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Open Society Institute  
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Dear Colleagues,

On behalf of the Sexual Health and Rights Project of the Open Society Institute's Network Public Health Program (SHARP), we are pleased to share with you this compilation of informational resources regarding the U.S. Government's requirement that groups receiving HIV/AIDS funds from USAID and HHS certify they have a "policy explicitly opposing prostitution." This policy mandates that grantees refrain from engaging in speech or conduct that is inconsistent with the government's views on the subject, even when such speech and conduct are financed by private funds. Attached, please find materials about the anti-prostitution pledge including fact sheets, editorials, press releases, and news articles. We believe these resources show the loyalty oath is unconstitutional and counter-productive and flies in the face of sound public health. Moreover, the anti-prostitution pledge falsely casts sex workers as part of the problem rather than acknowledging their important role in developing and implementing successful HIV/AIDS prevention strategies.

We are grateful for continued support regarding our legal challenge of the anti-prostitution pledge and welcome the opportunity to collaborate with others who are seeking to improve these overreaching policies and practices.

Sincerely,



Sue Simon

Director, Sexual Health and Rights Project  
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BUILDING A GLOBAL ALLIANCE FOR OPEN SOCIETY

## News & Announcements

### OSI Sues USAID over Dangerous Public Health Policy

September 23, 2005

The Open Society Institute, along with its affiliate the Alliance for Open Society International, filed a lawsuit today against USAID to challenge its unconstitutional and dangerous policy of requiring grantees to sign a pledge opposing prostitution. Failure to endorse this loyalty oath means health workers across the world striving to stop the spread of HIV/AIDS could lose funding and be forced to abandon life-saving programs.

The United States has made a historic and laudable commitment to combat HIV/AIDS. But these funding restrictions threaten to render these achievements ineffective. More than 40 million people are living with HIV/AIDS and five million became infected in 2004.

The USAID pledge requirement undermines efforts to provide life-saving services and information to sex workers, who are at significant risk of infection and can also transmit HIV to others. In many countries, the epidemic is concentrated among sex workers and reaching them with prevention services will help avert a wider epidemic.

Sex workers face harassment, violence, and discrimination. Severe stigmatization and threat of fines or incarceration make sex workers less able to access needed health and social services. Requiring health workers to condemn the people they are trying to help will intensify the stigma and fears among this vulnerable population and make it harder to engage them effectively.

The AOSI and OSI lawsuit charges that the pledge requirement is unconstitutional, under well established Supreme Court case law, because it requires private organizations to adopt the government's point of view in order to receive funding. The Justice Department under the Bush Administration originally reached this same conclusion, only recently reversing its view. Although the pledge requirement was passed by Congress in 2003, it was not until this year that USAID sought to implement it with US-based organizations.

The suit also alleges that the pledge requirement is unconstitutionally vague and therefore allows the law to be applied arbitrarily. It is unclear how organizations are supposed to "oppose prostitution," and the uncertainty created by this provision creates a chilling effect on efforts to stop the spread of HIV/AIDS. Despite repeated requests from OSI and other groups, USAID has declined to give any guidance as to what constitutes compliance with the pledge. In an attempt to keep its USAID-funded HIV prevention programs alive in Central Asia, AOSI this summer signed the anti prostitution pledge, while noting its objections.

On two previous occasions, USAID refused to indicate whether AOSI's policy met the pledge requirement. AOSI has stated that it believes that trafficking and sex work do harm both to the individuals directly involved and to others in various ways.


AOSI is administering a government grant awarded in 2002 to implement USAID's Drug Demand Reduction Program in Central Asia, where HIV/AIDS is spread overwhelmingly through injection drug use and left unchecked will have a devastating social and economic impact. Since sex workers are at increased risk of using drugs, they are a prime target for this program's interventions. The programs provide testing for HIV and other infectious diseases, drug treatment and other services to help people stop using drugs, and education and counseling to sex workers. Outreach work is crucial to curbing the HIV epidemic and is consistent with evidence-based public health best practices.


The Open Society Institute, which helps fund AOSI, is a leader among groups working to stem the spread of HIV/AIDS in the former Soviet Union where the epidemic is one of the fastest growing in the world. OSI also implements a range of initiatives to support the rule of law, education, public health, and independent media. OSI works to build alliances across borders and continents on issues such as combating corruption and rights abuses.

AOSI and OSI are urging that the pledge requirement be lifted so that aid groups and the government can continue to work together to save lives.

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*The Brennan Center for Justice at NYU School of Law filed this lawsuit on behalf of the Open Society Institute and the Alliance for Open Society International.*

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For immediate release  
September 23, 2005  
Contact: Dorothee Benz 212-998-6318

## Brennan Center Suit Challenges Sweeping Restriction on Relief Organizations Receiving U.S. HIV/AIDS Funding

NEW YORK -- The Brennan Center for Justice at New York University School of Law filed a lawsuit today challenging a requirement that relief organizations submit to a harmful and sweeping restriction on their free speech rights as a condition of participating in the U.S. government's program to combat the international spread of HIV/AIDS.

At issue in today's lawsuit is a requirement that United States Agency for International Development funding recipients pledge their "opposition to prostitution" in order to continue their life-saving HIV prevention work. While none of the relief organizations receiving funds "support prostitution," it is essential that they maintain their ability to engage in proven, effective HIV prevention methods with at-risk populations. That ability is inevitably compromised when groups are simultaneously forced to condemn those they are reaching out to. The "pledge requirement" puts providers in exactly this bind, and it thus undercuts evidence-based, practical and urgently needed public health policies in the name of ideological purity.

In addition to jeopardizing public health, the "pledge requirement" violates the First Amendment by forcing private organizations to adopt the government's point of view and by restricting what they can say and do with their private funding. While participating relief organizations are required to adopt the pledge, the government has refused to provide any guidance regarding just what it means to "oppose prostitution," casting a shadow of uncertainty over entire HIV/AIDS prevention programs. Organizations are left to wonder whether USAID will deem them out of compliance when they talk with allies, hold a conference, or issue a publication related to sex work.

Filed in the U.S. District Court for the Southern District of New York on behalf of the Open Society Institute (OSI) and its affiliate the Alliance for Open Society International (AOSI), the lawsuit alleges that this "pledge requirement" undermines the ability of relief organizations to stem the spread of HIV/AIDS internationally.

AOSI and OSI, in filing today's lawsuit, join a chorus of voices that have objected to a requirement that interferes with proven HIV prevention approaches. In July, Brazil declined tens of millions of dollars in U.S. funds for its anti-AIDS work. In February, 13 charitable organizations, including the International Rescue Committee, Save the Children and CARE, criticized USAID's policy, saying that it "greatly undermines" AIDS prevention efforts.

The lawsuit filed today on behalf of OSI and AOSI is brought by the Brennan Center's Non-Profit Rights Project, which advocates to protect First Amendment freedoms of non-profit

organizations when they partner with government. The Brennan Center also serves as co-counsel in a separate action challenging the pledge requirement brought by DKT International in August in federal court in the District of Columbia (see [http://www.brennancenter.org/programs/pov/npr\\_dkt.html](http://www.brennancenter.org/programs/pov/npr_dkt.html)).



OPEN SOCIETY INSTITUTE  
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BUILDING A GLOBAL ALLIANCE FOR OPEN SOCIETY

## News & Announcements

### Judge Rules in Favor of AOSI, Says USAID Pledge Rule Is Unconstitutional

May 9, 2006

NEW YORK, May 9, 2006—In a victory for free speech and sound public health policy, a federal judge ruled today that a sweeping restriction on the activities of groups participating in the federal government's international HIV/AIDS program violates the First Amendment.

