



December 23, 2009

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RE: Comments on Office of Global Health Affairs – Regulation on the Organizational Integrity of Entities Implementing Leadership Act Programs and Activities – Notice of Proposed Rulemaking, 74 Fed Reg. 61,096, November 23, 2009

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Dear Secretary Sebelius:

The American Civil Liberties Union (“ACLU”) submits these comments on the proposed rule published at 74 Fed. Reg. 61096 (November 23, 2009) to amend the regulation implementing the “pledge requirement” of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, set forth at 22 U.S.C. § 7631(f) (“Leadership Act”). As applied to U.S. individuals and entities, the requirement that non-governmental organizations receiving federal funds must have a “policy explicitly opposing prostitution and sex trafficking” is an unconstitutional restriction on speech that cannot withstand First Amendment scrutiny. The proposed amendments to the regulation regarding the “organizational integrity” of entities engaged in HIV/AIDS programs and activities fail to cure the constitutional defect. Instead, the proposed regulation exacerbates the Leadership Act’s constitutional infirmities.

The ACLU is a national, nonpartisan public interest organization of more than 500,000 members, dedicated to protecting the constitutional and civil rights of individuals. Through its Women’s Rights Project, founded in 1972 by Ruth Bader Ginsburg, the ACLU has long been a leader in the legal battles to ensure women’s full equality. Through its Reproductive Freedom Project, founded in 1974, the ACLU has fought to ensure that the decision whether or not to have a child be informed, meaningful, and protected from unwarranted government interference. Through its AIDS Project, founded in 1986, the ACLU has fought to maintain the civil liberties of people living with HIV and those working to prevent the spread of the disease. The ACLU has represented over 25 public health organizations and public health experts as *amici* in litigation challenging the application of the pledge requirement to

U.S. entities and individuals. *See e.g., Alliance for Open Society Int'l v. USAID*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006), *remanded mem.*, 254 Fed. Appx. 843 (2d Cir. 2007) (“*AOSP*”); *DKT Int'l, Inc. v. USAID*, 477 F.3d 758 (D.C. Cir. 2007).

In both lawsuits, the ACLU on behalf of *amici* argued that the anti-prostitution pledge was not only unconstitutional, but that it undermined the goals of the Leadership Act, because experience has shown that gaining the trust and cooperation of sex workers is a crucial component of successful anti-HIV/AIDS programs around the world. The pledge requirement compels public health service providers in the global fight against AIDS to choose between forgoing U.S. funding and adopting a policy that conflicts with the accepted best practices in the public health community and alienates and marginalizes the high-risk communities with which they work. Moreover, the pledge will affect the efficacy of even those entities that do not accept or receive U.S. funding. Such organizations will be limited in their ability to conduct research and advocate with respect to HIV/AIDS in these high-risk communities, as fewer partnering public health providers are willing to take the risk that they will be determined to have connected themselves with an organization that engages in undefined “restricted activities.”

These amendments to the “Organizational Integrity” rule purport to ease the legal, financial and physical separation that must exist between recipients of Leadership Act funding and an affiliate organization that engages in activities “inconsistent with a policy opposing prostitution and sex trafficking.” The modifications to the rule – like the regulation previously adopted by the Department – do not resolve the compelled speech and unconstitutional conditions concerns raised by the *amici* represented by the ACLU in the federal court litigation.

Further, the amended regulation fails to provide an alternative adequate channel for protected speech and activities. In light of the acknowledged need to enlist the services of experienced non-governmental organizations and public health groups in the global fight against HIV/AIDS, any such rule must be clearly stated and easily implemented. The proposed rule, however, fails for its continued vagueness and burdensome requirements. Given the significant First Amendment considerations and the magnitude of the public health crisis at issue, the ACLU urges HHS to substantially modify the proposed rule to address these concerns.

