

BRENNAN CENTER FOR JUSTICE

Alliance for Open Society International v. USAID

Questions and Answers about the July 6, 2011 Appeals Court Ruling Holding the Anti-Prostitution Pledge Requirement Unconstitutional

A sweeping speech restriction in the U.S. government's international HIV/AIDS program violates the First Amendment and cannot be enforced against U.S.-based members of InterAction and Global Health Council, a federal appellate court ruled on July 6, 2011. At issue in the case is a requirement that groups receiving U.S. funds under the U.S. Leadership Against HIV/AIDS, Tuberculosis and Malaria Act pledge their opposition to prostitution in order to continue their life-saving HIV prevention work. Under this "pledge requirement," recipients of U.S. funds must condemn some of the most vulnerable clients they serve and censor even their privately funded speech regarding the most effective ways to engage high-risk groups in HIV prevention.

What did the appeals court rule?

The U.S. Court of Appeals for the Second Circuit ruled that the pledge requirement violates the First Amendment by compelling funding recipients to espouse the government's point of view on prostitution in order to receive HIV/AIDS funding. "Compelling speech as a condition of receiving a government benefit," the Court wrote, "cannot be squared with the First Amendment." The Court also held that the requirement is impermissibly viewpoint-based because it requires recipients to take the government's side on a particular issue.

The Court rejected the government's assertion that the pledge is nonetheless permissible because it is part of a government program that seeks to convey a message. The stated purpose of the Leadership Act is to combat HIV/AIDS, as well as tuberculosis and malaria, the Court noted, and not to conduct an anti-prostitution messaging campaign. In addition, the Court rejected the government's assertion that anti-prostitution policy statements are central to the HIV/AIDS program by pointing to the exemption of several high-profile global organizations, two of which have advocated for the decriminalization of prostitution.

The Court also rejected the government's assertion that any compelled speech violations were cured by implementing guidelines that permit funding recipients to set up physically and financially separate affiliates. "It simply does not make sense to conceive of

the Guidelines here as somehow addressing the Policy Requirement's affirmative speech requirement by affording an outlet to engage in privately funded silence; in other words, by providing an outlet to do nothing at all," the Court stated.

In addition, the Court rejected the government's argument that InterAction and GHC did not have standing to assert the claims of their members.

Having upheld the injunction on free speech grounds, the Court did not reach the Plaintiffs' claims that the pledge requirement is unconstitutionally vague because, among other things, the government has barred recipients from engaging in speech "inconsistent with a policy opposing prostitution" but has not defined what that term means. However, the court did note that it had the "distinct impression that not even Defendants have a grasp on what it means to engage in expression that is 'inconsistent' with an opposition to prostitution."

For the full text of the Court's opinion, click [here](#).

Who are the plaintiffs?

The individual plaintiffs are Alliance for Open Society International ("AOSI") and Pathfinder International. Global Health Council and InterAction are participating as plaintiffs to assert the rights of and protect their members. All plaintiffs are represented by the Brennan Center for Justice at NYU School of Law and the law firm of Wilmer Cutler Pickering Hale and Dorr LLP.

Who are the defendants?

Defendants are the United States Agency for International Development ("USAID"), the U.S. Department of Health and Human Services ("HHS"), and the U.S. Centers for Disease Control and Prevention ("CDC"). CDC is an operating agency of HHS.

USAID and HHS are the two federal agencies with primary authority for implementing the U.S.'s global strategy to fight HIV/AIDS (also called the President's Emergency Plan for AIDS Relief, or PEPFAR). They distribute government funds for HIV/AIDS prevention, care and treatment.

What is the "pledge requirement" and how has it been enforced?

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.*, which authorized the appropriation of \$15 billion over a five-year period towards education,

research, prevention, treatment and care to fight HIV/AIDS worldwide. The Leadership Act requires private recipients of U.S. funds to adopt “a policy explicitly opposing prostitution.” 22 U.S.C. § 7631(f). For a year and a half after the Leadership Act’s enactment, this “pledge requirement” was not applied to U.S.-based groups, due to [warnings](#) from the U.S. Department of Justice that it would be unconstitutional to do so.

The Department of Justice eventually changed its opinion and advised federal agencies that they could apply the pledge requirement to U.S.-based groups. Accordingly, in late spring of 2005, USAID and HHS began applying the pledge requirement to U.S.-based organizations. In 2008, Congress left the pledge requirement intact when it reauthorized the PEPFAR program through the Tom Lantos and Henry J. Hyde United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2008.

What does the pledge requirement require?

USAID and HHS have required groups receiving HIV/AIDS funds to agree that they are “opposed to prostitution” and have required recipients to refrain from engaging in speech or conduct that is “inconsistent with an opposition to prostitution,” even when such speech and conduct are financed by a recipient’s private funds.

Neither USAID nor HHS has issued formal guidance explaining what types of speech and conduct are “inconsistent with an opposition to prostitution.”

USAID has advised AOSI informally that the pledge requirement bars advocacy for the elimination of criminal penalties against sex workers, advocacy for the legalization of prostitution, and organizing sex workers for the purposes of advocating the legalization of prostitution. Organizing sex workers and eliminating laws that penalize them, and therefore interfere with HIV prevention, have been recognized by the public health community as highly effective outreach tools in combating AIDS. USAID has never clarified what other activities may be banned.