At issue in the case is a requirement that public health groups receiving U.S. funds pledge their "opposition to prostitution" in order to continue their life-saving HIV prevention work. The pledge requirement law was passed by Congress in 2003, as part of the Global AIDS Act. Under this policy, recipients of U.S. aid are restricted in how they use even their private funds, impeding their ability to deliver effective prevention services to those most vulnerable to HIV/AIDS.

In his opinion issued today, Judge Victor Marrero of the U.S. District Court for the Southern District of New York ruled that the pledge requirement violated the First Amendment rights of two plaintiff organizations, Alliance for Open Society International (AOSI) and Pathfinder International, by restricting their privately funded speech and by forcing them to adopt the government's viewpoint in order to remain eligible for funds. "The Supreme Court has repeatedly found that speech, or an agreement not to speak, cannot be compelled or coerced as a condition of participation in a government program," wrote Judge Marrero.

"It's wrong for the government to force public health organizations to make ideological pledges in order to do their work of preventing HIV/AIDS," said Rebekah Diller, Associate Counsel at the Brennan Center for Justice at NYU School of Law, which represented the plaintiffs. "This decision has wider implications. As nonprofit organizations partner with government to address social problems, it should be clear that what counts is whether they do the work, not whether they are willing to espouse the government's positions."

The pledge requirement flies in the face of sound public health policy. It is essential that public health organizations maintain their ability to engage in proven, effective HIV prevention methods with at-risk populations, such as sex worker, without forcing them to condemn the people they are trying to help.

"Today's ruling by Judge Marrero enables Pathfinder to continue serving the most vulnerable women in many of the world's poorest nations without impediment," said Daniel Pellegrin, Executive Director of Pathfinder International, one of the plaintiffs in the case.

"We're delighted that the court recognized the pledge requirement as unconstitutional and against our national commitment to open debate," said Ricardo Castro, a board member of AOSI. "The provision not only violates the First Amendment, but also hampers organizations on the frontlines of the AIDS epidemic working to save lives through proven prevention methods. We believe that public health policy should be based on science—not ideology."

The plaintiffs are among a chorus of voices that have objected to a requirement that interferes with proven HIV prevention approaches. Last year, Brazil declined tens of millions of dollars in U.S. funds for its anti-AIDS work, and 13 charitable organizations, including the International Rescue Committee, Save the Children and CARE, criticized the pledge requirement, saying that it "greatly undermines" AIDS prevention efforts.

In his ruling today, Judge Marrero determined that a preliminary injunction against the enforcement of the pledge requirement was necessary to prevent AOSI and Pathfinder from suffering irreparable harm. While the court's decision applies directly only to AOSI and Pathfinder, it could have a broad impact on the many other public health organizations also forced to adopt the government's viewpoint to receive federal funds.

The lawsuit, *Alliance for Open Society International v. United States Agency for International Development*, was brought by Pathfinder International, AOSI, and the Open Society Institute, with which AOSI is affiliated. The Brennan Center for Justice, through its Non-Profit Rights Project, which works to protect the freedom of non-profit organizations when they

partner with government, is counsel to the plaintiffs.

Defendants are the United States Agency for International Development, the U.S. Department of Health and Human Services, and the U.S. Centers for Disease Control, all of which distribute U.S. funds for international HIV/AIDS work.

AOSI—which receives support from the Open Society Institute—was required to sign the pledge in order to receive continued government funding to administer USAID's Drug Demand Reduction Program in Central Asia. The Drug Demand Reduction Program has operated since 2002 in Central Asia, where HIV/AIDS is spread overwhelmingly through injection drug use and is likely to have a devastating social and economic impact.

Pathfinder International, based in Watertown, Massachusetts, provides reproductive health services and HIV/AIDS prevention to women and families in many of the world's most economically challenged countries.

The AOSI decision is available for download below, or may be viewed, with additional filings, at [www.brennancenter.org/programs/pov/osi\\_court\\_documents.html](http://www.brennancenter.org/programs/pov/osi_court_documents.html).

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#### **AOSI v. USAID**

**Decision**

*PDF Document*

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## **Related Information**

### **OSI Sues USAID over Dangerous Public Health Policy**

*September 23, 2005*

OSI, along with its affiliate the Alliance for Open Society International, filed a lawsuit against USAID challenging its unconstitutional and dangerous policy of requiring grantees to sign a pledge opposing prostitution. [more](#)

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**For Immediate Release**  
Tuesday, May 9, 2006

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## **Federal Court Holds "Anti-Prostitution Pledge Requirement" Violates First Amendment**

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**NEW YORK, NY** – A federal judge ruled today that a sweeping restriction on the privately funded speech of groups participating in the federal government's international HIV/AIDS program violates the First Amendment.

At issue in the case is a requirement that public health groups receiving U.S. funds 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.

In his opinion issued today, Judge Victor Marrero of the U.S. District Court for the Southern District of New York ruled that the pledge requirement violated the First Amendment rights of two plaintiff organizations, Alliance for Open Society International (AOSI) and Pathfinder International, by restricting their privately funded speech and by forcing them to adopt the government's viewpoint in order to remain eligible for funds. "The Supreme Court has repeatedly found that speech, or an agreement not to speak, cannot be compelled or coerced as a condition of participation in a government program," wrote Judge Marrero. The plaintiffs are represented by the Brennan Center for Justice at NYU School of Law.

While none of the relief organizations receiving funds "supports prostitution," it is essential that they maintain their ability to engage in proven, effective HIV prevention methods with at-risk populations. "Today's ruling by Judge Marrero enables Pathfinder to continue serving the most vulnerable women in many of the world's poorest nations without impediment." said Daniel Pellegrom, President of Pathfinder International, one of the plaintiffs in the case.

"We're delighted that the court recognized the pledge requirement as unconstitutional and overreaching," said Ricardo Castro, a board member of Alliance for Open Society ("AOSI") International, one of the plaintiffs. "The provision not only violates the First Amendment, but also hampers organizations on the front lines of the AIDS epidemic working to save lives through proven prevention methods. We believe that public health policy should be based on science--not ideology."

Rebekah Diller, Associate Counsel at the Brennan Center, attorney for the plaintiffs, explained. "It's wrong for the government to force public health organizations to make ideological pledges on unrelated issues in order to do their work of preventing HIV/AIDS. This decision has wider implications. As nonprofit organizations partner with government to address social problems, it



should be clear that what counts is whether they do the work, not whether they are willing to espouse ideological positions.”

The plaintiffs are among a chorus of voices that have objected to a requirement that interferes with proven HIV prevention approaches. In July 2005, Brazil declined tens of millions of dollars in U.S. funds for its anti-AIDS work. In February 2005, 13 charitable organizations, including the International Rescue Committee, Save the Children and CARE, criticized the pledge requirement, saying that it “greatly undermines” AIDS prevention efforts.

The lawsuit, Alliance for Open Society International v. United States Agency for International Development, was brought by Pathfinder International, AOSI, and the Open Society Institute, with which AOSI is affiliated. The Brennan Center for Justice, through its Non-Profit Rights Project which works to protect the freedom of non-profit organizations when they partner with government, is counsel to the plaintiffs. Defendants are the United States Agency for International Development, the U.S. Department of Health and Human Services, and the U.S. Centers for Disease Control, all of which distribute U.S. funds for international HIV/AIDS work.