THE PROPOSED AMENDMENTS TO THE RULE VIOLATE THE FIRST AMENDMENT RIGHTS OF U.S. ENTITIES AND INDIVIDUALS

The pledge requirement and the proposed amendments to the regulation compel non-governmental organizations working to combat the spread of HIV/AIDS to adopt a policy expressly opposing prostitution or to forgo the receipt of U.S. funds. The proposed amendments to the “Organizational Integrity” rule provide that an entity receiving federal funds may not be affiliated with any organization that “engages in activities inconsistent with a policy opposing prostitution and sex trafficking”, but fails to adequately explain the necessary legal, physical, and financial separation that organizations must maintain. Both the underlying pledge requirement and the amended rule violate the First Amendment rights of U.S. entities and individuals.

First, the pledge requirement and proposed regulation violate the First Amendment by compelling non-governmental organizations to affirmatively adopt a policy espousing the government's chosen message. Second, the proposed "Organizational Integrity" rule violates rights protected by the First Amendment by failing to provide the adequate alternative channel for protected speech that is required when the federal government limits a grantee's power to engage in privately funded speech.

The Supreme Court consistently has concluded that speech, or a pledge not to speak, may not be compelled as a condition of participation in a government program. For this reason, the Court struck down a New Hampshire statute requiring the display of license plates with the motto "Live Free or Die" as a condition for use of public highways. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). The Court determined that New Hampshire's interest in requiring the statement was not ideologically neutral; rather the state sought to communicate a particular view as to the "the proper appreciation of history, state pride, and individualism." *Id.* at 717. The statute, as a result, effectively forced an individual "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715. Although a state may communicate particular views legitimately through other means, "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.*

Similarly, the government may not require U.S.-based NGOs to make an explicit, specific statement in opposition to prostitution as a condition of receiving funds. Clearly, the U.S. government remains free to espouse its own opposition to prostitution, and the Act separately prohibits grantees from using Leadership Act funds to promote or advocate for the legalization or practice of prostitution. But the pledge requirement goes well beyond those prohibitions by forcing them to espouse an ideological message on its behalf as a requirement for receipt of federal funding. As *Wooley* teaches, such a compelled statement is not tolerated by the First Amendment. *See id.* at 715; *see also O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 725-26 (1996) (determining that the government as a contractor may not use its right to terminate at-will relationships for the purpose of imposing conditions on expressing or not expressing certain political beliefs); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (finding that a state acting as an employer may not condition employment upon refraining from public or private criticism of university policies); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (striking California's decision to deny a tax exemption to veterans who refused to state that they would not advocate the overthrow of the government because to do so would in effect penalize them for such speech).

As the district court held in *Alliance for Open Society International v. USAID*, the anti-prostitution pledge at issue here essentially enlists NGOs "to convey the government's message and renders these organizations, on this particular issue, de facto mouthpieces for its view." 430 F. Supp. 2d 222, 276 (S.D.N.Y. 2006). In doing so, the government "'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" *See Wooley*, 430 U.S. at 715

(quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). The proposed regulation does not even attempt to fix this fatal constitutional flaw.

The pledge requirement is unconstitutional not only because of the position it compels NGOs to take, but also because of the restrictions it places on a grantee's use of its own private funds. The unconstitutional conditions doctrine dictates that the government may not condition the receipt of public benefits on the surrender of vital constitutional rights, particularly speech rights, regardless of the fact that the government has no obligation to provide the benefit. *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 52 (2006); see *FCC v. League of Women Voters of California*, 468 U.S. 364, 400-01 (1984) (concluding that the government may not condition access to funding on a waiver of the First Amendment right to use private funds to participate in protected speech). The pledge requirement unconstitutionally forces the surrender of AIDS Leadership Act grantees' speech rights by requiring them to refrain from specific, privately funded speech on matters of public concern, a right that has historically been recognized as "rest[ing] on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 993 (1982).

