Journal of Gender, Social Policy & the Law

Volume 19 | Issue 1 Article 21

2012

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PROSTITUTES + CONDOMS = AIDS?: THE LEADERSHIP ACT, USAID, AND THE HHS GUIDELINES' FAILURE TO DEFINE "PROMOTING PROSTITUTION"

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I. INTRODUCTION

Imagine a staff member from a non-governmental organization (NGO) like the Open Society Institute approaching an HIV-positive prostitute and telling her that she may no longer receive treatment because the NGO does not promote prostitution.[1] Then imagine an NGO closing a drop-in center used to safely house and train vulnerable sex workers for fear of losing funding from the U.S. Department of Health and Human Services (HHS).[2] Now imagine a scenario where the same NGO successfully assisted sex workers to develop safe sex practices in brothels by distributing 350,000 free condoms every month.[3] This NGO was poised to expand its training

1. *See* Penelope Saunders, *Prohibiting Sex Work Projects, Restricting Women's Rights: The International Impact of the 2003 U.S. Global AIDS Act*, 7 HEALTH & HUM. RTS. 179, 187 (2004) (discussing successful HIV/AIDS programs and the prosecution of prostitution).

2. *See* Maurice I. Middleberg, *The Anti-Prostitution Policy in the U.S. HIV/AIDS Program*, 9 HEALTH & HUM. RTS. 3, 7-8 (2006) (describing the "pattern of self-censorship" leading to the closure of many effective anti-AIDS programs).

3. *See* CTR. FOR HEALTH & GENDER EQUITY, IMPLICATIONS OF U.S. POLICY RESTRICTIONS FOR HIV PROGRAMS AIMED AT COMMERCIAL SEX WORKERS 3 (2008) [hereinafter POLICY BRIEF], *available at* http://www.genderhealth.org/files/uploads/change/publications/aplobrief.pdf (discussing the development of programs designed to educate sex workers about condom use); *see also* Sheetal Doshi, *Sex Workers on the Front Line – of Prevention*, THE CTR. FOR PUB. INTEGRITY (Nov. 30, 2006), http://projects.publicintegrity.org/aids/report.aspx?aid=803 (discussing an effective strategy implemented by one anti-AIDS organization in India).

of condom use, but decided to forgo further funding when it learned of the "pledge requirement" stated in the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 (Leadership Act)[4] and the proposed HHS regulation implementing the requirement.[5] Instead, the NGO's legal counsel challenged the constitutionality of the pledge requirement and HHS's interpretive guidelines in federal court.[6]

Scholars and field experts have argued extensively that the U.S. policy stating that fund recipients may not promote prostitution is unconstitutional because it compels speech.[7] In response, HHS published a Notice of Proposed Rulemaking (NPRM) in the Federal Register to clarify what grantee organizations may do without being deemed as promoting prostitution.[8] On December 24, 2008, HHS issued a final rule to further clarify the rule's separation requirement.[9] The final rule states that Leadership Act fund recipients that have a policy opposing prostitution may maintain an affiliation with organizations that do not have such a policy as long as there is adequate separation between the two organizations.[10] However, grantee organizations have continued to complain that such guidelines are still vague and cause unwarranted chilling affects on HIV/AIDS outreach and treatment programs.[11]

This Comment argues that courts and administrative agencies should interpret the terms "promoting," "advocating," "endorsing," and "supporting" in ways that accurately reflect congressional intent and mitigate the chilling effect current U.S. guidelines have on NGO activities.[12] Part II.A discusses the substance and purpose of the

4. 22 U.S.C. §§ 7601-82 (2006).

5. *See* Doshi, *supra* note 3 (describing cancellation of expansion plans).

6. S*ee* 22 U.S.C. § 7631(e) (barring "promot[ion]" of prostitution); 22 U.S.C. § 7631(f) (requiring policies that "explicitly oppos[e] prostitution"); *see also, e.g.*, Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 430 F. Supp. 2d 222, 274 (S.D.N.Y. 2006) [hereinafter *AOSI I*] (holding the pledge requirement to be "offensive to the First Amendment").

7. *See* POLICY BRIEF, *supra* note 3, at 1-2 (describing federal court cases finding the pledge requirement to be unconstitutionally compelled speech).

8. *See* Regulation on the Organizational Integrity of Entities Implementing Leadership Act Programs and Activities, 73 Fed. Reg. 20,900 (Apr. 17, 2008) (codified at 45 C.F.R. pt. 88 (2010)) (responding to complaints that the Leadership Act does not explicitly delineate prohibited activities).

9. *See* Regulation on the Organizational Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 73 Fed. Reg. 78,997 (Dec. 24, 2008) (codified at 45 C.F.R. pt. 88 (2010)) (describing necessary separation between fund recipients and affiliates).

10. *See* 73 Fed. Reg. at 20,901-02 (defining "adequate separation" as financial and legal separation).

11. *See* POLICY BRIEF, *supra* note 3, at 4 (discussing the counterproductive and self-censoring effects of the anti-prostitution pledge).

12. *See* Humanitarian Law Project v. Mukasey, 552 F.3d 916, 928 (9th Cir. 2009) (quoting Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137 (9th Cir. 2000))

Leadership Act and its anti-prostitution pledge requirement.[13] Part II.B discusses the guidelines issued by the funding agencies in an attempt to clarify what actions constitute promoting prostitution.[14] Part II.C shows how courts have interpreted "promoting" in the anti-terrorism funding and government-endorsed religion contexts.[15] Part II.D notes that courts have invalidated the pledge requirement as unconstitutionally inhibiting First Amendment free speech rights.[16] Part III.A argues that the United States Agency for International Development (USAID) and HHS administrative guidelines (Guidelines) are vague and require impracticable separation.[17] Part III.B contends that the Guidelines should be struck down under the vagueness test, mens rea requirement, and direct subsidy theory used in the anti-terrorism and Establishment Clause contexts.[18] Part III.C argues that the Guidelines contradict HHS's funding practices in the faith-based context and therefore should be less restrictive.[19] Part IV proposes that courts and funding agencies should strike down the pledge requirement because it compels speech and that the agencies should amend the Guidelines to make the "promotion" language less restrictive.[20] This Comment concludes that specific delineations of what constitutes promoting prostitution and less burdensome restrictions would alleviate the unnecessary chilling effect currently suffered by NGOs.

II. BACKGROUND

A. The Leadership Act: An Attempt by Congress to Eradicate Prostitution

Congress passed the Leadership Act in May 2003, authorizing $15

(holding that a statute containing terms ambiguous to people of ordinary intelligence must be struck down).