What are the “separation regulations”?

In an attempt to forestall an appellate ruling on the constitutionality of the pledge requirement in the summer of 2007, USAID and HHS issued guidelines that purport to provide PEPFAR recipients with a means of speaking freely with their private funds, but only if they did so through legally, financially, and physically separate affiliates, with separate governance, management and staff. HHS subsequently conducted a formal “notice and comment” process for these guidelines and issued a final regulation in December 2008, right before the change from the Bush to Obama administrations.

HHS commenced a new notice and comment process in November 2009 that concluded with the publication of a revised [final regulation](#) on April 13, 2010.

What laws did the plaintiffs challenge?

Plaintiffs challenged the validity of the anti-prostitution pledge requirement and the guidelines issued under it. Plaintiffs did not challenge the requirement that they adopt policies explicitly opposing sex trafficking.

What happened previously in the case?

In 2005, original plaintiffs Alliance for Open Society International and Pathfinder International filed suit in federal court in New York to challenge the government's requirement that they adopt anti-prostitution policies and limit their privately funded work. In May 2006, Judge Victor Marrero of the U.S. District Court for the Southern District of New York ruled that the requirement violated their First Amendment rights by restricting their privately funded speech and forcing them to espouse the government's viewpoint. He issued a preliminary injunction that prohibited the government defendants – the United States Agency for International Development (“USAID”) and the Department of Health and Human Services (“HHS”) – from enforcing the pledge against the plaintiffs.

The government appealed that decision. However, while the appeal was pending, in the summer of 2007, the government issued new implementing guidelines. In light of the new guidelines, the appeals court sent the case back to the district court without ruling on the merits. The appeals court kept the preliminary injunction protecting AOSI and Pathfinder in place.

When the case returned to the district court, InterAction, the largest alliance of U.S.-based humanitarian organizations, and Global Health Council (“GHC”), a preeminent public health membership group, sought leave to join the case and bar the government from enforcing the pledge against their members. In August 2008, the district court granted that request and prohibited the government from enforcing the pledge against the U.S.-based members of InterAction and GHC. The ruling also rejected the government's claims that the constitutional flaws identified in the May 2006 decision had been cured by the summer 2007 guidelines that purport to provide recipients a means of speaking freely with their private funds.

The government then appealed both the August 2008 and May 2006 opinions to the U.S. Court of Appeals for the Second Circuit. The appeal was on hold while HHS and USAID conducted a new regulatory process from 2009 to 2010. In a ruling issued July 6,

2011, a three-judge panel of the appeals court held that the pledge requirement violated the plaintiffs' First Amendment speech rights and affirmed the district court's prior injunctions.¹

What are the next steps in the case?

Plaintiffs do not yet know whether the government defendants plan to seek a rehearing at the Second Circuit or review by the Supreme Court. The initial deadline for the defendants to seek a rehearing at the circuit court is August 22, 2011.

What does the decision mean for members of InterAction and GHC?

All members of InterAction and the U.S.-based members of GHC may continue to operate free of the pledge requirement.² This means that they can continue to receive Leadership Act funds without being forced to adopt an organization-wide policy opposing prostitution and without having to agree in their grant documents to oppose prostitution. Additionally, they will be able to use their own, non-U.S.-government funds, to engage in a range of First Amendment protected activities (such as meeting with local activists, conducting meetings about best methodologies for fighting HIV/AIDS, attending conferences) without being subject to the risk that the government would declare such work to be insufficiently opposed to prostitution, and without fear that such work would be deemed by the government to be a basis for suspending or terminating USAID or HHS funds.

USAID and HHS typically use preprinted standardized grant documents that include the anti-prostitution pledge requirement among numerous standard provisions. The court ruling trumps any clause in the standard agreement. Funding Opportunity Announcements and all other grant and contract documents should contain a footnote that makes clear that the standard language is altered by the court decision. To date, that footnote has read as follows:

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

¹ The opinion was authored by Judge Barrington D. Parker, Jr. and joined by Judge Rosemary Pooler. Judge Chester Straub dissented.

² The only U.S.-based GHC member that has not benefitted from the injunction is DKT International, because a separate appellate court in Washington, D.C., rejected its separate challenge to the pledge requirement.

Should you encounter any problems with particular grant solicitations or agreements, please contact Rebekah Diller at the Brennan Center, rebekah.diller@nyu.edu or 646-292-8321.

Did the plaintiffs challenge any restrictions on their federal funding?

No. The plaintiffs did not challenge the Leadership Act’s restriction on how they may spend the funds they receive from the federal government. Under that restriction, 22 U.S.C. § 7631(e), no U.S. funds may be spent on “the promotion or advocacy of the legalization or practice of prostitution.”

Did the plaintiffs challenge the application of the pledge requirement to groups based outside the United States?

No.

What does the decision mean for NGOs outside the U.S.?

NGOs based outside the U.S. are unaffected by the decision and are still bound by the pledge requirement.