"[T]he far-reaching role of NGOs in presenting issues of concern to governmental officials, as well as contributing to public debate on contested social issues, in influencing the course of public policy as well as in enhancing core public values and safeguarding them from government abuse, has always been critical to our democracy." *Alliance for Open Society International*, 430 F. Supp. 2d at 262 (S.D.N.Y. 2006). NGOs' ability to engage in an "uninhibited, robust, and wide-open' public discourse serves as an essential weight in preserving the balanced power relationship between the government and the people that the First Amendment safeguards." *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). NGOs want to work with the U.S. government in combating HIV/AIDS. "They seek to do so, however, without forfeiting the critical role they play in stimulating public discourse on controversial issues, including eminently debatable questions such as what may be the most appropriate or effective policy to engage high-risk groups in such efforts." *Id.* at 263. The pledge and the proposed "Organizational Integrity" rule, to the extent they prevent "NGOs from speaking openly on such questions with their private funds, contravenes our national commitment [to] open debate and our First Amendment values." *Id.* As is described below, the "Organizational Integrity" rule is so burdensome that it fails to afford NGOs an opportunity to participate in this important debate.

THE PROPOSED RULE FAILS TO PROVIDE AN ADEQUATE ALTERNATIVE CHANNEL FOR PROTECTED EXPRESSION, BURDENING GRANTEE'S ABILITY TO ENGAGE IN BEST PRACTICES AND DAMAGING PUBLIC HEALTH

In the course of the *AOSI* litigation, the government suggested that the "Organizational Integrity" rule, as first promulgated, would provide grantees an adequate alternative means of expression that would alleviate the First Amendment concerns. Such a suggestion is inherently flawed because an alternative channel – even a meaningful one, which the regulations do not provide – cannot cure the harms that flow from forcing a

private NGO to espouse the government's viewpoint as a condition of receiving funds. Moreover, the proposed regulation remains so burdensome and vague that it fails to provide grantees with "adequate alternative channels for protected expression" as required by *Velazquez v. Legal Services Corp.*, 164 F.3d 757, 766 (2d Cir. 1999) and *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 232 (2d Cir. 2006).

As discussed below, the proposed "Organizational Integrity" rule fails to provide an adequate alternative channel for international NGOs' privately funded, protected speech. First, the rule fails to describe with any certainty the degree of separation required for an affiliate organization, leaving grantee NGOs to guess at its full requirements in order to receive funding for their public health missions and the sort of collaborations that would be considered prohibited under the rule. Second, in the international NGO context, the rule places such a burden on NGOs that it effectively deprives them of any meaningful alternative channel. And third, because the rule appears to mandate such an extreme degree of separation that the grantee ultimately may not be able to speak through an affiliate, it deprives the grantee NGO of its free speech, and its ability to engage in internationally recognized best practices. Consequently, HHS's proposed affiliate option does not cure the unconstitutional condition that public funds are available only if the entity or individual espouses the government's viewpoint and refrains from using its own private funds to support speech or activities that depart from that prescribed view. Such a restriction limits NGO speech and activities that form a crucial component of the anti-HIV/AIDS programs that some of the undersigned and other NGOs have implemented around the world.

THE PROPOSED RULE IS UNCONSTITUTIONALLY VAGUE

The proposed "Organizational Integrity" rule does not provide a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104 (1972). HHS nowhere specifies the types of "restricted activities" that may be inconsistent with opposing prostitution. 74 Fed. Reg. at 61,099. As a result, the proposal leaves a grantee organization with no reliable means of divining what it must say or do in order to comply with the pledge requirement. The rule, for example, does not shed light on whether safe sex education programs for sex workers constitute "restricted activities." This lack of clarity will cause NGOs to engage in a pattern of self-censorship, such as avoiding discussing, much less opposing, the anti-prostitution pledge in public, the hesitation to join list-servs and public meetings on sex work and, in extreme cases, terminating publications. *See* Maurice I. Middleberg, *The Anti-Prostitution Policy in the US HIV/AIDS Program*, 9 HEALTH AND HUMAN RIGHTS 3, 8 (2006).

In addition, the proposed rule does not provide standards sufficiently clear for a grantee organization to determine with any certainty that its affiliates are satisfactorily physically and financially separate. The necessary separation is particularly hard to divine given that the requirements are limited "to the extent practicable" in a given set of circumstances. On its face, this subjective standard appears more lenient on grant organizations. However, in practice, the regulation simply fails to provide clear guidance and leaves a grantee guessing about what steps to take to comply with the regulation.