In his ruling today, Judge Marrero determined that a preliminary injunction against the enforcement of the pledge requirement was necessary to prevent AOSI and Pathfinder from suffering irreparable harm. While the court’s decision applies directly only to AOSI and Pathfinder, it could have a broad impact on the many other public health organizations also forced to sacrifice their privately funded speech in order to receive government funds.

Plaintiff AOSI is an independent nongovernmental organization headquartered in the United States that is affiliated with the Open Society Institute (OSI). Plaintiff OSI, a private operating and grantmaking foundation, aims to shape public policy to promote democratic governance, human rights, and economic, legal, and social reform.

Plaintiff Pathfinder International, based in Watertown, Massachusetts, provides reproductive health services and HIV/AIDS prevention to women and families in many of the world’s most economically challenged countries.

The Brennan Center for Justice at NYU School of Law unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. Its mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education and legal action that promotes equality and human dignity while safeguarding fundamental freedom.

**For Immediate Release**  
Tuesday, May 19, 2006

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**Second Federal Court Holds  
"Anti-Prostitution Pledge Requirement" Unconstitutional**

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**WASHINGTON, DC** – A second federal judge has ruled that a sweeping restriction on the privately funded speech of groups participating in the federal government's international HIV/AIDS program violates the First Amendment.

At issue is a requirement that public health groups receiving U.S. funds 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.

"[T]he Supreme Court has repeatedly held that the government may not compel private individuals or organizations to speak in a content-specific, view-point specific manner as a condition of participating in a government program," wrote Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia. Judge Sullivan's ruling in a challenge brought by the non-profit group DKT International comes on the heels of a similar ruling last week in Alliance for Open Society International v. USAID.

While none of the relief organizations receiving funds "supports prostitution," it is essential that they maintain their ability to engage in proven, effective HIV prevention methods with at-risk populations.

"Two federal judges now have affirmed that it's wrong for the government to force public health organizations to make ideological pledges in order to do their work of preventing HIV/AIDS," said Rebekah Diller, Associate Counsel at the Brennan Center. "This decision has wider implications. As nonprofit organizations partner with government to address social problems, it should be clear that what counts is whether they do the work, not whether they are willing to espouse ideological positions."

The lawsuit, DKT International v. USAID, was brought on August 11, 2005 in the U.S. District Court for the District of Columbia. The Brennan Center for Justice assisted in the representation of the plaintiffs, with the law firm of Jenner & Block serving as lead counsel. Defendant is the United States Agency for International Development, which distributes U.S. funds for international HIV/AIDS work.



**POVERTY PROGRAM**

**NONPROFIT RIGHTS**

## ***Challenging the Global AIDS Act's Anti-prostitution Pledge Requirement***

As part of its work to secure the rights of nonprofit organizations that partner with government, the Center is representing non-profit organizations that are suing in two separate lawsuits to overturn an "anti-prostitution pledge requirement" imposed by the U.S. government on domestic nonprofit organizations that receive funding under the Global AIDS Act to stop the spread of HIV/AIDS.

Two federal courts have ruled in separate cases that the pledge requirement violates the First Amendment.

On May 9, 2006, Judge Victor Marrero issued an opinion holding that the pledge requirement violates the First Amendment rights of plaintiffs Alliance for Open Society International (AOSI) and Pathfinder International. To see the Brennan Center's press release, click [here](#). To view the court's decision, click [here](#). To view a set of "Questions and Answers" about the decisions, click [here](#).

In this case, filed on September 23, 2005 in the U.S. District Court for the Southern District of New York, the Center represents AOSI, its affiliate (the Open Society Institute), and Pathfinder International. In recognition of the fact that the government would otherwise have eliminated a lifesaving USAID funded program to fight HIV/AIDS that AOSI operates in Central Asia, AOSI signed "the pledge" in August, and then sued USAID to secure its own First Amendment and statutory rights to engage in a range of privately financed activities to fight HIV/AIDS. OSI, an entity that receives no USAID funds, joined the lawsuit to ensure that USAID would not seek to penalize either AOSI or OSI for any of OSI's privately financed activities. Pathfinder, which works in 20 nations around the world to stem the spread of HIV/AIDS, joined the lawsuit on December 5, 2005.

To view documents submitted in AOSI v. USAID, click [here](#).

On May 18, 2006, only a week after Judge Marrero's decision, Judge Emmet G. Sullivan ruled that the pledge requirement violates the First Amendment rights of DKT International, a U.S.-based NGO. To view the court's decision, click [here](#).

In this case, filed on August 11, 2005 in the U.S. District Court for the District of Columbia, the Center is assisting in the representation of DKT International (with Jenner & Block serving as lead counsel). DKT was denied funding when it explained that for First Amendment and public health policy reasons, it would refuse to adopt a policy parroting the government's "anti-prostitution" ideology. One of the largest providers of HIV/AIDS services worldwide, DKT operates programs in Brazil, China, Egypt, Ethiopia, India, Indonesia, Malaysia, Mexico, Philippines, Sudan, and Vietnam. DKT has sued the United States Agency for International Development ("USAID").

To view documents submitted in DKT v. USAID, click [here](#).

Neither the Brennan Center nor its clients support prostitution, but it is essential that relief

organizations maintain their ability to engage in proven, effective HIV prevention methods with at-risk populations, including sex workers. Nor do the Brennan Center's clients challenge the government's basic authority to control how the government's own funds are spent. However, in each case, the Center argues that the pledge requirement restricts the free speech and the AIDS prevention efforts that the grantee organizations finance with their own funds.

To provide information to organizations engaged in work to limit the spread of HIV/AIDS, the Brennan Center has also authored a memorandum analyzing the constitutional problems caused by the USAID pledge requirement. Click to download the [memorandum](#).

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## The Prostitution Pledge Requirement: Legal Challenges and Public Health Needs

A federal judge ruled in May 2006 that a sweeping restriction on the privately funded speech of groups participating in the federal government's international HIV/AIDS program violates the First Amendment. The suit was filed by the Open Society Institute (OSI), the Alliance for Open Society International (AOSI), and Pathfinder International.

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 the government's views on the subject, even when such speech and conduct are financed by a recipient's private funds. Organizations that sign the pledge are forced to refrain from some effective HIV prevention strategies, for fear that the government will view the outreach as "pro-prostitution."

### Public Health At Risk

Sex workers are at high risk for contracting HIV and passing it on to others. According to UNAIDS:

- More than 80% of sex workers in **Kenya** and **Zimbabwe** are HIV-positive;
- More than 60% of sex workers in **Cote d'Ivoire**, **Ethiopia** and **Malawi** are HIV-positive; and
- 6 out of 10 sex workers in **East Timor** had never heard of AIDS and 4 out of 10 did not know what a condom was.

There is broad consensus that comprehensive HIV prevention services for sex workers are vital, not only to protect them and their children from this deadly disease, but also to prevent HIV/AIDS from further spreading. However, sex workers are often hesitant to use health and social care services if they think it will put them at risk for arrest, further stigma, or fines. Sex workers may be denied healthcare or their children may be denied access to education. Stigma and discrimination make sex workers vulnerable to physical abuse, often by police who use their illegal status to act with impunity. Such violence is often culturally acceptable. In a 2001 survey, 11% of residents in Bishkek, **Kyrgyzstan**, believed that sex workers should be "physically annihilated."

The pledge requirement requires public health groups to condemn the population they serve and restrict the use of proven public health interventions. This only intensifies fear, driving sex workers further away from health services.

