

08-4917-cv

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE,
PATHFINDER INTERNATIONAL, AND GLOBAL HEALTH COUNCIL,

PLAINTIFFS-APPELLEES,

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, THOMAS R.
FRIEDEN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE U.S. CENTERS FOR DISEASE CONTROL
AND PREVENTION, AND HIS SUCCESSORS, KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS
SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND HER SUCCESSORS,
UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, UNITED
STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, RAJIV SHAH, IN HIS
OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT, AND HIS SUCCESSORS,

DEFENDANTS-APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* INDEPENDENT SECTOR IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* files the following statement of disclosure: Independent Sector is a nonprofit 501(c)(3) corporation and is not a publicly held company that issues stock.

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INTEREST OF AMICUS CURIAE¹

Proposed Amicus Curiae Independent Sector is the leadership forum for charities, foundations and corporate giving programs committed to advancing the common good in America and around the world. Independent Sector's nonpartisan coalition of approximately 550 organizations leads, strengthens and mobilizes the nonprofit community in order to fulfill its vision of a just and inclusive society and of a healthy democracy of active citizens, effective institutions and vibrant communities.² Independent Sector's members include nonprofit organizations that receive both government and philanthropic funding, as well as foundations and corporate philanthropies that donate to nonprofits that also receive some government funding.

Independent Sector is committed to promoting and protecting the independence of the nonprofit community through the rights of advocacy and freedom of speech. Indeed, Independent Sector believes that such independence is critical to productive cooperation between the government, private and nonprofit sectors.

Independent Sector's members — private, voluntary associations primarily based in the United States — comprise an essential element of the “third sector,” that part of society that is distinct from government and business.³ On behalf of its members, Independent Sector seeks to advise the Court on the fundamental importance of safeguarding the independence and autonomy of this sector. Such associational autonomy is an animating principle of our constitutional

¹ All parties have consented to the filing of this brief.

² No portion of this brief was authored or funded by counsel for any party, and nor did any other person or entity support this brief with monetary contributions.

³ *See generally* Joel Fleishman, *THE FOUNDATION: A GREAT AMERICAN SECRET: HOW PRIVATE WEALTH IS CHANGING THE WORLD* 52 (2007) (describing charities and foundations as “a powerful third force” in society).

jurisprudence and a foundation upon which our democracy rests. Indeed, the right to associate for the purposes of advocacy or expression on matters of public concern is a core tenet of First Amendment jurisprudence, a right which the pledge requirement at issue in this case, 22 U.S.C. § 7631(f), directly threatens.

Several of Independent Sector's members and/or members' constituent organizations are United States-based recipients of Leadership Act funds and are thus directly affected by the pledge requirement and its newly expanded application to domestic organizations. They therefore are required by the Act to adopt a policy expressly opposing prostitution and to cease all activities deemed to be inconsistent with opposition to prostitution, even where those activities are funded wholly from private sources. Each organization receiving such funds has thus been compelled to espouse a particular, government-sponsored position and to forgo any alternative expression. This unconstitutional condition, placed on the receipt of federal funds, directly interferes with the right to associate for the purposes of speaking collectively on matters of public concern. Moreover, the implementing regulations, which set forth stringent requirements for maintaining "organizational integrity" by which recipients must distance themselves from affiliate organizations whose activities and speech might conceivably run afoul of the pledge requirement, are burdensome and inadequate to cure the unconstitutional conditions imposed by the pledge requirement. Furthermore, by engaging in viewpoint discrimination and compelling members of the third sector to adopt a particular position on a controversial issue — when in fact many organizations wish to remain neutral on this issue — the pledge requirement distorts the marketplace of ideas and diminishes the integrity of the third sector. Independent Sector submits this brief, respectfully urging affirmance of the district court's grant of a preliminary injunction, to explain the importance of preserving

the associational independence upon which the third sector, and indeed, our constitutional democracy, depends.

INTRODUCTION

In 2003, Congress enacted the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 (“the Leadership Act”). 22 U.S.C. § 7601 *et seq.* The Leadership Act, reauthorized in 2008, 22 U.S.C. § 7671; Pub. L. No. 110-293, 122 Stat. 2918 (2008), authorizes the appropriation of over \$63 billion over ten years to fight HIV/AIDS worldwide through education, research, prevention, treatment and care. In the act, Congress required that private recipients of federal Leadership Act funds adopt “a policy explicitly opposing prostitution and sex trafficking.” 22 U.S.C. § 7631(f) (hereinafter “the pledge requirement”). Pursuant to this provision, recipient organizations are required to adopt an organization-wide policy opposing “sex work.”⁴ In implementing the pledge requirement, the United States Agency for International Development (“USAID”), United States Center for Disease Control (“CDC”) and United States Department of Health and Human Services (“HHS”), all defendants in this action, require recipients of Leadership Act funds to “agree that they are opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.” (SPA 191 (USAID Acquisition & Assistance Policy Directive 05-04 Amendment 3 (Apr. 13, 2010)));⁵ SPA 203 (HHS Notice, 75 Fed. Reg. 18,760 (Apr. 13, 2010)); 45 C.F.R. § 89.1. Moreover, USAID and HHS⁶ have made clear that such organizations must also refrain from

⁴ In this brief, *Amicus* uses the term “sex work” or “sex worker” because the term “prostitute” and “prostitution” is viewed as stigmatizing.