13. *See infra* Part II.A (explaining how Congress intended to stop the spread of HIV/AIDS by controlling prostitution).

14. *See infra* Part II.B (explaining how the Guidelines attempted to clarify the Leadership Act by requiring legal and financial separation between affiliate organizations).

15. *See infra* Part II.C (illustrating judicial interpretation of the term "promoting").

16. *See infra* Part II.D (explaining how courts have ruled that the anti-prostitution pledge forces fund recipient organizations to support the government's views on prostitution).

17. *See infra* Part III.A (arguing that the Guidelines should be struck down because they are vague and require unnecessarily strict and unjustifiable separation requirements).

18. *See infra* Part III.B (arguing that court rulings in the anti-terrorism funding and religion-based contexts will help alleviate the Guidelines' ambiguities).

19. *See infra* Part III.C (arguing that the Guidelines should be struck down because they are unjustifiably more restrictive than faith-based funding guidelines).

20. *See infra* Part IV (illustrating how clearer regulations would allow Leadership Act fund recipients to effectively prevent and treat HIV/AIDS).

billion to combat HIV/AIDS, tuberculosis, and malaria for Fiscal Years 2004-2008.[21] The Act identifies prostitution and sex trafficking as contributing factors to the spread of HIV/AIDS and states that a U.S. policy goal is to eradicate prostitution as a principal means of combating HIV/AIDS.[22] The major purposes of the Leadership Act were to focus on the delivery of services through local community and faith-based organizations and to strengthen HIV/AIDS treatment, care, and prevention programs, especially for women, girls, orphans, and vulnerable children in hard-to-reach rural areas.[23]

The anti-prostitution pledge requirement contained in the Leadership Act is a limitation on funding stating that no Leadership Act funds may be used to promote or advocate the legalization or practice of prostitution or to assist any organization that does not have a policy explicitly opposing prostitution.[24] The so-called "anti-prostitution" pledge was a U.S. government initiative that required non-governmental organizations receiving U.S. funds to sign an agreement explicitly stating that they did not promote prostitution. The basis for such a requirement was a congressional finding that prostitution is "inherently harmful and dehumanizing."[25] Presently, both U.S.- and foreign-based grantees are subject to the pledge requirement.[26]

B. The Guidelines: Attempts by USAID and HHS to Clarify Which Actions Promote Prostitution

The pledge requirement applies to all grantee activities, including those

21. *See* H.R. REP. NO. 110-546, pt. 1, at 3 (2008) (explaining that funding efforts were concentrated on fourteen focus countries and that the Office of the Global AIDS Coordinator will lead interagency implementation of U.S. HIV/AIDS policy).

22. *See* H.R. REP. NO. 108-60, at 6 (2003), *reprinted in* 2003 U.S.C.C.A.N. 712, 712 (stating that prostitution is degrading to women and is an additional cause of the HIV/AIDS epidemic).

23. *See id.* at 8 (emphasizing an approach based on local delivery systems).

24. *See* 22 U.S.C. § 7631(e)-(f) (2006) (implying that fighting prostitution is the most effective way of fighting HIV/AIDS).

25. *See* OFFICE ACQUISITION & ASSISTANCE, POLICY DIRECTIVE 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 2 (2007) [hereinafter AAPD 05-04] (describing official government opposition to prostitution).

26. *See id.* at 3 (describing U.S. Justice Department guidance as to application of the pledge requirement to U.S. and non-U.S. NGOs); *see also* Joanna Busza, *Having the Rug Pulled from Under Your Feet: One Project's Experience of the U.S. Policy Reversal on Sex Work*, 21 HEALTH POL'Y & PLAN. 329, 330-31 (2006) (describing the House Committee on International Relations' criticism of providing health care to sex workers); Matt Moffett & Michael M. Phillips, *Brazil Refuses U.S. AIDS Funds, Rejects Conditions*, WALL ST. J., May 2, 2005, at A3 [hereinafter *Brazil Refusal*] (stating that the Brazilian government turned down $40 million in anti-HIV/AIDS funding instead of complying with the pledge).

funded through non-U.S. sources.[27] In addition, USAID and HHS have the right to investigate all grantee activities to ensure that they sufficiently abide by the terms of the pledge.[28] However, the Leadership Act does not define what it means to "promote" or "advocate" prostitution.[29] To clarify the vague language of the statute, USAID and HHS issued separate but almost identical administrative guidelines stating that a recipient organization will not be deemed to be promoting prostitution if it maintains adequate physical and financial separation with other organizations that do not explicitly oppose prostitution.[30] The Guidelines' principal goal was to clarify that an independent organization affiliated with a Leadership Act fund recipient does not need to explicitly oppose prostitution and sex trafficking for the grantee to comply with the pledge requirement.[31] Additionally, the Guidelines list five non-exclusive factors that may be used by the agencies to determine whether a recipient organization is complying with such separation requirements.[32] Specifically, the Guidelines list criteria for when a grantee will be deemed to have "objective integrity and independence" from an affiliated organization, including legal, physical, and financial separation.[33] These criteria for determining separation were the agencies' attempt to clarify how recipient organizations may continue their operations with affiliates without violating the anti-prostitution pledge.[34] More importantly, even after the issuance of additional guidelines, USAID and HHS maintained case-by-

27. *See* AAPD 05-04, *supra* note 25, at 3.

28. *See id.* at 4 (stating that the funding agencies have the power to determine compliance on a case-by-case basis).

29. *See*, *e.g.*, Letter from Rebekah Diller, Deputy Dir., Justice Program, to Kathleen Sebelius, Sec'y, HHS (Dec. 22, 2009), *available at* http://www.brennancenter.org/content/resource/aosi_v_usaid/ (discussing the unconstitutionally vague language).

30. *See* AAPD 05-04, *supra* note 25 (describing USAID's separation requirements); DEP'T OF HEALTH & HUMAN SERVS., GUIDANCE REGARDING SECTION 301(F) OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS AND MALARIA ACT OF 2003 (2007) [hereinafter HHS GUIDANCE] (describing HHS's "Organizational Integrity" requirements).

31. *See* HHS GUIDANCE, *supra* note 30 (reiterating the affiliated organization's position regarding prostitution).

32. *See* AAPD 05-04, *supra* note 25, at 3-4 (requiring financial and physical separation, including separate management, accounting records, facilities, and equipment); *see also, e.g.*, Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219, 229-33 (2d Cir. 2006) (upholding separation criteria in provision of legal services); Velazquez v. Legal Servs. Corp., 164 F.3d 757, 767 (2d Cir. 1999) (upholding criteria requiring separation).

