintiffs’ use of private funds. Restrictions on how federal funds recipients use private funding to engage in constitutionally protected speech are unconstitutional when, as here, they leave no alternative avenue for a recipient to engage in privately funded speech. *See generally League of Women Voters*, 468 U.S. 364 (1984). At the very least, such restrictions are subject to heightened scrutiny, which a flat ban will almost always fail. *See id.*

As demonstrated below, and in addition to the reasons set forth in plaintiffs’ pleadings, the pledge requirement and its resulting restraint on private speech fail heightened scrutiny. The pledge requirement undermines rather than reinforces the government’s goal — expressed in the AIDS Leadership Act and elsewhere — of reducing the stigmatization of those affected by HIV/AIDS. Likewise, the pledge requirement and its restraints on the use of private funds to engage in speech are at odds with well-established “best practices” for the prevention and treatment of HIV/AIDS, as well as international human rights standards on the rights to

health and free expression. As such, the pledge requirement is not narrowly tailored to advance the public health objectives that the AIDS Leadership Act was designed to promote.

II. Compelling Organizations To Adopt The Anti-Prostitution Pledge Conflicts With The U.S. Government's Long-Standing Opposition To Stigmatization Related To HIV/AIDS.

USAID's current policy of compelling domestic and foreign NGOs to take a position opposing prostitution and to refrain from using private funding to engage in constitutionally protected activities as a condition of their receiving federal funds marks a radical and unjustified shift in U.S. policy towards AIDS prevention. "U.S. funded HIV/AIDS initiatives . . . have employed sex workers to promote adoption of safer-sex behavior among their peers and have engaged in policy discussion and law reform as part of efforts to create 'enabling environments' to protect health among communities of sex workers." Penelope Saunders, *Prohibiting Sex Work Projects, Restricting Women's Rights: The International Impact of the 2003 U.S. Global AIDS Act*, 7 HEALTH AND HUMAN RIGHTS: AN INTERNATIONAL JOURNAL 179, 184 (2004). Indeed, the pledge requirement is at odds with the U.S. government's long-standing acknowledgment that stigmatizing groups vulnerable to HIV/AIDS undermines treatment and prevention efforts.

As a result of its experience with the outbreak of HIV/AIDS in the United States in the 1980s, the U.S. Government has long-recognized that stigmatizing individuals living with HIV/AIDS and the members of vulnerable groups most at risk for HIV/AIDS actively harms efforts to prevent and treat the disease. For those already infected by HIV/AIDS, such stigmatization discourages them from acknowledging their condition and seeking treatment out of fear of being shunned by their community and in some cases verbally or physically abused. Likewise, members of vulnerable groups who fear stigmatization will shun HIV/AIDS information — and even medical treatment — or fail to take precautions to prevent the spread of

the disease because they fear the additional stigma of being associated with those already infected by HIV/AIDS.

The premier federal agencies leading the U.S. efforts at home and abroad to prevent the spread of HIV/AIDS and to treat those infected with the disease have repeatedly recognized that isolating groups most vulnerable to HIV/AIDS, such as sex workers, undermines prevention and treatment efforts for these very reasons. The U.S. Government's Centers for Disease Control and Prevention ("CDC"), which has a long history working to combat HIV/AIDS in the United States and overseas, has warned that stigmatization of vulnerable groups "profoundly affect[s] prevention effort[s]" worldwide because of its "pernicious effects" through which stigmatized people are threatened with shunning and physical harm, and therefore avoid seeking HIV/AIDS testing, information and other related services. Centers for Disease Control and Prevention, *Stigma and Discrimination: World AIDS Day 2002* (Press Release Dec. 1, 2002).⁵ The CDC has explained that the stigma associated with HIV/AIDS goes beyond the fears people have about the disease itself: "AIDS stigma reflects societal biases about race/ethnicity, socioeconomic status, sexual orientation, age, gender, and drug use. HIV infection evokes and magnifies these biases." Centers for Disease Control and Prevention, *Testimony of Dr. Eugene McCray, Director, CDC's Global AIDS Program Before the Senate Committee on Foreign Relations, Subcommittee on African Affairs* (Feb. 14, 2002).⁶

The CDC recognizes that "[at] home and abroad, HIV continues to stalk our most *vulnerable populations*, people who are marginalized because of race or ethnicity, socioeconomic status, sexual orientation, age or gender. For HIV/AIDS prevention to succeed,

⁵ Available at <http://www.cdc.gov/hiv/wad.htm>.

⁶ Available at <http://www.cdc.gov/washington/testimony/ha021402.htm>.