⁵ References to the special appendix of the parties appear herein as “SPA ___.” References to the joint appendix of the parties appear herein as “JA ___.” References to the revised brief of Appellants appear herein as “ARB ___.” References to the brief of Appellees appear herein as “PB ___.”

⁶ CDC is an operational department of HHS, and is therefore governed by HHS regulations.

using their own private funding to engage in speech and activities that defendants perceive as being insufficiently opposed to sex work. (SPA 198, 201; JA 389 (Letter from Christopher D. Crowley, Mission Director, USAID (October 7, 2005))). The Leadership Act also requires that federal funding not be used to “promote or advocate the legalization or practice of prostitution or sex trafficking.” 22 U.S.C. § 7631(e). As opposed to the pledge requirement, this restriction does not apply to the use of non-government funds, and is not at issue here.

In fall 2005, plaintiffs,⁷ Alliance for Open Society International (“AOSI”) and Pathfinder International, U.S.-based nonprofit organizations that receive government funding to which the pledge requirement attaches, brought suit against the defendants, agencies and officials who distribute Leadership Act funds. Plaintiffs argued that the Act violates the First Amendment and sought a preliminary injunction barring defendants from using the pledge requirement as a basis for action against plaintiffs for engaging in activities deemed insufficiently opposed to prostitution. The district court granted the request for declaratory and injunctive relief, finding that the pledge requirement was not narrowly tailored to further Congress’ goals, and that the requirement unconstitutionally applies viewpoint discrimination to organizations’ private funds and compels speech resulting in irreparable injury to plaintiffs. (SPA 26-144).

The defendants appealed the district court’s order. While the appeal was pending, defendants indicated that they intended to issue guidance on the implementation of the regulations, as a result of which this Court remanded the case to the district court to determine whether the new guidelines would render a preliminary injunction unnecessary. *See AOSI v. USAID*, 254 Fed. Appx. 843, 846

⁷ The claims of Open Society Institute, also a plaintiff in this case, are not part of the instant appeal. (JA 629-32).

(2d Cir. 2007). The district court, however, maintained the preliminary injunction, (SPA 145-181), rejecting defendants' arguments that the guidelines promulgated by the agencies⁸ alleviated the unconstitutional conditions at issue. (SPA 168-179). Instead, the district court determined that the non-neutrality of the Act still constitutes viewpoint discrimination and requires compelled speech in violation of the First Amendment and that the pledge requirement places an unconstitutional condition on the receipt of federal funds by imposing a viewpoint-based restriction on even the privately-funded speech of grantees. (SPA 168-179). Additionally, the district court granted Plaintiffs' motion to amend the complaint in order to join Global Health Council ("GHC") and InterAction as Plaintiffs, rejecting defendants' argument that these parties lacked associational standing. (SPA 151-167).

Subsequently, both agencies took further regulatory action: HHS adopted final regulations implementing the Act, (SPA 200-04 (75 Fed. Reg. 18,760 (April 13, 2010))), and USAID issued another directive (SPA 182-04 (USAID Acquisition & Assistance Policy Directive 05-04, Amendment 3 (April 13, 2010))). In critical respects, these regulations and directives are identical to the guidelines considered by the district court. Thus, for example, recipients may affiliate with organizations that do not adopt the pledge requirement only to the extent that such affiliation "will not undermine or confuse the government's position in opposition to prostitution" (SPA 202, SPA 198 (government message must not be "confused by conflicting positions of implementing organizations")) — just as, under the Guidelines, such affiliations must "not threaten the integrity of the Government's programs and its message opposing prostitution," (SPA 149). Likewise, under

⁸ HHS Guidance, 72 Fed. Reg. 41,076 (July 23, 2007); (SPA 148 (USAID AAPD 05-04 Amend. 1 (June 23, 2007))).

both the regulations and the Guidelines, a recipient will be adjudged to maintain “objective integrity and independence” (SPA 188-89, SPA 203, SPA 149) only on the basis of a non-predictable, case-by-case determination that will consider a non-exhaustive list of factors, including whether the organization maintains legal separation, separate personnel, separate record keeping, a physical separation of facilities, and separate signage from an affiliate organization whose activities may not be in keeping with the government’s approved viewpoint. (SPA 188-89, SPA 204, SPA 149-150).

For the reasons explained below, Independent Sector respectfully urges this Court to affirm the district court’s grant of a preliminary injunction. The government’s position that the pledge requirement does not violate plaintiffs’ First Amendment rights, and is not an unconstitutional funding condition, lacks legal support and ignores the First Amendment protection due the associational independence of non-governmental organizations (“NGOs”), without which the productive partnership between government and civil society, and fundamental democratic principles critical to our system of government would be undermined.

SUMMARY OF ARGUMENT

The pledge requirement violates the First Amendment rights of organizations that receive Leadership Act funds. By placing unconstitutional conditions on the receipt of such funds, and by restricting the organizations’ ability to engage in associational life for the purposes of expression, this provision undercuts the core functions of the third sector. Not only do such restrictions contravene principles upon which our democracy rests, but they also undermine the strength and vitality of the long-standing and productive partnership between government and society.