33. *See* HHS GUIDANCE, *supra* note 30, at 4 (stating that none of the factors are dispositive and the agency retains the authority to consider other facts).

34. *See id*. at 2 (describing how a recipient can maintain "program integrity" through separation); *see also* AAPD 05-04, *supra* note25, at 2 (revising the Leadership Act's blanket ban on recipient organizations' activities with third party affiliates).

case discretion to determine whether there is sufficient physical and financial separation between the grantee and its affiliated organization.[35] The Southern District of New York ruled in *Alliance for Open Society International, Inc. v. USAID*[36] that the Guidelines were overly broad to meet the government's legitimate interest and granted a preliminary injunction preventing the government from enforcing the prostitution pledge on U.S.-based NGOs.[37] In that case, the plaintiff, Alliance for Open Society International (AOSI), argued that the Guidelines still compel speech, and the court agreed, reasoning that recipient organizations are still not allowed to take a position on prostitution.[38] The court also stated that the Guidelines' separation requirement is not narrowly tailored to meet congressional goals, and therefore does not survive heightened scrutiny.[39]

C. Legal Definition of "Promotion" in Other Contexts

1. Anti-Terrorism

Courts have grappled with what it means to promote or advocate prostitution, and the limited case law does not delve into the definitional issue.[40] In contrast, courts have attempted to define what actions support terrorism and what actions are deemed to endorse a particular religion.[41] Two leading cases regarding anti-terrorism funding have attempted to define what it means to promote terrorism.[42] In *Humanitarian Law Project*

35. *See* HHS GUIDANCE, *supra* note 30, at 4 (stating that USAID will determine whether there exists sufficient "physical and financial separation" based on the totality of facts in each situation).

36. 570 F. Supp. 2d 533 (S.D.N.Y. 2008) [hereinafter *AOSI II*] (holding that the Guidelines still compel speech and are thus unconstitutional).

37. *See id.* at 547 (stating that the plaintiffs have shown enough cause to prove irreparable harm if not awarded the preliminary injunction).

38. *See id*. at 545-46 (upholding AOSI's argument with similar reasoning used to strike down the anti-prostitution pledge in *AOSI I*); *see also AOSI I*, *supra* note 6, at 274-75 (rejecting the government's argument that speech is not compelled because there remains a choice to refuse funding).

39. *See AOSI II*, *supra* note 36, at 549 (citing Rust v. Sullivan, 500 U.S. 173, 188 (1991)) (noting the additional management and governance requirements in the Guidelines not present in other similar cases, like *Rust*).

40. *See id*.; DKT Int'l, Inc. v. U.S. Agency for Int'l Dev., 477 F.3d 758 (D.C. Cir. 2007); *AOSI I*, *supra* note 6 (all confronting what it means to "promote" but failing to give a definitive answer).

41. *See*, *e.g.*, Humanitarian Law Project v. Mukasey, 552 F.3d 916, 925 (9th Cir. 2009) (explaining that criminal liability generally requires intent); Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 585 F. Supp. 2d 1233, 1268-69 (D. Or. 2008) (establishing the mens rea and vagueness standards for interpreting whether an organization is promoting terrorism).

42. *See Mukasey*, 552 F.3d at 927-28 (discussing what "material support or resources" means); *Al Haramain*, 585 F. Supp. 2d at 1252-53 (discussing the relevance of financial relationships in determining "promotion" of terrorism).

v. Mukasey, the Ninth Circuit examined the Antiterrorism and Effective Death Penalty Act (AEDPA) and its 2004 amendment, the Intelligence Reform and Terrorism Prevention Act (IRTPA).[43] As amended, AEDPA states that if one "*knowingly* provides material support or resources to a foreign terrorist organization," he has promoted terrorism.[44] AEDPA goes on to state that, "material support or resources" includes property, services (including financial services), lodging, training, and expert advice or assistance.[45] In *Mukasey*, the court stressed the mens rea requirement of the amendment and established the rule that a person meets the requirement if they provide material support or resources to a designated terrorist organization knowing that: (1) the organization is a designated terrorist organization; or (2) the organization has engaged, or is engaging, in terrorist activity.[46] In addition, the court also stated that because AEDPA fails to notify a person of ordinary intelligence as to what is considered "material support or resources," that part of the statute is unconstitutionally vague.[47]

In another terrorism case, the District Court of Oregon attempted to define the term "promote" in the anti-terrorism funding context. In *Al Haramain Islamic Foundation v. U.S. Department of Treasury*, the court stated that if one provides financial, material, technological, and other support to a designated terrorist organization, one promotes terrorism.[48] In that case, the Al-Haramain Islamic Foundation (AHIF) was designated as a terrorist organization, and the court stated that its subsidiary organization, AHIF-Oregon, supported terrorism because it had a "close financial relationship" with AHIF.[49] Additionally, the court stated that money is fungible, making it possible that funds may be used either directly or

43. *See Mukasey*, 552 F.3d at 923 (stating that Congress intended to clarify the AEDPA restrictions by defining "training" and "expert advice or assistance").

44. 18 U.S.C. § 2339B(a)(1) (2006) (emphasis added).

45. *See* 18 U.S.C. §§ 2339A(b), 2339B(g)(4) (amending the definition of "material support or resources" to include the prohibition against providing "expert advice or assistance").

46. *See Mukasey*, 552 F.3d at 922-23 (stating that the circuit had already ruled that the government must prove criminal intent in *Humanitarian Law Project v. United States Dep't of Justice*, 352 F.3d 382 (9th Cir. 2003)).

47. *See id.* at 925 (reiterating that the Due Process Clause of the Fifth Amendment requires statutes to clearly delineate the conduct they proscribe); *see, e.g.*, Foti v. City of Menlo Park, 146 F.3d 629, 638 (9th Cir. 1998) (emphasizing the importance of clearly delineated statutes).

48. *See* Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1251 (D. Or. 2008) (implying that an organization must take the initial steps to distinguish itself from a designated terrorist organization).