Moreover, the rule provides a nonexclusive list of factors relevant to HHS's determination in addition to stating that "HHS will determine on a *case-by-case* basis and based on the *totality of the facts*, whether sufficient physical and financial separation exists. The presence or absence of any one or more factors will not be determinative." 74 Fed. Reg. at 61,009 (emphasis added). Compounding the uncertainty inherent in establishing such an individualized, fact-based standard, each of the nonexclusive factors relies on the "degree of" or the "extent to which" the factors exist. *Id.* Until a grantee has established a physically and financially separate affiliate and HHS has passed judgment on its affiliate scheme, that NGO has no way to know whether it is in compliance with the regulation.

THE PROPOSED RULE IS UNDULY BURDENSOME

Creating affiliate organizations of the kind contemplated by the rule in foreign countries can pose insurmountable difficulties. Even when a separate entity can be created, doing so will cause great expense and delays for NGOs attempting to serve communities most affected by the HIV/AIDS epidemic. The rule will require NGOs seeking to engage in certain activities with their private funds to overcome hostile foreign bureaucracies and their complex and burdensome regulations to satisfy the most basic requirements for operation of affiliates, such as:

- procuring visas and work permits for new employees
- obtaining tax exempt status
- opening of bank accounts and transferring foreign funds to the new entities
- registering new legal entities

Further, the proposed rule forces NGOs to confront far greater funding burdens in order to maintain legal and physical separation between organizations that serve a single purpose (stopping the spread of HIV/AIDS) in locations where secure and feasible office space is nearly impossible to come by. Simultaneously, it hinders their ability to raise private funds for these affiliates because the legal separation requirement means the affiliates cannot rely on the grantee organization's proven record and, thus, affiliates have no record of successful performance on which to campaign. The strict separation requirements also impose hiring obstacles in countries where qualified, available personnel remain scarce.

The amendment's attempt to minimize these burdens by requiring legal, physical, and financial separation only "to the extent practicable," fails to alleviate the problem, because it is unclear what "circumstances" affect the stringency of the requirement.

For these reasons the proposed rule does not truly provide an adequate alternative channel for protected expression and therefore does not cure the unconstitutional condition placed on NGOs' receipt of AIDS Leadership Act funds. Additionally, by

failing to provide a channel by which NGOs can undertake work that might be prohibited by the pledge, the rule undermines a grantee NGO's efforts to combat HIV/AIDS.

THE PROPOSED RULE DEPRIVES NGOS OF THEIR FIRST AMENDMENT RIGHT TO SPEAK THROUGH THEIR AFFILIATES

The rule states that HHS will consider “[t]he existence of separate personnel, management, and governance” in its determination that sufficient physical and financial separation exists between grantee organizations and affiliate organizations. 74 Fed. Reg. at 61,099. This factor appears to require that grantees not share boards and management with affiliates. If so, the rule does not present an “alternative channel” but in effect prevents grantees from advancing their protected speech through affiliates.

Control over affiliates constitutes a vital characteristic of a constitutionally adequate alternative channel. When it upheld the government's conditioning contribution tax deductibility on refraining from lobbying, the Supreme Court stressed that the law allowed entities to create financially independent but wholly controlled lobbying affiliates without compromising their eligibility for deductible contributions. *Reagan v. Taxation With Representation*, 461 U.S. 540, 544 (1983). Likewise, in *League of Women Voters*, the Court invalidated a prohibition on editorializing by Corporation of Public Broadcasting grantees because the law left no adequate alternative avenue for protected expression. 468 U.S. 364, 400. In so holding, the Court indicated that Congress could cure the statute by allowing radio stations “to establish ‘affiliate’ organizations that could then use the station's facilities to editorialize with nonfederal funds.” *Id.* Unless Leadership Act grantees have the ability to advance their own privately funded speech through affiliates with shared governance, the proposed rule does not cure the unconstitutional restriction on grantees' privately funded speech. Therefore, the proposed regulation should be amended to eliminate consideration of shared governance as a factor in the determination of whether an affiliate is sufficiently separate from a recipient.