First, the pledge requirement violates the First Amendment rights of Leadership Act grantees by conditioning access to Leadership Act funds on the forfeiture of protected speech. This requirement forces private organizations to pledge support for a particular government policy as a condition of qualifying for government benefits, and conditions access to government funding on a waiver of the First Amendment right to use private funds to engage in constitutionally protected speech. Thus, the pledge requirement restricts the ability of organizations to speak freely and independently on matters of concern to them and to undertake expressive activity to that end.

Second, the freedom to engage in associational life and to associate for the purposes of expression, especially on issues of public concern, is a critical feature of this nation's history. Such freedoms undergird our democracy and are therefore strongly protected by our constitutional jurisprudence. Because the pledge requirement contravenes these freedoms and encroaches on the autonomy of NGOs and private voluntary associations to speak freely on matters of public concern, it contravenes core democratic principles.

Third, the pledge requirement violates the integrity and undermines the autonomy of NGOs in general and of Independent Sector's members in particular. Independence is a critical feature of these organizations' ability to effectively partner with government and provide innovative approaches to addressing urgent social problems. The pledge requirement, by requiring adherence to a specific viewpoint by entire entities, stifles other viewpoints and distorts the marketplace of ideas.

I. ARGUMENT

A. THE PLEDGE REQUIREMENT IMPOSES UNCONSTITUTIONAL CONDITIONS ON THE FIRST AMENDMENT FREEDOMS OF NON-GOVERNMENTAL ORGANIZATIONS.

The pledge requirement is, in a word, unconstitutional. It violates the First Amendment rights of the recipients of Leadership Act funds by placing unconstitutional conditions on the receipt of federal funds. And it impermissibly discriminates on the basis of viewpoint, and therefore must be subjected to heightened scrutiny. The district court’s order enjoining its enforcement should be affirmed.

Under the unconstitutional conditions doctrine, government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also Speiser v. Randall*, 357 U.S. 513, 526 (1958) (state cannot condition property tax exemption on loyalty oath); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (FCC not permitted to condition federal funds for radio and television stations on the basis of editorial content). The pledge requirement engenders an unconstitutional condition in two specific respects. First, it requires that the entity receiving federal funds adopt a particular viewpoint — that is, the viewpoint espoused by the government — as a condition of receiving such funds. And second, it demands that recipient organizations forgo certain speech, even when that speech is funded by non-government sources.

The United States Supreme Court has consistently refused to allow government to compel private individuals or organizations to pledge support for a particular government policy — or for government policy in general — as a condition of participating in a government program. *See, e.g., O’Hare Truck Serv. v. City of Northlake*, 518 U.S. 712 (1996) (refusing to permit cancellation of a trash

hauling contract because the contractor had vigorously criticized the local government); *Bd. Of County Comm'rs Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668 (1996) (invalidating removal of a tow truck operator from the city's rotation list as a penalty for refusing to support the mayor's re-election). The Court has also refused to allow the government to condition access to funding on a waiver of the First Amendment right to use private funds to engage in constitutionally protected speech. *See League of Women Voters of California*, 468 U.S. at 400-01.

The Act, however, specifically forces NGOs to pledge support for a particular government policy as a condition of qualifying for the receipt of federal funds. Thus, this provision expressly conditions access to government funding on the forfeiture of free expression and adoption of a particular viewpoint. But because the government may not “deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially his interest in freedom of speech,” even though the person has no “right” to the government benefit, this provision is unconstitutional. *See Perry*, 408 U.S. at 597. Thus, the district court correctly reaffirmed its earlier reasoning that “the government cannot compel speech in exchange for participation in a government program, even a program to which there is no direct entitlement.” (SPA 168 (quoting 430 F.Supp.2d at 275)); *see also Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 230 (2d Cir. 2006) (acknowledging need for “closer attention” to funding restrictions that are not viewpoint neutral).

The government, however, construes the pledge requirement as nothing more than the refusal of the government to subsidize the exercise of a particular First Amendment activity. That is, defendants argue that the First Amendment “does not require the government to fund competing messages equally[.]” ARB at

55. The government's argument, however, profoundly mischaracterizes the pledge requirement and, in particular, the conditions it places upon the exercise of First Amendment activity. It is true that there is a distinction between the Government's punishment of speech, and the Government's decision not to subsidize the exercise of First Amendment rights. See *DKT Memorial Fund Ltd. v. AID*, 887 F.2d 275, 287-288 (1989). But, that is not the issue here. The application of 22 U.S.C. § 7631(e) to the use of *non-federal* funds cannot be described as simply insisting that public funds be spent for the purposes for which they were authorized. Rather, the pledge requirement imposes restrictions on the use of *non-government* funds and thus restricts the speech of the entity as a whole. The pledge requirement thereby transforms private NGOs into "the United States' representatives," ARB at 34, and compels them to speak the government's anti-prostitution message. See PB at 42-25.