49. *See id.* at 1250 (indicating that a website hosting articles in support of terrorist acts, and posting photographs and videos depicting violent terrorist activities, was sufficient to prove a close financial relationship).

indirectly to promote terrorism.[50] However, unlike in *Mukasey*,[51] the court in *Al Haramain* did not define "promoting terrorism" as knowingly providing material support to a terrorist organization.[52] Instead, the court merely stated that the government did not have the burden to prove that an organization intended to support terrorism.[53] The court concluded that an organization's "affirmative conduct" of providing financial support and services to a terrorist organization was sufficient to constitute promoting terrorism.[54] The court's ruling in *Al Haramain* was significant because it provided a clear rule to organizations that if they gave money to a designated terrorist organization, or provided any services to such an organization, they were promoting terrorism.[55]

2. Faith-Based Initiatives

Faith-based initiatives are another area in which courts and federal agencies have attempted to define "promotion."[56] In *Zobrest v. Catalina Foothills School District*, parents of a deaf student attending a Catholic high school brought an action to require the school district to provide an interpreter for the student.[57] The Supreme Court held that providing an interpreter under the Individuals with Disabilities Education Act (IDEA) to a student attending a Catholic high school did not violate the Establishment

50. *See id.* at 1251; *Humanitarian Law Project*, 205 F.3d at 1136; Farrakhan v. Reagan, 669 F. Supp. 506, 512 (D.D.C. 1987) (stating that even contributions for peaceful purposes can be used unlawfully).

51. *See Mukasey*, 552 F.3d at 916 (stating that statutes must be sufficiently clear so that a person of ordinary intelligence reasonably knows what is prohibited).

52. *See Al Haramain*, 585 F. Supp. 2d at 1259 (stating that specific intent is irrelevant if the evidence provides reasonable belief that an organization provided any support to a designated terrorist organization).

53. *See id. But see* Holy Land Found. v. Ashcroft, 333 F.3d 156, 160 (D.C. Cir. 2003) (noting that courts are bound to consider whether the agency's designation was reasonable based on the evidence present in the record).

54. *See* Exec. Order No. 13224, 3 C.F.R. 768 (2001), *reprinted in* 3 U.S.C. § 301 (2006) (reiterating Office of Foreign Aseets Control's authority to prevent financial transactions between U.S. citizens which it has reasonable cause to believe pose a risk of furthering terrorist acts in the United States).

55. *See* U.S. DEP'T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S. BASED CHARITIES 5-7 (2002), *available at* http://www.treasury.gov/offices/enforcement/key-issues/protecting/docs /guidelinescharities.pdf (stressing the protection of charities against unintended diversion of charitable support to terrorist organizations). *But see* OMB WATCH, COLLATERAL DAMAGE: HOW THE WAR ON TERROR HURTS CHARITIES, FOUNDATIONS, AND THE PEOPLE THEY SERVE 16 (2008) (arguing that the Treasury guidelines do not prevent the diversion of terrorism funds and, instead, hinder charitable operations).

56. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993) (stating that the government may not use public schools as a forum to convey religious viewpoints).

57. *See id.* (arguing that the Individuals with Disabilities Education Act and the Free Exercise Clause of the First Amendment required the school to provide an interpreter).

Clause and in turn did not constitute the government promoting religion.[58] The Court stated that if programs funded by the federal governments resembled a "direct subsidy," the program was promoting religion.[59]

Furthermore, the Court in *Zobrest* ruled that if a program is relieved of expenses that it otherwise would have assumed, and if the attenuated financial benefits received by the parochial school are not attributable to private, individual choices, the program is promoting religion.[60] The Court reasoned that the Catholic school was not relieved of such an expense, and that because disabled students, not the schools, are the primary beneficiaries of the IDEA, the government is not promoting religion by providing interpreter services.[61]

Additionally, the Supreme Court has ruled that a program does not promote religion when it provides benefits to recipients who apply their aid to religious education.[62] In *Witters v. Washington Department of Services for the Blind*, a blind student pursuing a Bible studies degree at a Christian college appealed a denial of financial vocational assistance from the Washington State Commission for the Blind.[63] The Court ruled that this funding program is paid directly to blind students and that it does not advance religion because the funds are made available generally without regard to the sectarian-nonsectarian, or public-nonpublic, nature of the grantee organization.[64] Additionally, the Court stated that because the funds go directly to individuals and not to the organization, the decision to

58. *See id.* (stating that providing the interpreter does not violate the Establishment Clause because the government is offering a neutral service as part of an unbiased program). *But see id.* at 18 (Blackmun, J., dissenting) (stating that the government is participating in a school's inculcation of religion if secular and sectarian activities are intertwined).

59. *Cf.* Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 94-98 (1999) (stating that the Supreme Court's Establishment Clause decisions have intensified religious conflict through ambiguous standards).

60. *See Zobrest*, 509 U.S. at 14 (majority opinion); *see also* Harris v. McRae, 448 U.S. 297, 319-20 (1980); McGowan v. Maryland, 366 U.S. 420, 432 (1961) (implying that the Establishment Clause is viewed as a prohibition of improper governmental power).

61. *See Zobrest*, 509 U.S. at 13 (reasoning that it was the disabled children, and not the religious institution, that was receiving the benefit from the IDEA); *cf.* Norman Dorsen, *The Religion Clauses and Nonbelievers*, 27 WM. & MARY L. REV. 863, 868 (1987) (arguing that the purpose of the Establishment Clause is safeguarding minorities with respect to religious belief).

62. *See* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 483, 488 (1986) (recognizing the significance of equal access to school-related benefits).

63. *See id.* at 483-84 (distinguishing vocational assistance from funding intended to subsidize religious activities).

64. *See id.* at 488; Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring) (implying that the constitutionality of Establishment Clause issues should be based on coercion or unwilling indoctrination, not simple endorsement).

support religious education is made by the individual, not by the government.[65]

3. Abortion

In addition to defining "promotion," the Supreme Court has ruled that statutory separation requirements must be narrowly tailored to effectuate the government's intent.[66] The plaintiffs in *Rust v. Sullivan* challenged the program integrity requirement of Title X of the Public Health Service Act.[67] In that statute, the program integrity requirement states that Title X programs shall not provide counseling services related to abortion, and that Title X projects may not engage in activities that "encourage, promote, or advocate abortion."[68] Additionally, the federal government requires that Title X projects must be "physically and financially separate" from abortion activities.[69] The statute also states that to be deemed physically and financially separate, a Title X project must have "objective integrity and independence" from prohibited activities.[70]

The administrative guidelines interpreting the Title X objective integrity requirement list various factors used to determine the existence of adequate separation.[71] The Supreme Court in *Rust* ruled that the administrative guidelines were narrowly tailored to meet the government's interest in prohibiting abortion because the regulation is not a general law designed to single out a disfavored group, but rather one that specifically excludes certain activities from the scope of the funded projects.[72] The Court also upheld the separation requirements because the requirements did not bar abortion referral or counseling where a pregnant woman's health was in

65. *See Witters*, 474 U.S. at 488 (reasoning that the choice of institution is left to the students, and therefore it is not Washington state that decides where the funds go); *cf.* PAUL KAUPER, RELIGION AND THE CONSTITUTION 37 (1964) (stating that religion is being used to disqualify certain organizations from receiving public funds if such funds are available for all educational institutions except those controlled by a religious body).

