

***Alliance for Open Society International v. USAID***  
**Questions and Answers About the August 8, 2008 Ruling**  
**Granting InterAction and Global Health Council a Preliminary Injunction**

A sweeping speech restriction in the U.S. government's international HIV/AIDS program cannot be enforced against U.S.-based members of InterAction and Global Health Council, a federal judge ruled on August 8, 2008. 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 are forced to censor even their privately funded speech regarding the most effective ways to engage high-risk groups in HIV prevention.

### **Background**

In May 2006, Judge Victor Marrero of the U.S. District Court for the Southern District of New York ruled that the requirement violates the First Amendment rights of two plaintiff organizations, Alliance for Open Society International and Pathfinder International, by restricting their privately funded speech and forcing them to espouse the government's viewpoint.

The August 2008 ruling extends that injunction to the members of InterAction, the largest alliance of U.S.-based humanitarian organizations, and to the U.S.-based members of Global Health Council, a preeminent public health membership group.<sup>1</sup> The ruling also rejects the claims of the defendants that the constitutional flaws identified in the May 2006 decision had been cured by the summer 2007 issuance of government guidelines that purport to provide recipients a means of speaking freely with their private funds.

The full opinion and all the legal papers are available at:  
[http://www.brennancenter.org/programs/pov/osi\\_court\\_documents.html](http://www.brennancenter.org/programs/pov/osi_court_documents.html).

### **Who are the plaintiffs?**

The original plaintiffs in the lawsuit were Alliance for Open Society International, the Open Society Institute, and Pathfinder International. In its August 8, 2008 decision, the Court permitted Global Health Council and InterAction to join as

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<sup>1</sup> The only U.S.-based GHC member that will not benefit from the injunction is DKT International, which brought a separate, unsuccessful challenge to the pledge requirement before a different court.

additional plaintiffs to assert the rights of and protect their members. Plaintiffs in the lawsuit 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 Global AIDS 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 Global AIDS 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 Global AIDS 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 certify that they have “a policy explicitly opposing prostitution” and 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 section 7631(f) 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 last summer, 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 do so through legally, financially, and physically separate affiliates, with separate governance, management and staff. HHS subsequently published these guidelines as a proposed regulation, which is still in the midst of the “notice and comment” process. That process is described in more detail below.

### **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.

### **Did the plaintiffs challenge any restrictions on their federal funding?**

No. The plaintiffs did not challenge the Global AIDS 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 did the judge rule?**

In his August 8, 2008 decision, Judge Marrero, who is a federal trial judge in New York City, held that InterAction and GHC could join the lawsuit as plaintiffs to seek relief on behalf of their members. He then held that the guidelines did not cure the pledge requirement’s constitutional flaws identified in the May 2006 decision. The pledge requirement and guidelines violate the First Amendment because they continue to require independent organizations to espouse the government’s message and are more burdensome than they need to be in order to further the government’s interest, he ruled.

Having ruled on the plaintiffs' claims that the pledge requirement and guidelines violate the First Amendment for these reasons, Judge Marrero did not reach the plaintiffs' other claim that the requirement and guidelines are unconstitutionally vague.

### **What are the next steps in the case?**

Plaintiffs do not yet know whether the government defendants plan to appeal Judge Marrero's decision. The deadline for filing a notice indicating their intent to appeal is October 7, 2008

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

All members of InterAction and the U.S.-based members of GHC<sup>2</sup> may now operate free of the pledge requirement. This means that they will no longer be forced to adopt an organization-wide policy opposing 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. To indicate that your organization is operating under the benefit of the injunction, we suggest that you add the following language after the signature in the certification section of any grant agreement document that you sign going forward:

“except insofar as provided in *Alliance for Open Society International v. USAID*, No. 05-8209 (S.D.N.Y. August 8, 2008) (extending preliminary injunction relief to U.S.-based members of InterAction and Global Health Council).”

This is the practice that Pathfinder International has engaged in since obtaining injunctive relief two years ago. Should you encounter any problems with particular grant officers or agreements, please contact Rebekah Diller at the Brennan Center, [rebekah.diller@nyu.edu](mailto:rebekah.diller@nyu.edu) or 212-992-8635.

### **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.

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<sup>2</sup> As discussed above, DKT International is not protected by the injunction.

### **What does the decision mean for HHS's notice and comment process?**

In the notice and comment process, the agency issues a proposed regulation, accepts comments from the public regarding that proposal, and then, after considering the comments it has received, issues a final regulation. As mentioned above, HHS published its separation rules as a proposed regulation in spring 2008. Dozens of groups submitted comments documenting how onerous the proposed regulation is for NGOs operating in the international arena, and arguing the regulation is unconstitutional. Judge Marrero's decision agreed with the many commenters who had written that the proposed regulation is unconstitutional. We certainly hope that HHS will take the comments, and Judge Marrero's decision, into account when it decides what the final regulation should say.

There is no official deadline for HHS to complete its notice and comment process and issue the final regulation. According to news reports, the White House has advised agencies to issue all final regulations by November 1.

### **Does the decision affect the similar anti-prostitution requirements of the Trafficking Victims Protection Act ("TVPA")?**

No. The TVPA restriction is not at issue in the *AOSI v. USAID* lawsuit. The TVPA act requires funding recipients to "[state] in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution." 22 U.S.C.A. § 7110(g)(2). Like the Global AIDS Act's anti-prostitution pledge requirement, the TVPA contains an entity-wide pledge requirement and ban on speech regarding prostitution. However, the TVPA provisions have not yet been challenged in court. Accordingly, InterAction and GHC members that receive TVPA funds are still required to abide by the TVPA restriction.