By regulating recipients as entities and transforming them into government speakers, the Leadership Act imposes conditions beyond those deemed constitutionally permissible. For example, in *League of Women Voters*, the Court invalidated a statute which prohibited non-commercial radio and television stations that accepted federal funds from editorializing even when funded by wholly private funds. 468 U.S. at 368. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld restrictions on the ability of federal funding recipients to conduct abortions on the grounds that grantees remained free to use private funding to engage in prohibited speech at a separate location. 500 U.S. at 196 (noting that "the regulations do not require [grantees] to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct" from their federal funded activities). The Court distinguished *Rust* from other unconstitutional conditions cases on the grounds that in true unconstitutional conditions cases, such as here, the "Government effectively prohibit[s] the recipient from engaging in the

protected conduct outside the scope of the federally funded program.” 500 U.S. at 197.

This is precisely why the pledge requirement is so offensive to fundamental First Amendment principles. It requires the adoption of a particular viewpoint and places an expressive restriction on the entity as a whole prohibiting contrary expressive activity even outside of the confines of the federally funded program. In requiring that independent, private, voluntary organizations adopt a particular viewpoint, the Act transforms independent voices into government speakers, thereby depriving the public of truly independent voices and skewing the marketplace of ideas towards a single viewpoint. The pledge requirement must be invalidated.

B. THE PLEDGE REQUIREMENT RESTRICTS THE FIRST AMENDMENT FREEDOM OF NON-GOVERNMENTAL ORGANIZATIONS TO ENGAGE FREELY IN PRIVATELY FINANCED SPEECH ON MATTERS OF PUBLIC CONCERN.

The speech engaged in by private voluntary associations fulfills a critically important function in a democratic society. As set forth below, such speech lessens the authority of the majority, serves as a bulwark against the power of the state, and enables individuals more powerfully and effectively to advance diverse and competing views in the marketplace of ideas. As is evident from this Nation’s history and as is enshrined in our constitutional jurisprudence, in order to carry out these critical functions, such private associations must maintain their independence from the state. It follows that, by suppressing their independent speech and by affirmatively requiring that they espouse a particular view — even when they wish to remain neutral or in fact hold an opposite or nuanced view — as a condition of receiving federal funding, the pledge requirement undermines the American democratic system as a whole. While private voluntary associations often partner

with government, this valuable partnership need not — and indeed, must not — compromise the associational autonomy and independence of NGOs.

The vitality, diversity and abundance of voluntary associations and non-governmental institutions is a central pillar upon which the American democracy rests. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932-33 (1982). Indeed, the constitutional freedom of association specifically affords protection to group activity and speech designed to advocate shared beliefs and controversial viewpoints. “[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.” *Id.* at 908 (quoting *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981)).

Historically, American life has long been characterized by vigorous associational activity. “Better use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world.” Alexis de Tocqueville, *DEMOCRACY IN AMERICA* 113 (Phillips Bradley, ed. 1990). “In their political associations the Americans of all conditions, minds, and ages, daily acquire a general taste for association and grow accustomed to the use of it. There they meet together in large numbers, they converse, they listen to one another, and they are mutually stimulated to all sorts of undertakings.” *DEMOCRACY IN AMERICA* 129. *See also* Gordon S. Wood, *THE CREATION OF THE AMERICAN REPUBLIC 1786-96*, 319-28 (1969) (associations have been a distinctive feature of American life from the earliest days of the Republic); David Cole, *Hanging With The Wrong Crowd: Of Gangs, Terrorists, and The Right Of Association*, 1999 *Supreme Court Review* 203 (quoting Arthur Schlesinger, *PATHS TO THE PRESENT* 23 (1949) (“Traditionally, Americans have distrusted collective organization as embodied in government while insisting upon their own untrammelled right to form voluntary associations.”)). Indeed,

associational activity was extolled in the Federalist Papers as a critical manner of maximizing the power of the people and minimizing the dangers of centralized government. See THE FEDERALIST NO. 56, at 53 (James Madison) (Clinton Rossiter ed. 1961) (describing the virtues of voluntary private association as minimizing the dangers attendant to centralized power).

The critical significance of voluntary association as an essential aspect of the freedom of speech was fortified by and memorialized in the Constitution, which expressly protect rights of association, including the rights of free speech, assembly and petition. See U.S. CONST. AMEND. I. See also *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (maintaining that "[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental"); *Republican Part of State of Conn v. Tashjian*, 770 F.2d 265, 275-76 (2d Cir. 1985) (noting that the importance of political association was enshrined in the Constitution). Indeed, the Supreme Court has made clear that there is an independent right of association which derives from the First Amendment guarantees of speech, press, assembly and petition. See *Christian Legal Soc. Chapter of the Univ. of Calif., Hastings College of Law v. Martinez*, 561 U.S. ___, No. 08-1371, slip op. at 13 (June 28, 2010) (describing rigorous review of laws and regulations that constrain associational freedom); *Boy Scouts of America and Monmouth County v. Dale*, 530 U.S. 640, 647-48 (2000) (characterizing right of expressive association as "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas"); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). In *NAACP v. Alabama*, the Court held that the state could not constitutionally compel production of a membership listing from a private, voluntary association because compelled disclosure would likely curtail the organization's advocacy of dissident beliefs. See *id.* The Court reasoned that "[e]ffective advocacy of both public and private points of view,

particularly controversial ones, is undeniably enhanced by group association.” *Id.* And as the Court stated in *Roberts v. United States Jaycees*, “[a]n individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group efforts toward those ends were not also guaranteed.” 468 U.S. 609, 622 (1984).