66. *See* Rust v. Sullivan, 500 U.S. 173, 180 (1991) (noting similar government interests as those stated in the HIV/AIDS funding cases).

67. *See* 42 U.S.C. §§ 300-300(a)(6) (2006); *see also Rust*, 500 U.S. at 178-79 (providing federal funding for family planning services).

68. *See Rust*, 500 U.S. at 179-80 (recognizing the government's discretion to choose to fund one type of activity over another).

69. *See id.* at 174 (dismissing the plaintiffs' claim that the Title X regulations reversed a long-standing agency policy permitting nondirective abortion counseling).

70. *See id.* at 180-81 (enumerating the ways the Secretary could distinguish prohibited activities from those allowed under the statute).

71. *See id.* at 180 (quoting 42 C.F.R. § 59.9 (1989)) (stating that abortion-related activities must be kept separate and distinct from Title X activities).

72. *See id.* at 195; *see also* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 580-81 (1983) (noting that the regulations were targeting a small group within the press on the basis of speech content).

serious peril.[73]

D. First Amendment Challenges to the Anti-Prostitution Pledge Requirement

Previous lawsuits have challenged the validity of the anti-prostitution pledge, alleging that the pledge required NGOs to positively assert the government's view, therefore violating their First Amendment rights.[74] Notably, in *Alliance for Open Society International v. USAID*, AOSI asserted a free speech challenge to the Leadership Act's pledge requirement and sought clarification of the Act's requirements.[75] The plaintiffs were all U.S.-based, non-profit organizations working to limit the spread of HIV/AIDS worldwide, and consequently, they worked closely with highly vulnerable populations, including those engaged in prostitution.[76]

The Southern District of New York ruled in favor of the plaintiffs' First Amendment free speech violation claims, acknowledging that the pledge requirement chilled AOSI from planning and co-sponsoring a sex work conference.[77] The court stated that the plaintiffs had sufficiently proven grounds of irreparable harm suffered from their loss of First Amendment freedoms and ordered a preliminary injunction against the pledge requirement.[78] Additionally, the court ruled that the Guidelines require more separation than is "reasonably necessary" to justify the governmental interests.[79] The court also ruled that the guidelines impermissibly compel speech, that they would not survive heightened scrutiny, and that they are

73. *See Rust*, 500 U.S. at 195 (stating that the regulations only prohibit abortion counseling as a "method of family planning," not when a woman's life is in danger).

74. *See* DKT Int'l v. U.S. Agency for Int'l Dev., 477 F.3d 758, 761 (D.C. Cir. 2007); *AOSI I*, *supra* note 6, at 237-38 (citing Plaintiffs' argument that the pledge requirement unconstitutionally forces them to convey the government's message against prostitution).

75. *See AOSI I*, *supra* note 6, at 235 (detailing Plaintiffs' demand for clarification of guidelines); Complaint at 34, Alliance for Open Soc'y Int'l v. U.S. Agency for Int'l Dev. (S.D.N.Y. 2005) (No. 05-cv-8209) (implying that in contrast to DKT's argument, AOSI acknowledges the that various harms that sex work may inflict on individuals).

76. *See AOSI I*, *supra* note 6, at 230; *see, e.g.*, Doshi, *supra* note 3 (proffering the significance of personal relationship building in the effort of preventing the spread of HIV/AIDS).

77. *See AOSI I*, *supra* note 6, at 278 (citing Paulsen v. Cnty of Nassau, 925 F.2d 65, 68 (2d Cir. 1991)) (stating that the loss of First Amendment freedoms unquestionably constitutes irreparable harm).

78. *See id.* at 278; Kushen Decl. at 53-54, *AOSI I*, *supra* note 6, at 222 (explaining why AOSI could not sponsor a conference dealing with sex worker topics); *see also* Green Party v. New York State Bd. of Elections, 389 F.3d 411, 418 (2d Cir. 2004) (reiterating the irreparable harm caused by First Amendment violations).

79. *See AOSI II*, *supra* note 36, at 549.

unconstitutionally vague.[80]

III. ANALYSIS

A. USAID and HHS Administrative Guidelines Describing Which Actions Promote Prostitution Are Unconstitutionally Vague and Require Impracticable Separation Requirements.

The Guidelines are unconstitutionally vague because they reserve too much discretion to the funding agencies in determining which actions promote prostitution.[81] Grantees receiving Leadership Act funds have no assured method of determining whether their operations meet the guideline standards because it only lists five non-exclusive factors in determining the legitimacy of grantee activities.[82] Moreover, the Guidelines reserve to the funding agencies the right to take other undisclosed factors into account and the right to determine compliance on a case-by-case basis.[83] The Guidelines are thus unconstitutionally vague because they contain no provisions by which recipient organizations may seek approval for affiliation proposals.[84] The vagueness exposes recipient organizations to inconsistent enforcement and possible political retribution.[85]

Additionally, the Guidelines fail to notify a person of ordinary intelligence as to what conduct violates its provisions.[86] The Due Process

80. *See id.* (stating that the government's interest in conveying a uniform message on prostitution is not met because a substantial number of organizations are exempt from the Guidelines).

81. *See, e.g.*, Letter from Rep. Henry A. Waxman and Rep. Barbara Lee, to Secretary Kathleen Sebelius, HHS (Dec. 22, 2009) [hereinafter *Waxman Letter*], *available at* http://brennan.3cdn.net/2f7d571dba331b96a1_3hm6bffbh.pdf (arguing that the agencies' discrepancy discourages affiliation between recipients and other organizations providing HIV/AIDS services).

82. *See, e.g.*, Comments on Office of Global Health Affairs Regulation on the Organizational Integrity of Entities Implementing Leadership Act Programs and Activities, 74 Fed. Reg. 61,096 (Nov. 23, 2009) (codified at 45 C.F.R. § 89 (2010)) (stating that the guidelines provide no guidance about when it is necessary to establish an affiliate).