### Impact of the Pledge Requirement

Some groups chose to forgo US funding; others were denied funding:

- In January 2006, the BBC World Service Trust lost US funding, when it refused to comply with the pledge requirement. BBC had signed a \$4 million contract with USAID for an HIV/AIDS program in **Tanzania**. The campaign included media programs that non-judgmentally portrayed sex workers. Due to the lack of clarity around the requirement, BBC chose to suspend the program, saying there was "no common ground."
- In May 2005, the **Brazilian** government, which has cut new HIV infections in half since 1990, refused \$40 million in U.S. HIV/AIDS funding, rather than sign the pledge. The government decided "to remain faithful to the established principles of the scientific method and not allow theological beliefs and dogma to interfere," according to Pedro Chequer, director of Brazil's AIDS program, who submitted an affidavit in support of the plaintiffs.
- A public health NGO in **Cambodia**, Womyn's Agenda for Change, refused to modify its programs and subsequently lost funding. The group received \$93,000 from USAID, using

some of the funds to enlist its network of over 5,000 sex workers in HIV prevention efforts. In 2004, the group was told it would have to cease its empowerment activities to continue to receive funding.

- DKT International refused to sign the pledge and lost funding for a program in **Vietnam** that distributes condoms and is estimated to have prevented over 85,000 cases of HIV. DKT filed suit in the District of Columbia and U.S. District Judge Sullivan ruled in May that the pledge requirement violates the First Amendment.

### **Court Rules in Favor of First Amendment Rights**

The United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 requires recipients of US funding to “have a policy explicitly opposing prostitution and sex trafficking.” The government has never released guidelines on this requirement. The lawsuit did *not* challenge a second provision that prohibits US funds from being spent on activities that “promote or advocate the legalization or practice of prostitution and sex trafficking.”

US District Judge Marrero, a federal trial judge in New York City, held that enforcement of the pledge requirement violates the First Amendment rights of AOSI and Pathfinder. The Court found:

- The blanket ban on privately funded speech by U.S.-based NGOs was not “narrowly tailored” to achieve the government’s interest.
- The requirement violates the First Amendment because it requires U.S.-based NGOs to adopt the government’s viewpoint, and to refrain from espousing any competing viewpoints even with private funds, in order to qualify for government grants.
- The requirement improperly compels speech by requiring U.S.-based NGOs to convey the government’s message and to become “de facto mouthpieces for its view.”

The government has not announced whether it plans to appeal Judge Marrero’s decision.

The pledge initially applied only to foreign NGOs, as the US Department of Justice (DOJ) warned that domestic enforcement would be unconstitutional. However, in September 2004, DOJ reversed its position, allowing the pledge to apply to US-based groups, which gave rise to the lawsuit.

### **Support for Legal Action**

- Interaction, the largest US-based alliance of development and humanitarian NGOs, with 160 member organizations, filed a friend of the court brief in support of the plaintiffs.
- Twenty-two US-based public health and human rights organizations, including AIDS Action, AmFAR, Human Rights Watch, Physicians for Human Rights, and Population Council, filed a friend of the court brief in support of the plaintiffs in November 2005.
- Thirteen charitable organizations, including International Rescue Committee, Save the Children, and CARE, have criticized the pledge requirement, charging that it is “contributing to the stigmatizing of populations that are at risk, infected, or affected by HIV/AIDS greatly undermines the success of AIDS prevention, testing, and care efforts.”

The Brennan Center for Justice at NYU School of Law and Wilmer Cutler Pickering Hale and Dorr LLP are counsel in the case. The suit was filed in the U.S. District Court for the Southern District of New York on September 23, 2005. For more information, including legal documents, go to: [http://www.brennancenter.org/programs/pov/osi\\_court\\_documents.html](http://www.brennancenter.org/programs/pov/osi_court_documents.html).

May 25, 2006

## The Anti-Prostitution Loyalty Oath: Undermining HIV/AIDS Prevention and U.S. Foreign Policy

Since the 1960s, the U.S. has provided international family planning and reproductive health care assistance to developing countries around the world. For years, opponents of family planning in Congress have worked to place burdensome and harmful restrictions on U.S. population assistance — restrictions that impede the delivery of crucial reproductive health services to the people who need them the most.

One such restriction, commonly called the “anti-prostitution loyalty oath” requires organizations receiving U.S. HIV/AIDS assistance to formally pledge their opposition to prostitution and sex trafficking. It also prohibits activities that “promote or support the legalization or practice of prostitution.” Because the law makes no distinction between privately and publicly funded programs, the U.S. government has interpreted it such that it restricts an organization’s speech and activities, regardless of funding source.

The anti-prostitution loyalty oath was introduced in 2003 by conservative anti-choice legislator Rep. Chris Smith (R-NJ) and affects all U.S. government funding for international HIV/AIDS programs overseas. Due to widespread concerns about its constitutionality — concerns that were shared by the Department of Justice

— the anti-prostitution loyalty oath was originally applied only to foreign organizations. A year later, however, the Department of Justice shifted course and the requirement was expanded to include U.S. organizations.

### The Anti-Prostitution Loyalty Oath in the U.S.: Violating the Constitution

The loyalty oath requirement violates the U.S. Constitution in several ways. First, it forces private, U.S.-based organizations to espouse the government’s point of view on a controversial social issue in order to remain eligible for government grants. Second, the requirement restricts how organizations use their private funds to engage in speech or programs related to prostitution. Both of these requirements are in violation of the First Amendment. Finally, the language of the requirement is so vague that organizations do not know how to comply with it and government officials do not know how to enforce it. This lack of guidance allows the law to be arbitrarily applied, which is in violation of the due process clause of the Fifth Amendment.

### Undermining Service Delivery and U.S. Foreign Policy

Failure to endorse the anti-prostitution loyalty oath means health workers striving to stop the spread of HIV/AIDS could lose funding and be forced to abandon lifesaving programs. Sex workers are at high risk for contracting the disease and spreading HIV to the general population. Health organizations focusing on the causes and repercussions of sex work agree that outreach to protect the health of this marginalized population is urgent and vital for HIV education and prevention. All efforts must be made to assist those most vulnerable to infection in order to avoid an epidemic. Requiring health professionals and international development organizations to judge — and pronounce their disapproval of — the very people they are trying to help could damage the trust between health professionals and those most in need.

The anti-prostitution loyalty oath contradicts U.S. foreign policy. The U.S. spends billions of dollars in developing countries to support democratic principles such as freedom of speech and the right to participate in the political process. This policy under-

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**PATHFINDER'S APPROACH  
TO PROTECTING  
COMMERCIAL SEX  
WORKERS FROM HIV/AIDS**

Pathfinder's programs to protect commercial sex workers from contracting STIs and HIV are varied; some aim to prevent entry into sex work, others protect those involved in sex work, and others provide assistance to sex workers to pursue other income-generating activities.

Many HIV/AIDS programs overseas provide information and condoms, and in some cases harm reduction services. However, few employ participatory approaches, address public policies and social factors fueling the epidemic, and build the capacity of associations of vulnerable groups. Pathfinder implements programs with vulnerable groups that recognize the totality of individuals and not just their sexual or drug use behavior, moving beyond condom and social marketing to include advocacy, harm reduction, capacity building, community development, and nurturing of enabling environmental factors.

mines these principles by dictating how organizations may speak out on a controversial issue and by preventing the free exchange of ideas.