The right of association is, in part, a right to speak collectively on matters of public concern. It is important precisely because it guarantees “the right of people to make their voices heard on public issues.” *NAACP v. Claiborne Hardware*, 458 U.S. at 908-09. “By collective effort individuals can make their views known, when, individually, their voices would be faint or lost.” *See id.*; *see also NAACP v. Alabama*, 357 U.S. at 460-61 (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”). Freedom of association is therefore protected as a fundamental component of our personal liberty. *See also DEMOCRACY IN AMERICA* 117 (“The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of Association therefore . . . is as inalienable in its nature as the right of personal liberty.”).⁹

⁹ The First Amendment protection afforded associational rights further supports the district court’s finding that the regulation here at issue should be subjected to heightened scrutiny. *See NAACP v. Alabama*, 357 U.S. at 460-61 (“State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”) *See also Bates v. Little Rock*, 361 U.S. 516, 524 (1960) (in order to justify an encroachment on an associational right, the state must present a compelling reason for that encroachment). The Supreme Court has struck down state action which curtails the freedom to associate as unconstitutional. Such

The robust right to associate for expressive purposes — one of the “foundations of our society,” *NAACP v. Claiborne*, 458 U.S. at 932-33 — serves several functions that are essential to the democratic principles that undergird our constitutional democracy. *See also DeJonge*, 299 U.S. at 372 (“the security of the Republic, the very foundation of constitutional government” lies in preserving the right of assembly). First, the right of association serves to lessen the moral authority of the majority and strengthen the minority. *See NAACP v. Alabama*, 357 U.S. at 460 (reasoning that the right to associate enables the expression of dissident beliefs). As De Tocqueville observed, “[i]n America, the citizens who form the minority associate in the first place to show their number and lessen the moral authority of the majority.” DEMOCRACY IN AMERICA 117.

Second, a robust right of association which protects “expressive group effort” enhances both “political and cultural” diversity and gives voice to our “abiding commitment to pluralism.” *NAACP v. Alabama*, 357 U.S. at 277-78; *see also Roberts*, 468 U.S. at 622 (“According protection to collective effort on behalf of shared goals is especially important to preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”). Indeed,

impermissible state action includes, but is not limited to, the imposition of penalties or withholding of benefits from individuals because of their membership in a disfavored group, requests for disclosure of the fact of membership in a group seeking anonymity, and interference with the internal organization or affairs of the group. *See Roberts*, 468 U.S. at 622-23. *See also Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that right of expressive association trumps state public accommodations law); *Cousins v. Wigoda*, 419 U.S. 477, 487-88 (1974) (holding that associations have right to be free from state interference with the internal structure of the organization); *Gibson v. Florida Legislative Investigation Comm.*, 371 U.S. 539 (1963) (contempt conviction for refusal to divulge information in local NAACP membership lists violated the right of association); *Shelton v. Tucker*, 364 U.S. 479 (1960) (statute compelling teachers to file affidavit organizational affiliation invalid on the grounds of associational freedom).

associational life provides the participants in the third sector with “socialization into the political values necessary for self-government.” CIVIL SOCIETY AND GOVERNMENT 18 (Robert C. Post and Nancy L. Rosenbaum eds.).

Third and finally, the right of expressive association protects against tyranny and serves as a bulwark against centralized power. “Despotism, by its very nature suspicious, sees the isolation of men as the best guarantee of its own permanence.” DEMOCRACY IN AMERICA 119; Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 1313 (2d ed. 1988) (“[T]o destroy the authority of intermediate communities and groups . . . destroys the only buffer between the individual and the state.”); *Cf. DeJonge*, 299 U.S. at 364-65 (reasoning that the right of assembly ensures that “government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means”). The third sector thus serves as a “center of collective political resistance against capricious and oppressive government.” CIVIL SOCIETY AND GOVERNMENT 18 (Robert C. Post and Nancy L. Rosenbaum eds.).

And, without question, our constitutional democracy has been well served by protecting associational freedom. Today, nearly half of all adults volunteer each year, and nine out of ten households make charitable contributions, all towards diverse causes. Independent Sector, PANEL ON THE NONPROFIT SECTOR: STRENGTHENING TRANSPARENCY, GOVERNANCE, AND ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS 9 (June 2005). The resulting free interplay of diverse viewpoints has led to the incubation of new ideas by private associations that now seem commonplace, including, as just one example, the 9-1-1 emergency response system. *Id.* at 10. Charitable organizations have also been the partners through which government effectively and efficiently delivers services such as early childhood education programs, health clinics, drug counseling, and after-school programs. *Id.* at 11; *see also* Arnaud C. Marts, PHILANTHROPY’S ROLE IN

CIVILIZATION: ITS CONTRIBUTION TO HUMAN FREEDOM 50 (1991) (noting that this sector has pioneered almost every cultural advance for the past three hundred years); Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity*, 6 Cornell J.L. Pub. Pol’y 325, 332 (1997); Lester M. Salamon, *Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations*, in THE NONPROFIT SECTOR 99 (Walter W. Powell, ed., 1987).