83. *See* 22 C.F.R. § 226.62(a)(3) (2007) (listing the penal authority given to USAID when it finds non-compliance); *see also* U.S. v. Gatewood, 173 F.3d 983, 987 (6th Cir. 1999) (implying that more detailed criteria for determining compliance give administrative agencies less deference).

84. *Cf.* Cullen v. Fliegner, 18 F.3d 96, 104 (2d Cir. 1994) (stating that the government cannot have a legitimate interest in discouraging the exercise of constitutional rights).

85. *See* HHS GUIDANCE, *supra* note 30, at 5 (listing the HHS's non-exclusive criteria for deciding whether sufficient physical and financial separation exists between the Recipient and an affiliate).

86. *See, e.g.*, United States v. Wunsch, 84 F.3d 1110, 1119 (9th Cir. 1996) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)) (stating that the Fifth Amendment requires that statute a be sufficiently clear so as not to cause a person to be confused about the prohibited conduct).

Clause of the Fifth Amendment requires statutes to delineate clearly the conduct they proscribe,[87] and when sensitive First Amendment free speech rights are concerned, the requirement for clarity is heightened.[88] Because the Guidelines lack clear direction on this matter, recipient organizations are forced to comply with each factor and unnecessarily maintain the maximum level of separation between themselves and their affiliates.[89] Thus, the Guidelines fail the heightened scrutiny test mandated by the Supreme Court in First Amendment cases.

The Guidelines also fail to define critical terms. As a result, recipient organizations still do not know whether privately funded programs with sex workers are prohibited from receiving Leadership Act funds such that they must be performed through a separate affiliate.[90] Thus, the Guidelines fail to give the person of "ordinary intelligence" a reasonable opportunity to know what is prohibited and to provide explicit standards for organizations applying such standards.[91] Moreover, courts should strike down the Guidelines because they do not define what activities are inconsistent with the recipient organization's opposition to prostitution.[92]

Additionally, the Guidelines fail to define what constitutes an "affiliated organization."[93] Such failure subjects recipient organizations to increased risk of sanctions for maintaining relationships with third parties.[94] HHS's broad definition of "affiliate" used in the food and drug regulation context

87. *Compare* Foti v. City of Menlo Park, 146 F.3d 629, 638 (9th Cir. 1998) (emphasizing the unambiguous delineation required by the Fifth Amendment), *with* Kolender v. Lawson, 461 U.S. 352, 361 (1983) (quoting United States v. Petrillo, 332 U.S. 1, 7-8 (1947)) (stating that impossible standards of clarity are not required to satisfy the Due Process Clause).

88. *See* Info. Providers' Coal. for the Def. of the First Amendment v. FCC, 928 F.2d 866, 874 (9th Cir. 1991) (suggesting a heightened scrutiny standard for First Amendment free speech protections because such rights are inherently more valuable).

89. *Cf.* Julia L. Ernst et al., *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 760 (2008) (analyzing the undermining effects of U.S. foreign policy on women's reproductive rights).

90. *See* HHS GUIDANCE, *supra* note 30, at 5 (overlooking the court's ruling in *AOSI*, which denounced the Leadership Act's failure to define "promote").

91. *See* Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 130 (1992); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

92. *See* 45 C.F.R. § 1610.2(b) (2010) (incorporating statutory definitions of prohibited activities); *see also* AAPD 05-04, *supra* note 25, at 3-4 (requiring objective integrity and independence between recipient organizations and affiliates); *cf.* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048 (1991) (condemning a statute using words like "general" and "elaboration" because such terms of degree do not provide clear guidance for determining unlawful conduct).

93. *See* AAPD 05-04, *supra* note 25, at 3-4 (depriving recipient organizations the opportunity to establish and maintain effective working relations with third parties).

94. *See* 73 Fed. Reg. 78,997, 78,999 (Dec. 24, 2008) (codified at 45 C.F.R. § 88 (2010)) (omitting the term "affiliate" in response to complaints that the term was vague and undefined).

is inferred in the Guidelines, and the failure to limit the term violates the recipient organizations' First Amendment free speech rights.[95] The Guidelines' broad definitions of critical terms force the recipient organizations to adopt the government's view on prostitution.

More importantly, the Guidelines fail to define restricted activities and are inconsistent with the Supreme Court's ruling in *Rust v. Sullivan*.[96] Unlike *Rust*, where the separation requirements were upheld because they were necessary to assure the government's intentions, the Guidelines require additional management and governance separation.[97] The government's interest regarding the Guidelines is identical to that in *Rust*; however, the additional management and governance requirements add unjustifiable burdens that were not present in *Rust*.[98] The Guidelines are not narrowly tailored to meet the government's interest because they ignore the existence of a less burdensome affiliate scheme used in *Rust*.[99] Also, unlike *Rust*, where the separation requirements did not exempt a number of significant organizations, the Guidelines exempt many key organizations, thus undermining the government's stated interest in conveying a uniform message opposing prostitution.[100] Furthermore, different from *Rust*, where the Court upheld the separation requirements because the absence of a separate governance requirement allowed fund recipients to maintain control over affiliates, the Guidelines mandate that recipients may only express views contrary to the government's opposition to prostitution through affiliates over which recipients have no control over.[101] The Guidelines' separation requirements are not justified by the government's interest in opposing prostitution.

Furthermore, courts should adopt the standards from *Foti v. City of Menlo Park* when interpreting the "promote" language because that case effectively dealt with a similarly burdensome ban.[102] The court in that case struck down a picketing ban because law enforcement officers would have

95. *See* 21 C.F.R. § 203.3(t) (2010) (defining "affiliate" as an organization that is either associated with or a subsidiary of a charitable organization).

96. *See generally* Rust v. Sullivan, 500 U.S. 173 (1991).

97. *See id*. at 196 (stating that the First Amendment rights at issue were not violated by the separation requirements).

98. *See id.* at 196-97 (implying the significance of management and governance autonomy in determining the adequacy of separation requirements).

99. *See id.* (determining that separation requirements must follow less-burdensome schemes if the governmental interests at stake are equivalent).

100. *See* HHS GUIDANCE, *supra* note 30, at 4; *see also AOSI I*, *supra* note 6, at 269 (challenging the government's argument that the Guidelines' exemptions should play no role in determining the adequacy of the separation requirements).

101. *See Rust*, 500 U.S. at 196 (limiting the separation requirement's authority to affiliates that are under the control of the fund recipient).