**The "Chilling Effect"**

Because of its vague and far-reaching nature, the anti-prostitution loyalty oath compels organizations to discontinue effective and innovative programs to avoid losing critical funding. For example, the government of Brazil refused \$40 million in U.S. funds in order to continue its programs working with and empowering sex workers to advocate for their rights and protect their health. Prostitution is not illegal in Brazil and sex workers are even enrolled in government savings plans. Yet, U.S. policy would have required the Brazilian government to alter an approach that has resulted in projected HIV infection rates dropping by half from 1992 to 2002.<sup>1</sup>

Organizations that sign the oath are forced to refrain from some of the most effective HIV prevention strategies with sex workers, for fear that the government will view the outreach as "pro-prostitution."

**Increasing the Social Stigma of HIV/AIDS and Sex Work**

Sex workers are confronted with violence, discrimination, and harassment. They are often reticent to seek assistance from outsiders, even NGOs, for fear of severe stigmatization, fines, and incarceration. In some cases, sex workers may be denied healthcare or

their children may be denied access to education.

As part of their work, public health organizations strive to provide non-judgmental assistance to best serve the health of a sex worker, regardless of the status or situation of the individual. An institutional policy opposing prostitution could have the effect of deterring high-risk clients from seeking assistance for fear of moralistic attitudes or forced rehabilitation.

**Forcing Prostitution Underground**

Legalization or decriminalization of prostitution has long been a contentious issue. Many experts are concerned that criminalization pushes prostitution further underground, allowing for increased abuse and less opportunity for sex workers to seek legal recourse when their rights are violated. Experts are also concerned that repressive laws and policies will obstruct HIV prevention efforts. The issue is further complicated by a lack of adequate data regarding the impact of legalization or criminalization on the frequency of abuse or forced prostitution.

<sup>1</sup> Michael M. Phillips and Matt Moffett, "Brazil Refuses U.S. AIDS Funds, Rejects Conditions," *The Wall Street Journal* 2 May 2005.





## Implications of U.S. Policy Restrictions for Programs Aimed at Commercial Sex Workers and Victims of Trafficking Worldwide

November 2005

### Background

In May 2003, Congress passed the United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act (Global AIDS Act);<sup>1</sup> and, in December 2003, it passed the Trafficking Victims Protection Reauthorization Act (TVPRA).<sup>2</sup> The U.S. Global AIDS Act bars the use of federal funds to "promote, support, or advocate the legalization or practice of prostitution."<sup>3</sup> Organizations receiving U.S. global HIV/AIDS funding also must adopt specific organization-wide positions opposing prostitution.<sup>4</sup>

These restrictions were first applied to foreign non-governmental organizations only,<sup>5</sup> with the law specifically exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization (WHO), International AIDS Vaccine Initiative, and any "United Nations agency."<sup>6</sup> In June 2005, however, the U.S. Agency for International Development issued a directive requiring that funding for AIDS programs be given **only** to those organizations - both U.S. and foreign - with policies explicitly opposing prostitution and sex trafficking.<sup>7</sup> Such funding restrictions follow other similar - and increasing - efforts to force organizations working in public health to comply with ideological litmus tests that often run counter to both public health practice and human rights standards.<sup>8</sup>

### What does the law say?

#### The Global AIDS Act:

- No funds . . . may be used to *promote or advocate the legalization or practice* of prostitution or sex trafficking.<sup>9</sup>
- No funds . . . may be used to provide assistance to any group or organization that does not have a *policy explicitly opposing* prostitution and sex trafficking.<sup>10</sup>

#### The TVPRA:

- No funds . . . be used to *promote, support, or advocate the legalization or practice* of prostitution.<sup>11</sup>
- No funds . . . may be used to implement any program . . . through any organization that has *not stated in either a grant application, a grant agreement, or both*, that it does not promote, support, or advocate the legalization or practice of prostitution.<sup>12</sup>

### How are the laws translated into policy?

The U.S. Department of State (DOS), Office of the Global AIDS Coordinator (OGAC), Agency for International Development (USAID), Department of Health and Human Services (HHS), and Centers for Disease Control (CDC) all require non-governmental organizations (NGOs) receiving global AIDS or anti-trafficking funds to comply with the funding restrictions related to sex trafficking and prostitution.

- An NGO applying for or receiving federal **anti-trafficking funds** must sign a statement in the grant application or grant agreement that it "does not promote, support, or advocate the legalization or practice of prostitution." The primary grantee NGO must ensure that all sub-grantees are also in compliance with this policy.<sup>13</sup>
- An NGO applying for or signing a contract or agreement for federal **global HIV/AIDS funding** must have a policy explicitly opposing prostitution and sex trafficking. Although the law does not specify how an NGO must evidence such a policy, U.S. Senate Majority Leader Bill Frist has stated that "a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking . . . would satisfy the intent of the provision."<sup>14</sup>

## Who must adopt an organizational policy opposing sex trafficking and prostitution?

### The Global AIDS Act:

- **Foreign NGOs** receiving bilateral U.S. HIV/AIDS funds from the DOS, USAID, and HHS have been subject to these restrictions since the implementation of Global AIDS Act.<sup>15</sup>
- **U.S.-based NGOs working abroad:** The U.S. Constitution prohibits compelling speech from U.S.-based NGOs.<sup>16</sup> Notwithstanding the Constitution, however, a September 2004 U.S. Department of Justice opinion letter argued that Global AIDS Act restrictions could apply to U.S.-based organizations.<sup>17</sup> The administrative regulation implementing this decision – a USAID Acquisition & Assistance Policy Directive – was released June 9, 2005.<sup>18</sup> In 2005, two lawsuits were filed protesting the application of this policy. (See Timeline, Center for Health and Gender Equity, 2005.)

Global AIDS Act funding restrictions are not currently being applied to:

- **Multilateral Agencies:** To date, UN Agencies, including the Global Fund for AIDS, Tuberculosis and Malaria, the World Health Organization (WHO), regional WHO subsidiaries, and UNAIDS remain exempt from these restrictions.<sup>19</sup> In May 2005, the CDC attempted to apply the restrictions to UNAIDS and WHO sub-grantees.<sup>20</sup> After public outcry, the Global AIDS Coordinator, Ambassador Randall Tobias, called on the CDC to rescind the language in the grant expanding restrictions to multilateral organizations.<sup>21</sup> However, concern remains that expansion of these restrictions to multilaterals may yet occur.

### The TVPRA:

- **Foreign NGOs** receiving bilateral U.S. anti-trafficking funds from the DOS, USAID, and HHS have been subject to these restrictions since the implementation of the TVPRA.

- **U.S.-based NGOs working abroad:** The U.S. Constitution prohibits compelling speech from U.S.-based NGOs.<sup>22</sup> The Constitution notwithstanding, a September 2004 U.S. Department of Justice opinion letter opined that TVPRA restrictions apply to U.S.-based organizations.<sup>23</sup> The DOS appears to restrict funding to organizations “that are and have been supportive, in policy and programs, of U.S. Government policies on combating trafficking in persons and prostitution.”<sup>24</sup>

## What are the implications of these policies?

These policies and restrictions have numerous adverse implications for effective HIV prevention, and the promotion of both human rights and public health.

First, and most importantly, these policies run contrary to best practices in public health and will undermine efforts to stem the spread of HIV and human trafficking. The restrictions preclude recipients of U.S. funds from using the best practices at their disposal to prevent the spread of HIV among marginalized populations, and undermine efforts to promote the fundamental human rights of all persons.