It follows that government must not be permitted to supervise or manage civil associations or to interfere with their free speech “lest their independent influence on society be diluted” and the marketplace of ideas stifled. *See* DEMOCRACY IN AMERICA 115-119, 312. Attempts to bring the third sector under the control of the government will inevitably discourage participation of the public in private associations, *see Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518, 671 (Story, J., concurring) (1819) (predicting that conflation of private charities with governmental entities “would extinguish all future eleemosynary endowments”); *Jackson v. Statler Found.*, 496 F.2d 623, 639-40 (2d Cir. 1974) (Friendly, J., dissenting from denial of rehearing *en banc*) (“The interest in preserving an area of untrammelled choice for private philanthropy is very great”), which will, in turn, result in the “loss of innovative solutions to social problems,” Evelyn Brody and John Tyler, *Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy?*, 85 Chi. Kent L. Rev 571, 615 (2010). This is not to say, and *amicus* does not contend, that there can be no laws governing this sector, only that the government must not interfere with private associations in a manner that compromises their independence, and with it, their salutary function in society. Indeed, it is the independence of associational life from government interference that enables the third sector to serve this critical function. As the district court in this case correctly stated, “The diversity and breadth of the

traditional public functions NGOs contribute to our society should rank the quality of First Amendment rights and protection they merit to no lesser degree than that accorded to editorial opinion or to universities.” (JA 599). While government should, and commonly does, partner with private associations, and while it is certainly appropriate for government to shape and tailor its funding to serve the purposes it wishes such funding to serve, it is not permissible for the government to use funding to co-opt the entities with which it partners, many of which receive much of their funding from other sources.¹⁰

C. THE PLEDGE REQUIREMENT UNDERMINES THE VALUABLE PARTNERSHIP BETWEEN GOVERNMENT AND THE THIRD SECTOR.

Requiring Independent Sector’s members that receive Leadership Act funds to satisfy the pledge requirement and to cease all contrary speech undermines their constitutionally protected independence. Indeed, such compelled adoption of government sponsored views compromises the right of these members to associate for the purposes of collective expression. In so doing, the pledge requirement not only infringes their constitutional rights but also undermines the independence of the third sector and the crucial partnership between government and civil society. And it further deprives the public of independent voices, while creating the misleading impression that a chorus of independent voices endorses a single viewpoint — that of the government.

¹⁰ During fiscal year 2007, U.S private voluntary organizations working with USAID took in \$19.5 billion in annual private support. This was more than seven times the \$2.7 billion they received from USAID during the same period. See USAID Report, *The Voluntary Foreign Aid Programs: 2009 Report of Voluntary Agencies Engaged in Overseas Relief and Development*, at 5. Only a fraction of USAID NGO partners’ budgets, therefore, comes from the U.S. government.

As discussed *supra*, private associations have long provided critically needed services in concert with governmental programs and entities and have assisted government in solving pressing social problems. But the success of this partnership depends upon the independence of the third sector and its institutions from governmental control. Without such independence and autonomy, the creativity and innovation that define this sector would be undermined and its valuable contributions to American life would be lessened. As the district court correctly noted earlier in this case, “NGOs have played a significant role as partners of government in administering vital public services. They promote fuller participation and a diversity of views in civil society.” (JA 598). Indeed, the organized efforts of the third sector to abolish slavery, protect civil rights and create public libraries all depended upon the independence of private, voluntary associations that arose in order to bring about these results. *See* John H. Filer, *The Filer Commission Report; Report of the Commission of Private Philanthropy and Public Needs*, in *THE NONPROFIT ORGANIZATION: THE ESSENTIAL READINGS* 70, 80 (David L. Geis, et al. eds. 1990). It is precisely their independence from government control — and their corresponding freedom to innovate and effect change — that enables the third sector to effectively partner with government.

Here, the pledge requirement directly compromises the independence and autonomy of Independent Sector’s member-organizations that receive Leadership Act funds; it thereby cripples their valuable partnership with defendants. In particular, many NGOs adopt a principle of impartiality in providing humanitarian relief and assistance. Specifically, the Code of Conduct for NGOs in Disaster Relief provides that “[a]id not be used to further a particular political or religious standpoint,” and that such agencies “act independently from governments.” *See* Code of Conduct for NGOs in Disaster Relief, Articles 3, 4; *see also* Larry Minear, *THE HUMANITARIAN ENTERPRISE, DILEMMAS AND DISCOVERIES* 76-80 (describing

the importance of impartiality to international relief organizations and the way in which independence from state governments enables them to carry out their “humanitarian imperative”); Henry J. Steiner and Philip Alston, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 943-52 (2d ed.) According to these principles, humanitarian assistance, in order to be effective, must not be linked to any political or religious viewpoint. *See id.* In part this is so because of the danger attendant to operating in a conflict situation in which the organization is deemed to be an agent of any one side. *See THE HUMANITARIAN ENTERPRISE* 117-18, 161-65 (describing the dangers of humanitarian operations in unstable and war-torn countries as well as the dangers of being perceived by the population to be served as affiliated with a participant in the conflict). Thus, in many instances, NGOs depend upon their independence from government and state actors in order to carry out their work effectively, by, for example, serving communities that might otherwise be wary of receiving assistance from government or state actors. This purpose is undermined by the requirement of a pledge that inexorably links them to a particular side of the conflict.