TO ADVANCE THE GOALS OF THE LEADERSHIP ACT IN COMBATING HIV/AIDS, THE PROPOSED RULE SHOULD BE MODIFIED TO ALLOW EASY NGO COMPLIANCE CONSISTENT WITH THEIR PUBLIC HEALTH MISSION.

The proposed rule cannot be promulgated in a vacuum but must be considered against a backdrop of an epidemic of devastating proportions. If the fight against HIV/AIDS is to be successful, the international community must generate a multitude of dynamic and innovative approaches to reach the remote and vulnerable populations affected by the disease. The Leadership Act itself recognizes the need to enlist the assistance of a wide range of entities with the skills and experience to work with the populations most at risk of contracting and spreading the disease. The Act specifically acknowledges that in order to be most effective, the United States government must “encourag[e] active involvement of the private sector, including . . . charitable foundations, private and voluntary organizations and nongovernmental organizations, faith-based organizations, community-based organizations, and other nonprofit entities.” 22 U.S.C. § 7601(22)(F). Congress

sought partnerships with NGOs with experience in health care and HIV/AIDS counseling precisely because they “have proven effective in combating the HIV/AIDS pandemic and can be a resource in assisting indigenous organizations in severely affected countries.” *Id.* § 7601(18).

The public health imperatives of the AIDS Leadership Act are undermined by the pledge requirement. If organizations adopt explicit policies opposing prostitution and cease any activities that could be deemed “restricted activities,” insufficiently opposed to sex work, they are likely to alienate and marginalize the vulnerable communities in which HIV/AIDS is most likely to be contracted and spread. Effectively requiring NGOs that deal primarily with health and social services to take a political stance opposing sex work negates their ability to approach sex workers with the non-judgmental and non-moralistic attitude that their years of experience have shown to be most effective with these communities.

Even if the pledge itself is enforced, the “Organizational Integrity” rule should seek, consistent with First Amendment principles, to pose the narrowest burden on the free speech rights of organizations and individuals whose help the U.S. government seeks to enlist in the fight against HIV/AIDS. The preamble to the rule states that its purpose is to prevent the government’s message from being “garbled.” However, there are easier, far less intrusive means of ensuring that there is no confusion as to the U.S. government’s opposition to prostitution. The Leadership Act acknowledges that the disease is “first and foremost a health problem,” that demands the involvement of a broad range of experienced public health organizations. Even if the Leadership Act demands the anti-prostitution pledge of federal grantees, the regulation should ensure that the pool of potential grantees is as large as possible by making it easy for the entity receiving federal funds to conduct other activities with private funds through an affiliate that it controls. Otherwise, the regulation runs the risk of forcing NGOs to choose between accepting desperately needed federal funds and abandoning strategies that have proven effective in stopping the spread of HIV/AIDS.

The government’s purpose in mandating the pledge does not require the extreme degree of separation contemplated by the “Organizational Integrity” rule. Far more narrowly tailored means would adequately ensure that NGOs’ positions on prostitution are not attributed to the United States. For example, disclaimers, which USAID already requires grantees to insert in grant-funded published literature, inform readers that NGOs’ views do not represent those of the United States. *See League of Women Voters*, 468 U.S. at 391-92 (concluding that Congress’ funding condition banning radio stations from editorializing was not narrowly tailored, because a disclaimer would adequately ensure that stations’ views were not imputed to the federal government). The President and Congress recognized in passing the AIDS Leadership Act that the U.S. government cannot solve the AIDS crisis alone. Therefore, HHS policy should not alienate and disable organizations whose collaboration the U.S. government so desperately needs in order to stop the spread of HIV/AIDS.

CONCLUSION

For the reasons discussed above, the ACLU urges HHS to withdraw the proposed regulation. Should HHS insist upon proceeding with the proposed rule it should substantially modify its proposal in accordance with the foregoing comments.

Sincerely,



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