Women and men in prostitution, some of whom have been trafficked, are among the most marginalized

These policies run contrary to best practices in public health and will undermine efforts to stem the spread of HIV and human trafficking.

persons in any society. The organizations with the most effective anti-AIDS and anti-trafficking strategies build their efforts on a sophisticated understanding of the social and personal dynamics faced by marginalized

populations, and start by building trust and credibility among the populations in question. They recognize that it is both possible and often necessary to provide social, legal and health services to men and women in prostitution without judging them, and without adopting positions on issues such as

prostitution.<sup>25</sup> They may work to provide persons in prostitution with new skills essential to moving out of the commercial sex sector, to secure the legal rights of men and women in prostitution to be free from violence and discrimination, or to empower them to demand universal condom use, thereby preventing the further spread of HIV infection within and outside this sector.<sup>26</sup> They may also work to prevent people from being trafficked into the sex sector and to assist trafficking victims. Requiring organizations to adopt these policies makes it extremely difficult, if not impossible, to establish the trust necessary to provide services to these hard-to-reach groups.

The Sonagachi Project in Calcutta, India, has reached more than 30,000 persons working in the commercial sex sector at risk of HIV, in large part through peer-based outreach services. Sonagachi's peer educators work to stop the spread of HIV among women and men in prostitution in part through strategies intended to earn their trust, reduce their social isolation, increase their participation in public life, and confront stigma and discrimination.<sup>27</sup> Sonagachi's work has received strong positive evaluations from both UNAIDS and the World Bank, and has been cited by UNAIDS as a "best-practice" model of working with women and men in prostitution.<sup>28</sup> These initiatives focus on promoting the fundamental human rights and health of persons working in prostitution, but do not equal the promotion of prostitution. Yet valuable programs such as those run by Sonagachi and organizations like it are exactly the type threatened by current U.S. laws and policies.

The broad language of the restrictions increases the risk that organizations will self-censor or curtail effective programs for fear of being seen as supporting or promoting prostitution. In fact, the restrictions are already having a chilling effect on work in the field. In Cambodia, for example, NGOs discontinued plans to provide English language training classes for people working in the commercial sex sector for fear such programs would be interpreted as "promoting prostitution."<sup>29</sup> Yet in Phnom Penh alone, the rapid growth of job opportunities in government, in non-

Compelling foreign organizations to adopt policies consistent with the government's viewpoint raises important constitutional concerns.

governmental organizations, and in the tourist industry makes English language skills a valuable commodity and a means of accessing opportunities outside the sex sector. In Jamaica, health workers working with men and women in prostitution have expressed concern that these restrictions curtail their ability to support the efforts of people working in the commercial sex sector to protect their rights.<sup>30</sup>

It is critical to address the dangers associated with prostitution and trafficking in persons. However, current U.S. policies will do little to advance this goal, and will instead exacerbate stigma and discrimination against already marginalized groups. Any anti-prostitution declaration by organizations working in the sex sector has the potential to judge and alienate the very people these organizations seek to assist, making it difficult or impossible to provide services or assistance to those at risk. Public statements against prostitution can also fuel the public opprobrium against men and women in prostitution, further driving them underground and away from lifesaving services. It was for these and other reasons that Brazil recently rejected \$40 million in U.S. global AIDS money, noting that such restrictions undermined the very programs responsible for Brazil's success in reducing the spread of HIV.<sup>31</sup>

Finally, the expansion of these restrictions to U.S.-based groups contradicts the fundamental right to freedom of speech guaranteed in the U.S. Constitution.<sup>32</sup> Requiring domestic organizations with mixed funding to adopt positions consistent with U.S. government policy compels speech, which is an unconstitutional condition on government funding in violation of the First Amendment.<sup>33</sup> While the U.S. government can legally require its funds be used to further government-approved messages,<sup>34</sup> it has not previously compelled U.S. organizations with multiple funding sources to speak explicitly on an issue in compliance with a specific U.S. objective. The courts have long held that the government does not have power to compel a U.S. grantee to pledge allegiance to the government's viewpoint in order to participate in a government program.<sup>35</sup> Compelling foreign organizations to adopt policies consistent with the government's viewpoint raises important constitutional concerns and undermines the democratic principles for which the United States stands.<sup>36</sup>

Rather than requiring organizations to adopt explicit anti-prostitution policies, the U.S. government could fulfill its goals by permitting organizations that do not have a policy on prostitution to receive U.S. funds. There is bipartisan support in Congress for this solution.<sup>37</sup> The advantage of this approach is that it does not pressure organizations, whether international or domestic, to adopt policies that run contrary to best health care practices, may have nothing to do with their work or organizational mission, and have the potential to undercut the very purpose of U.S. grants. Such a policy would allow a wide range of organizations to participate in the global struggle against AIDS, while recognizing the importance of freedom of speech and freedom to receive and impart information in promoting the health and well-being of all citizens.

## Recommendations to the President and Congress

- Request that the Department of Justice reconsider its interpretation on the application of the restrictions in the Global AIDS Act of 2003 to domestic grantees, ensuring instead that all programs are consistent with human rights and public health norms and constitutional guarantees of freedom of speech;
- Institute the practice of consultation with a broad range of experts in both the HIV/AIDS and trafficking fields before any agency or office issues program directives interpreting U.S. HIV/AIDS and trafficking laws to ensure transparency in policymaking, consistency with U.S. and international human rights law, and the promotion of best practices in public health;
- Ensure that all scientific and program evidence is regularly reviewed by experienced researchers and program managers;
- Work with Congress to amend the TVPRA and the Global AIDS Act of 2003 so that these laws are consistent with U.S. and international human rights law and with best practices in public health.

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<sup>1</sup> *United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003*, 22 U.S.C. §§ 7601-7682 (2003) [hereinafter, Global AIDS Act].

<sup>2</sup> *Trafficking Victims Protection Reauthorization Act of 2003*, 22 U.S.C. §§ 7101-7110 (2003) [hereinafter, TVPRA].

<sup>3</sup> See Global AIDS Act, 22 U.S.C. § 7631(e) (barring use of funds to "promote or advocate the legalization or practice of prostitution or sex trafficking"); TVPRA, 22 U.S.C. § 7110(g) (1) (barring use of funds to "promote, support, or advocate the legalization or practice of prostitution").

<sup>4</sup> See *United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003*, 22 U.S.C. § 7631(f) (2003) [hereinafter, Global AIDS Act]; *Trafficking Victims Protection Reauthorization Act of 2003*, 22 U.S.C. § 7110(g) (2) (2003) [hereinafter, TVPRA].

<sup>5</sup> See, e.g., Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Svcs., *Rapid Expansion of HIV/AIDS Activities by National Ivorian Nongovernmental Organizations and Associations Serving Highly Vulnerable Populations in Cote d'Ivoire Under the President's Emergency Plan for AIDS Relief*, Funding Opportunity No. 04199, Jul. 2004, at 9 (stating, "[A]ny foreign recipient must have a policy explicitly opposing, in its activities outside the United States, prostitution and sex trafficking..."). See also Bureau of Administration, U.S. Dep't of State, *Anti-Trafficking in Persons*, Funding Opportunity No. DOS-GTIP, Mar. 2005, at 11-12 (stating, "U.S. law... prohibits such funds from being used to implement any program that targets victims of severe forms of trafficking in persons involving sex trafficking by an organization that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution. It is the responsibility of the primary grantee to ensure these criteria are met by its sub-grantees").

<sup>6</sup> See Consolidated Appropriations Act of 2004 PL108-199 (2004), which amends section 301(f) of the AIDS Authorization by exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any "United Nations agency" from that section. The Statement of Managers states that the conferees "intend that for purposes of this provision, the World Health Organization includes its six regional offices: The Americas (PAHO); South-East Asia (SEARO); Africa (AFRO); Eastern Mediterranean (EMRO); Europe (EURO); and Western Pacific (WPRO)."