102. *See generally* Foti v. City of Menlo Park, 146 F.3d 629, 638 (9th Cir. 1998).

had to confusingly evaluate a myriad of factors in determining compliance.[103] Similarly, courts should strike down the Guidelines because they call for overly harsh requirements.[104] Before implementing any federally funded program, a recipient must evaluate all of these restrictions.[105] However, the legal, physical, and financial separation requirements are more burdensome than the picketing ban in *Foti* because the funding agencies reserve the right to take all relevant factors into account even if they are not listed explicitly in the guidelines.[106] Also similar to *Foti*, where the picketing regulation was struck down because it delegated impermissible discretion to the police, the Guidelines unconstitutionally reserve basic policy matters to USAID and HHS and allow them to adjudicate on an "ad hoc and subjective basis."[107] Moreover, like the *Foti* regulations, the guidelines are unconstitutional because the agencies may take into account a "myriad of factors" when determining compliance.[108] The Guidelines' five non-exclusive factors allow a "real possibility" of discriminatory enforcement.[109]

B. The Guidelines Should Be Struck Down Because They Inaccurately Interpret the Congressional Intent Behind the Leadership Act.

The Guidelines improperly interpret the legislative intent behind the Leadership Act. The text of the statute states that the purpose of the statute is to strengthen U.S. leadership in combating HIV/AIDS by providing technical assistance and training and by encouraging the expansion of private sector efforts and expanding public-private sector partnerships.[110] However, the Guidelines, which were designed to clarify how recipient organizations may continue working with affiliates without violating the

103. *See id*. at 639 (listing various factors that must be considered to determine compliance with the picketing ban).

104. *See* HHS GUIDANCE, *supra* note 30, at 4 (requiring the existence of separate personnel, management, and governance, separate accounts, accounting records, and timekeeping records, and separate use of facilities, equipment and supplies).

105. *See id.* (insisting the agency's authority to give greater weight to any one of the listed factors).

106. *See* AAPD 05-04, *supra* note 25, at 4; HHS GUIDANCE, *supra* note 30, at 4 (listing non-exclusive factors and reserving the right to determine each case on the totality of circumstances).

107. *See Foti*, 146 F.3d at 639 (condemning Menlo Park's regulation's broad, sweeping language and unlimited discretion given to the police).

108. *See id.*; *see also* HHS GUIDANCE, *supra* note 30, at 5 (stating that considering a broad range of factors may allow officers to subjectively decide noncompliance).

109. *See* HHS GUIDANCE, *supra* note 30, at 4; *see also* United States v. Wunsch, 84 F.3d 1110, 1119 (9th Cir. 1996) (reiterating the imprecise nature of the regulations).

110. *See* H.R. REP. NO. 110-546, pt. 1, at 5 (2008) (explaining the statute's purpose to strengthen health care capacity through local training).

anti-prostitution pledge, do not advance these purposes.[111] Congress sought partnerships with NGOs with HIV/AIDS experience because they "have proven effective in combating the HIV/AIDS pandemic and can be a resource in assisting indigenous organizations in severely affected countries."[112] However, the Guidelines severely undermine these partnership efforts by alienating the very communities with which the NGOs must work.[113]

Moreover, the anti-prostitution pledge itself is not supported by the Leadership Act's legislative history.[114] Similar to *FCC v. League of Women Voters*, where the disputed provision was added by a House amendment with no debate and was held unconstitutional, the pledge requirement should be invalidated.[115] Although the government argues that NGOs must endorse the government's view in both their publicly and privately funded operations to not undermine its viewpoint-based program, Representative Chris Smith did not cite any justification for extending the pledge requirement to privately funded activities.[116]

The Guidelines contradict the legislative history behind the Leadership Act and the Supreme Court's ruling in *Rust*. The Court has held that when the legislative history is ambiguous with respect to the regulations at issue, courts should defer to the agency's expertise.[117] However, unlike *Rust*, where the Court clearly found that the legislative history was ambiguous and thus exonerated the agency's regulations, the Leadership Act's legislative history is clear that treating and preventing HIV/AIDS through cooperation is the priority.[118] Also, unlike *Rust*, where the Court upheld

111. *See, e.g.*, Lauren E. Baer, *Recent Development: Making Enemies from Allies: How the Global AIDS Act Undermines Partnerships to Combat AIDS and Sex Trafficking*, 31 YALE J. INT'L L. 513, 516-17 (2006) (listing examples of noted charitable organizations refusing U.S. funds in fear of not complying with vague Guidelines).

112. *See* 22 U.S.C. § 7601(18) (2006) (acknowledging the effectiveness of public-private partnerships in preventing and treating HIV/AIDS).

113. *See, e.g.*, CAROL JENKINS, JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS), FEMALE SEX WORKER HIV PREVENTION PROJECTS: LESSONS LEARNT FROM PAPUA NEW GUINEA, INDIA AND BANGLADESH 15-16 (2000) (discussing the effectiveness of NGOs composed of and led by sex workers).

114. *See* H.R. REP. NO. 108-60 at 28-31 (2003), *reprinted in* 2003 U.S.C.C.A.N. 712, 718 (failing to explain or justify the addition of the pledge requirement).

115. *See* FCC v. League of Women Voters, 468 U.S. 364, 370 (1984) (anchoring its analysis on the overall legislative scheme rather than rationales readily apparent from the legislative history).

116. *See* Leadership Act, Markup Before the H. Comm. on Int'l Relations, 108th Cong. 148-50 (March 4, 2004) (avoiding a direct justification of Congress' interest in expanding the Leadership Act's reach to privately funded activities).

117. *See, e.g.*, Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (endorsing an agency's power to adapt its rules to changing demands and circumstances).

118. *See* H.R. REP. NO. 110-546, pt. 1, at 2-3 (2008) (articulating the devastating

the HHS Secretary's sudden change in policy because such change was justified through ample analysis, the USAID and HHS guidelines do not resemble a justifiable reaction to reports and comments submitted by lawmakers and legal experts.[119]

In addition, the pledge requirement is not supported by the Leadership Act's goal of encouraging private-public cooperation.[120] More importantly, while the government argues that Congress included the pledge requirement to ensure that all fund recipients communicate a unified federal message on prostitution, the Leadership Act itself strives to advocate diverse approaches among NGOs.[121] The Leadership Act's goal of increasing the number of HIV/AIDS victims receiving prevention, treatment, and care services is hindered by the Guidelines.[122] The House of Representatives, in reauthorizing the Leadership Act in 2008, stated that the goal of universal access to HIV/AIDS prevention and treatment services remains a priority purpose of the statute and that this purpose is to be carried out through training and extending the workforce to expand the reach of HIV/AIDS programs to those yet to be served.[123] However, the Guidelines hinder Leadership Act fund recipients from effectively reaching out to vulnerable populations.[124] Critics in the anti-terrorism field have also condemned a similar pledge requirement.[125] They argue that while the effective prevention of diversion of funds comes down to recipient organizations establishing trusting relationships, the certification

effect of HIV/AIDS on vulnerable populations).