Undermining the independence of NGOs is counterproductive. Indeed, elsewhere Congress has recognized the importance of relying on the third sector to achieve development objectives abroad “without compromising their private and independent nature.” Foreign Assistance Act, 22 U.S.C. § 2151u. USAID has similarly acknowledged the importance of the independence of the third sector from the government stating that one “inherent challenge” “is achieving the right mixture of collaboration and independence between public and private spheres. A healthy degree of separation between the two is essential for the unique mission of each, but cooperation is also critical to the success of both.” USAID Report, *The Voluntary Foreign Aid Programs: 2006 Report of Voluntary Agencies Engaged in*

Overseas Relief and Development 4 (“USAID recognizes the independent mission of [the third sector]....”).

The government’s brief completely fails to appreciate the independent nature of the third sector. By accepting Leadership Act funds, the government reasons, members of the third sector simply become “those who speak the government’s message.” *See* ARB at 33. But one of the fundamental flaws of the pledge requirement is that it regulates the grantee as an entity, and not merely the program activities of the grantee funded by the government. That is, although the Act fails to “distinguis[h] between a [government] *grantee* and a [government] *project*,” (SPA 176-77 (contrasting Act’s “program integrity” requirements with those upheld in *Rust*)), in fact, members of the third sector, even when conducting activities funded by the government, retain their distinct non-governmental identities — and the public does not attribute their actions or viewpoints to the government. It is for this reason that the receipt of government funds by faith-based initiatives does not alone engender the constitutionally impermissible government espousal or establishment of religion. But this has not been the case. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (Thomas, J., plurality opinion) (finding that where government benefits are distributed with neutrality, “no one would conclude that any indoctrination that any particular [religious] recipient conducts has been done at the behest of the government”); *Agostini v. Felton*, 521 U.S. 203, 229-32 (1997) (finding that presence of public school teachers in parochial schools did not result in unconstitutional “symbolic link” between government and religion). And it is for this reason, as well, that the courts, including the Supreme Court, have been careful to maintain the distinction between private and public entities, as a result of which private enterprises may be held liable as state actors only in very limited circumstances. *See, e.g., Brentwood Acad. v. Tenn. Secondary Sch. Ass’n*, 531 U.S. 288, 295 (2001) (describing “close

nexus” that must exist between state and private association to bring association’s action within Fourteenth Amendment); *Jackson v. Statler Found.*, 496 F.2d 623, 625 (2d Cir. 1974) (enumerating list of factors determinative of whether private association is state actor).

Indeed, in other contexts, these very same defendants have recognized that private activities are not attributable to the government. For example, in 2004, USAID promulgated a rule removing certain barriers to the participation of faith-based agencies in USAID programs. *See* 69 Fed. Reg. 61,716 (Oct. 20, 2004). In order to avoid violation of the Establishment Clause of the Constitution, faith-based agencies are eligible for USAID funding so long as the funding is not used by those agencies for “inherently religious activities.” *Id.* at 67,717. The rule recognizes that “a religious organization that participates in USAID programs *will retain its independence* and may continue to carry out its mission, including the definition, practice, and *expression* of its religious beliefs, provided that it does not direct financial assistance from USAID to support any inherently religious activities...” *Id.* (emphasis added). It is difficult to reconcile the government’s position in this case — that an organization’s privately funded conduct necessarily will automatically be attributed to the government, *see* ARB at 34-35, 56-57 (arguing that in overseas operations, the government is judged as much by its own actions as by its associations) — with its apparent recognition that an organization may espouse religious messages without those messages appearing to be government endorsed.¹¹

¹¹ Notably, in response to a concern raised that the Rule did not ensure the creation of appropriate “firewalls” between government-funded services and core religious activities of a grantee recipient, USAID stated that “the [existing] system of monitoring is more than sufficient to address the commenter’s concerns.” 69 Fed. Reg. at 61721 (referring to policies, guidelines and regulations prescribing cost

The government argues, however, that the international nature of the efforts funded by the Leadership Act provide further need to control the speech of grantees. *See* ARB at 34 (arguing that the international context creates “a special need to prevent those who serve as the United States’ representatives from undermining the government’s mission”). But here, too, experience counsels otherwise. Independence, neutrality, and integrity are *especially* critical to the success of NGOs operating internationally. The NGOs that receive Leadership Act funds, for example, operate in regimes that vary with respect to the legality of sex work. Thus, sex work is not criminalized in countries such as Senegal and Brazil. *See* Declaration of Chris Beyrer, dated September 21, 2005 (JA 56 ¶ 20, JA 59 ¶ 27) (describing the success of Senegal in combating the spread of HIV/AIDS by decriminalizing sex work for sex workers registered with the government and noting that due to the decriminalization of sex work in Brazil, outreach programs have been successful in keeping the rates of HIV low). Likewise, in the Philippines, sex workers must register with the government. *See id.* (JA 59 ¶ 26). In these and other countries in which sex work is not criminalized, United States based NGOs may and frequently do wish to provide public health assistance or to subcontract with others to provide such assistance, in order to stop the spread of HIV/AIDS. In these countries and others, adopting the position of the United States government will undermine the work of these organizations and will hamper their ability to operate in these alternative legal regimes. *Accord* Carol Jenkins, UNAIDS, *Female Sex Worker HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India, and Bangladesh* 52 (2000) (identifying strong relationships with target group predicated on non-stigmatization as key to program success). In illustration of this point, the Brazilian government, which runs a

accounting procedures that are to be followed by all recipients in using USAID funds).

highly successful HIV/AIDS prevention program, returned \$40 million in grants from the United States on the ground that its ability to conduct effective outreach to sex workers would be undermined if their NGO partners were forced to state their explicit opposition to prostitution. *See* Michael M. Phillips and Matt Moffett, *Brazil Refuses U.S. AIDS Funds, Rejects Conditions*, WALL ST. J., May 2, 2005 at A3.