<sup>7</sup> "Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 – Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking." (June 9, 2005) [http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aapp05\\_04.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapp05_04.pdf)

<sup>8</sup> The Mexico City Policy, also called the "Global Gag Rule" (GGR), denies U.S. family planning funding to any organization that performs, collects data on, provides referrals for, or advocates legal changes for abortions. First announced by President Reagan in 1984, the GGR was rescinded on January 22, 1993 by President Clinton and reinstated on January 22, 2001 by President G.W. Bush. In 2003, the Bush Administration threatened to expand the GGR to cover international HIV/AIDS programs, thereby disqualifying from federal funding many potential partners for the President's Emergency Plan for AIDS Relief (PEPFAR). The Administration later withdrew this threat.

<sup>9</sup> Global AIDS Act, 22 U.S.C. § 7631(e).

<sup>10</sup> Global AIDS Act, 22 U.S.C. § 7631(f).

<sup>11</sup> TVPRA, 22 U.S.C. § 7110(g) (1).

<sup>12</sup> TVPRA 22 U.S.C. § 7110(g) (2) (2003).

<sup>13</sup> See Bureau of Administration, U.S. Dep't of State, *Anti-Trafficking in Persons*, Funding Opportunity No. DOS-GTIP, Mar. 2005, at 11-12.

<sup>14</sup> See 149 Cong. Rec. S6457 (2003).

<sup>15</sup> See USAID, Acquisition & Assistance Policy Directive, AAPD 04-04, Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 – Eligibility for Assistance, Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking (January 15, 2004), available at [http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aapd04\\_04\\_original.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd04_04_original.pdf).

<sup>16</sup> See Brennan Ctr. for Justice, NYU School of Law, Memorandum on Constitutionality of Anti-Prostitution Pledge in the AIDS Act 7-9 (June 13, 2005).

<sup>17</sup> See Letter from Daniel Levin, Acting Assistant Attorney General, U.S. Dep't of Justice, to Alex M. Azar II, General Counsel, U.S. Dep't of Health and Human Svcs. (Sept. 20, 2004) [hereinafter, "Levin letter"].

<sup>18</sup> See USAID, Acquisition & Assistance Policy Directive, AAPD 05-04, Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 – Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking (June 9, 2005), available at [http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aapd05\\_04.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf).

<sup>19</sup> See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199 (2004), amending Global AIDS Act §301(f).

<sup>20</sup> See Centers for Disease Control and Prevention, Dep't of Health and Human Svcs., Increasing Access to HIV Counseling and Testing (VCT) and Enhancing HIV/AIDS Communications, Prevention, and Care in Botswana, Lesotho § IV.5 (May 2005), available at <http://www.cdc.gov/od/pgo/funding/AA006.htm>.

<sup>21</sup> See David Brown, *U.S. Backs Off Stipulation on AIDS Funds*, WASH. POST, May 18, 2005.

<sup>22</sup> See Brennan Ctr. for Justice, *supra*.

<sup>23</sup> See Levin letter, *supra*.

<sup>24</sup> See Bureau of Administration, U.S. Dep't of State, *Anti-Trafficking in Persons*, Funding Opportunity No. DOS-GTIP 11-12 (March 2005).

<sup>25</sup> See WORLD HEALTH ORG. (WHO), TOOLKIT FOR TARGETED HIV/AIDS PREVENTION AND CARE IN SEX WORK SETTINGS (2004), available at [http://www.who.int/hiv/pub/prev\\_care/swtoolkit/en/](http://www.who.int/hiv/pub/prev_care/swtoolkit/en/).

<sup>26</sup> See *id.* at 6 (noting "The diversity of sex work settings requires flexible, locally adapted responses. However, experience shows that HIV prevention in sex work settings should work toward three main outcomes: 1. Increased condom use and safer sex 2. Increased sex worker involvement and control over working and social conditions 3. Reduced STI burden").

<sup>27</sup> See UNAIDS, *Female Sex Worker HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India and Bangladesh*, UNAIDS BEST PRACTICE COLLECTION, Nov. 2000, at 57-90.

<sup>28</sup> See *id.*

<sup>29</sup> Interview by Alice Miller, Columbia Univ. Law School, with Elaine Pearson, Anti-Slavery International, Bangkok, Thailand (July 2004).

<sup>30</sup> Interview by Human Rights Watch with Jamaican health worker, Kingston, Jamaica (June 2004).

<sup>31</sup> See Michael M. Phillips and Matt Moffett, *Brazil Refuses U.S. Aids Funds, Rejects Conditions*, WALL ST. J., May 2, 2005, at A3.

<sup>32</sup> See U.S. CONST. Amend. I.

<sup>33</sup> See *FCC v. League of Women Voters*, 468 U.S. 364 (1984). See also *Regan v. Taxation w. Representation of Washington*, 461 U.S. 540 (1983) (holding permissible speech restrictions on a government subsidy because other, non-federal contributions could be used to fund prohibited speech).

<sup>34</sup> See *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (holding that the Government may make a value judgment, implement that judgment by the allocation of public funds, and "leave the grantee unfettered in its other activities" funded by other sources).

<sup>35</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating a requirement that children pledge allegiance to the U.S. flag in order to attend public school). See also *Speiser v. Randall*, 357 U.S. 513 (1958) (holding unconstitutional a requirement that receipt of a tax exemption was contingent on the filing of a loyalty oath to the U.S. Government); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), citing *Barnette* (holding that forcing an individual to be "an instrument for fostering public adherence to an ideological point of view he finds unacceptable . . . invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control").

<sup>36</sup> See *DKT Memorial Fund Ltd. v. Agency for Intern. Dev't*, 887 F.2d 275 (D.C. Cir. 1989) (Ginsberg, J., dissenting).

<sup>37</sup> See 108 Cong. Rec. H10287 (2003) (colloquy of Reps. Chris Smith and Tom Lantos during the reauthorization of the TVRPA). Congressman Smith, Republican Vice-Chair of the House International Relations Committee (HIRC), and Congressman Lantos, Ranking Democrat Member on the HIRC, agreed on the proper interpretation of the TVPRA funding restriction related to sex trafficking and prostitution. According to Congressman Smith, "an organization can satisfy the prohibition...if it states in a grant application, a grant agreement, or both that it does not promote, support, or advocate such actions since it has no policy regarding this issue." See also 149 Cong. Rec. S6457 (2003) (colloquy of Senator Leahy and Senator Frist during the authorization of the Global AIDS Act) Senator Frist, President Pro Tempore of the Senate, and Senator Leahy, Ranking Democrat Member on the Judiciary Committee, agreed on the proper interpretation of the Global AIDS Act funding restriction related to sex trafficking and prostitution. Senator Frist stated that "a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women . . . would satisfy the intent of the provision."

## Prostitution pledge goes up in smoke

By Esther Kaplan

Tue May 09, 2006 at 10:55:57 PM EST



A federal judge today struck down the Bush administration's notorious prostitution pledge, finding it violates the First Amendment. In recent years, Bush and his gang of Republicans in Congress have pushed through laws requiring that all recipients of U.S. assistance to fight AIDS must make an official statement opposing prostitution. Of course for organizations doing HIV prevention work among sex workers, taking such a stance would undermine their entire mission. In countries such as India, where sex work is a significant factor in an exploding epidemic, the policy could prove to be quite deadly as organizations doing front-line AIDS work have faced having to either eliminate programs with sex workers or sacrifice crucial U.S. government grants.

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Unlike the abortion gag rule, which only applied to foreign organizations, the prostitution pledge has been applied to organizations based in the United States that do AIDS work abroad. Two of these groups, [Alliance for Open Society International](#) and [Pathfinder International](#), sued the government and won.

"The Supreme Court has repeatedly found that speech, or an agreement not to speak, cannot be compelled or coerced as a condition of participation in a government program," wrote Judge Victor Marrero of the U.S. District Court for the Southern District of New York.

"We believe that public health policy should be based on science, not ideology," said the Open Society's Ricardo Castro, according to a press release from [NYU's Brennan Center for Justice](#), which argued the case.

Last year, Brazil refused some \$40 million in U.S. monies for its HIV/AIDS work in order to avoid signing the pledge. The country's [AIDS commissioner](#) said at the time, "For us it was an ethical issue. We have to reach every segment of society, with no discrimination." Smaller, resource-starved HIV prevention groups refused to sign as well, leaving them to continue their life-saving work as volunteers.

The federal court decision could mark a return to sanity in U.S. global health policy.

Meanwhile, the use of sex workers as political footballs continues unabated, even among self-identified liberals. Nicholas Kristoff was at it again in today's *New York Times* Op Ed page. Just like his comrades in the State Department, whose praises he sings with an embarrassing effusiveness, Kristoff has let his obsession with sex trafficking lead him to tinker with the facts. In his zeal to exaggerate the phenom, he segues seamlessly from descriptions of girls in prostitution to the global total of all trafficked people.

I've seen the peddling of humans in many countries: the 8-year-old Filipino girl whose mother used to pull her out of school to rent pedophiles; the terrified 14-year-old Vietnamese girl imprisoned in a brothel pending the sale of her virginity; the Pakistani teenager whose brothel's owner dealt with her resistance by drugging her into a stupor. The U.N. has estimated that 12.3 million people worldwide are caught in forced labor of one kind or another.

According to [UNICEF](#), a large part of that tally is trafficking of babies for adoption in the West,

trafficking of girls for mail-order brides, and trafficking for domestic work. The significant trafficking busts in the United States--the sinking of the Golden Venture, with its cargo of trafficked garment workers; the New York City racket involving deaf Mexicans who were trafficked to work as beggars on the subways--all involve adults forced into various kinds of indentured servitude involving manual labor, not young girls forced into brothels. UNICEF estimates that of the 246 million children engaged in child labor worldwide, only about 1.8 million are engaged in prostitution or pornography.

Those at the State Department and on the Christian right who have made sex trafficking their top priority are not doing it to save those 246 million kids from grinding labor in factories or as domestic servants. They're doing it to serve a broader agenda of legislating morality and disempowering women. And who's a better poster girl for that crusade than Kristoff's imprisoned 14-year-old?

Full discussion: [story/2006/5/9/225557/5526](http://www.talk2action.org/printpage/2006/5/9/225557/5526)

Just Say Nao

by Esther Kaplan

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In early May, Brazil declared its defiance of American diktats abroad. The country's national AIDS commissioner, HIV doctor Pedro Chequer, turned down \$40 million in US assistance for its fight against AIDS rather than sign a statement condemning prostitution. "For us it was an ethical issue," Chequer told The Nation. "We have to reach every segment of society, with no discrimination. Besides, no country is supposed to decide what another country must do." At a time when the Bush Administration has elected itself not only the world's cop but its pope, too, Brazil's audacity carries the shock of the new.

Over the past two years, organizations around the world have been asked to sign similar statements and to halt their advocacy for sex workers' rights, the result of restrictive language slipped into AIDS and human-trafficking bills by Representative Chris Smith, a morality crusader who began his career as director of New Jersey Right to Life. According to human rights advocates, most have signed rather than risk losing crucial funds, but Brazil insisted that USAID negotiate directly with its AIDS commission rather than with individual NGOs, and this changed the balance of power.

According to Chequer, seven government ministries have seats on the commission, and all voted unanimously to support his decision and to fill the funding gap. In Brazil, where prostitution is legal, the government was unwilling to turn its back on a population that's not only among the most vulnerable to HIV but also among the most active in combating it. "Sex workers are part of implementing our AIDS policy and deciding how to promote it," Chequer says. "They are our partners. How could we ask prostitutes to take a position against themselves?"

Brazil's aggressive approach to controlling AIDS, which includes HIV treatment, massive condom distribution and explicit HIV education, has produced one of the few success stories in the developing world: In the early 1990s experts projected 1.2 million infections in Brazil by 2000, but the interventions cut that number in half. In meetings over the past several weeks, Chequer convinced USAID to pull its emphasis on abstinence from the grant agreement. But the anti-prostitution policy was a deal breaker. He says this "theological" restriction would have "wasted money, wasted time and promoted the dissemination of HIV."

Brazil's act of resistance is especially important as the right intensifies its campaign to attach fundamentalist restrictions to foreign aid. Representative Henry Hyde is seeking to withdraw funds from groups that object to pushing abstinence, while Representative Mark Souder is leading a campaign to match the anti-prostitution pledge with one condemning needle exchange. In guidelines for grants to stop human trafficking, the Administration now explicitly privileges organizations "that are and have been supportive, in policy and programs, of US Government policies" on prostitution—marking the thoroughgoing politicization of the grant-making process. Thus, while grassroots organizations in Cambodia, Thailand and India that advocate for sex workers were losing funding, Concerned Women for America, a conservative lobby group with no experience in the field, received a \$113,000 anti-trafficking grant in November.

Soon, the crusade will land on our shores. In the past, US groups, sheltered by the First Amendment, were exempt from such policies as the infamous gag rule that requires overseas NGOs to forswear abortion services and advocacy or lose US aid. But in response to a creative legal interpretation by the Justice Department, new rules will extend the anti-prostitution pledge to Americans. Rebekah Diller, an attorney at NYU's Brennan Center for Justice, calls the Justice Department directive unconstitutional. "The government can tell you how to spend its funds," says Diller, "but it can't direct you to adopt a particular viewpoint. It's not unlike the loyalty oaths of the McCarthy period, and there's a lot of case law striking down those oaths."



Leaders of fourteen major American charities that receive USAID money sent a letter of protest to Randall Tobias, Bush's global AIDS coordinator, in February. "We see this as an overreaching of government authority," says one signatory, Maurice Middleberg, vice president of EngenderHealth, which runs AIDS programs in Africa and Asia. "We shouldn't have to agree with Administration policy in order to do the work of saving lives." Middleberg says Tobias responded firmly that "this is the government's policy, and since the DOJ released its letter it's also a matter of law."

Brazil can absorb the loss of US support, as 90 percent of its AIDS program is funded from its own coffers. But small HIV prevention efforts in places like Southeast Asia, where sex work and drug use drive the AIDS epidemic, are far more vulnerable. Some, such as the Women's Network for Unity in Cambodia, chose like Brazil not to sign a statement opposing prostitutes' rights and sacrificed US funding; others have quietly avoided programs, like English-language instruction, that could offer a path out of sex work but might be construed as "supporting" prostitution. These organizations "don't want to leave their clients hanging in the wind," says Ann Jordan, who directs anti-trafficking initiatives for the human rights group Global Rights. Humanitarian groups in the United States that fund many of these struggling activists abroad will soon be handed their own loyalty oaths. Perhaps they'll join Brazil's rebellion.

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<http://www.thenation.com/doc/20050530/kaplan>