Moreover, the government itself recognizes that neutrality and independence are often prerequisites to the effective work of NGOs operating internationally. For, even as it becomes increasingly clear that sponsoring international relief and development stands to further the national security of the United States, *see* 22 C.F.R. § 226 *et seq.* (implementing requirement that all USAID program materials be marked as “from the American people”), so too is it recognized, even by the government, that in some instances, conferring government identity on NGOs threatens their effectiveness. Thus, the by their terms, the branding requirements of USAID do not apply if they would “compromise the intrinsic independence or neutrality of a program,” “diminish the credibility” of reports or recommendations, or “offend local cultural or social norms.” 22 C.F.R. § 226.91(h)(1) (listing presumptive exceptions to branding requirement).

Finally, the pledge requirement and “organizational integrity” guidelines threaten the vitality of the third sector by subverting the values of transparency and accountability upon which public trust — and participation — in the third sector is predicated. Thus, best practices dictate that third sector organizations ensure that all representations made in promotional, fundraising, and other documents reflect the underlying values and mission of the organization. *See* INDEPENDENT SECTOR, *Obedience to the Unenforceable: Ethics and the Nation’s Voluntary and Philanthropic Community* 20-21 (2002). The pledge requirement and corresponding guidance on the formation of affiliates forces members of the third

sector into an untenable position. They must either abandon certain activities otherwise within their mission, or create affiliate organizations that in fact obscure their structure and activities. That the government seemingly anticipates and accepts such duplicity, *see* ARB at 57 (advocating that organizations seeking to maintain neutral or conflicting position may “remain neutral or continue advocating its contrary view” while “setting up a subsidiary organization”), does not lessen the deleterious impact of such practices. In addition to incurring unnecessary and non-negligible administrative costs, creating disingenuous affiliate structures violates a key tenet of the third sector: “Accountability to the public is a fundamental responsibility of public benefit organizations; openness and honesty in reporting, fundraising and relationships with all constituencies are essential behaviors for organizations which seek and use public or private funds and which purport to serve public purposes.” *Id.* at 18.

In sum, in the face of the pledge requirement at issue in this case, partnerships between the government and public sector will be less effective, and less likely, as NGOs are forced to choose between adopting policies that may severely hamper their legitimacy and effectiveness or forgoing government funds altogether. Further, as the district court noted, NGOs such as plaintiffs in this case play a “critical role” in “simulating public discourse on controversial issues, including eminently debatable questions such as what may be the most appropriate or effective policy to engage high-risk groups in [combating the HIV/AIDS pandemic].” (JA 599-600). Third sector organizations will find it difficult if not impossible to experiment with new views and approaches to addressing the HIV and AIDS pandemic if forced to adhere to the restrictions of the pledge requirement. Indeed, the district court has warned,

[T]he government's intervention would carry the substantial likelihood to redirect the choice of speech that a recipient might otherwise feel entirely uninhibited to make, and by the use of such inducements derived from its vast resources, to tilt the public power equilibrium to the choice of view the government elects to favor. (JA 589).

It is not only the third sector organizations that stand to lose in such a scenario. Without the vital independence of these organizations, and the diversity of views engendered by that independence, the government is left to partner only with its ideological bedfellows, and is consequently deprived of the robust exchange of ideas that lead to innovative approaches to solving pressing social problems. *Cf. Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (“The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”) (finding unconstitutional regulation of speech in university context) (citation omitted).

The pledge requirement has the effect of undermining the critical partnership between government and civil society, which has served as a cornerstone of our democracy. Without autonomy, the ability of the third sector to work together with government to provide essential services and to solve urgent public problems is severely compromised. Efforts to compel members of the third sector to adopt a single viewpoint favored by the government will distort the independent voices of the third sector, and will ultimately deprive our democracy of the fruits of the third sector's robust autonomy.

CONCLUSION

For the foregoing reasons, the district court's grant of a preliminary injunction should be affirmed.

Respectfully submitted,

Dated: September 15, 2010

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of *Amicus Curiae* Independent Sector complies with the type-volume limitation specified in the Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief is proportionately spaced, has a typeface of 14 points and contains less than 7000 words exclusive of the table of contents, table of authorities, and certificate of service.

/s/ Lawrence S. Lustberg
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September 15, 2010

CERTIFICATE OF VIRUS CHECK

I hereby certify that a virus check of the electronic .PDF version of this Brief was performed using Sophos Endpoint Security and Control, version 9 and the .PDF file was found to be virus free.

/s/ Lawrence S. Lustberg
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September 15, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 15th day of September 2010, I caused two true and accurate copies of the Brief of *Amici Curiae* Independent Sector to be served by overnight federal express and email at the following addresses:

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