119. *See, e.g.*, Letter from Rep. Henry A. Waxman to Alberto Gonzales, Attorney General (June 29, 2007), *available at* http://oversight.house.gov/images/stories/documents/20070629123546.pdf (addressing the Guidelines' hindrance on public health best practices). *Compare* S. Rep. No. 110-128, at 33 (2007) (nullifying any requirements that impose more costly and burdensome restrictions than those used in the faith-based context), *with* HHS GUIDANCE, *supra* note 30, at 4-5 (overlooking the Senate's concern for unjustified burdens imposed by administrative guidelines).

120. *See* H.R. REP. NO. 110-546, pt. 1, at 2-3 (2008); *see also* 22 U.S.C.A. § 2151(a) (West 2010) (emphasizing the effective and efficient use of federal funds).

121. *See* 22 U.S.C. § 7631(f) (2006) (exempting four organizations from the pledge requirement); *see also* FCC v. League of Women Voters, 468 U.S. 364, 391-92 (1984) (invalidating a ban on television editorializing because it only regulated local stations).

122. *See generally* Letter from Human Rights Watch to President George W. Bush (May 18, 2005), *available at* http://www.hrw.org/campaigns/hivaids/hiv-aids-letter/ (expressing disapproval of the pledge requirement as undermining best practices in HIV/AIDS prevention and treatment).

123. *See* H.R. REP. NO. 110-546, pt. 1, at 2 (2008) (stating that the reauthorization seeks to further rebuild the health care workforce).

124. *See id.* at 3 (noting the vulnerability of young girls and orphans and that the Leadership Act targets such populations).

125. *See, e.g.*, Barnett Baron, *Deterring Donors: Anti-Terrorist Financing Rules and American Philanthropy*, 6 INT'L J. OF NOT-FOR-PROFIT L. 7-13 (2004) *available at* http://www.icnl.org/knowledge/ijnl/vol6iss2/special_5.htm (observing the chilling effect posed by the anti-terrorism funding regulations).

requirements damage the necessary trust.[126]

C. Courts Should Adopt the Approaches Taken by the Supreme Court in the Anti-Terrorism and Establishment Clause Contexts.

1. The Vagueness Test and Mens Rea Approach Used in Humanitarian Law Project v. Mukasey *Should Be Applied to the HIV/AIDS Funding Context.*

Courts should strike down the anti-prostitution pledge because other courts have struck down similarly vague statutory provisions in antiterrorism funding cases.[127] For example, in *Humanitarian Law Project v. Mukasey*, the court struck down parts of the statute, holding they were vague because a person of ordinary intelligence would not know whether, when teaching someone to petition for international tsunami-related aid, one is imparting a "specific skill" or "general knowledge."[128] Moreover, courts have explicitly stated that when a statute deals with "sensitive areas of basic First Amendment rights," the requirement for clarity is enhanced.[129] Thus, the statute and the Guidelines are void for vagueness because a person of ordinary intelligence would not know what actions promote prostitution.[130]

Furthermore, the Guidelines are vague because the discretion left to the funding agencies in determining what actions promote prostitution fails to meet the heightened standard required for First Amendment rights.[131] The

126. *See generally* THE CTR. FOR PUB. & NONPROFIT LEADERSHIP, PANEL DISCUSSION: SAFEGUARDING CHARITY IN THE WAR ON TERROR 9 (2005) *available at* http://cpnl.georgetown.edu/doc_pool/Charity061405.pdf [hereinafter SAFEGUARDING CHARITY] (stating that the guidelines are useless and embarrassing and threatening to organizations).

127. *See, e.g.*, Humanitarian Law Project v. Mukasey, 552 F.3d 916, 922 (9th Cir. 2009) (holding language in the AEDPA impermissibly vague). *But see Constitutional Implications of Statutes Penalizing Material Support to Terrorist Organizations*; *Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004) (testimony of David Cole) (defining exceptions to what constitutes material support).

128. *See Mukasey*, 552 F.3d at 928-29; *see, e.g.*, Letter from Kay Guinane, Dir., OMB Watch to Michael O. Leavitt, Sec'y, U.S. Dept. of Treasury 2 (Feb. 1, 2006), *available at* http://www.ombwatch.org/npadv/CommentsPEPHARPledge RuleMay2008.pdf (explaining problems with the Treasury Department's anti-terrorism guidelines).

129. *See, e.g.*, Info. Providers' Coal. for the Def. of First Amend v. FCC, 928 F.2d 866, 874 (9th Cir. 1991) (stating that the government may only regulate with narrow specificity when the issue concerns First Amendment freedoms).

130. *See* Letter from Rebekah Diller, Deputy Director, Justice Program, to Kathleen Sebelius, Sec'y, HHS 4 (Dec. 22, 2009), *available at* http://www.brennancenter.org/content/resource/aosi_v_usaid/ (stating that the failure to define "affiliated organization" makes the statute vague).

131. *See AOSI II*, *supra* note 36, at 533 (requiring narrow tailoring by the government in restricting speech); *Waxman Letter*, *supra* note 81, at 1 (stating that the agencies' discretion undermines Congress' intent).

Supreme Court has ruled that heightened scrutiny should be applied when speech activities carried out with private funds are restricted as a "qualification for receiving federal funding."[132] Similar to *Mukasey*, where the term "service" was deemed impermissibly vague, courts should hold that the Guidelines still fail to define "promoting prostitution."[133] Also, like *Loper v. New York City Police Department*, where a statute that totally prohibited begging in all public places was struck down because it was not narrowly tailored to meet the government's purpose,[134] the Guidelines are a "blanket ban" on constitutionally protected speech.[135] Finally, the Supreme Court has ruled that the government's ability to condition participation in federally funded programs by the recipients' relinquishment of constitutional rights is limited.[136] Therefore, courts should strike down the Guidelines because USAID and HHS exceeded their authority in mandating blanket bans on constitutional rights.

2. Courts Should Include a Mens Rea Requirement When Interpreting the Leadership Act and the USAID and HHS Guidelines.

The Guidelines do not take into consideration whether recipient organizations knew that their affiliates were participating in prostitution-related activities. Courts should interpret the Leadership Act and the USAID and the HHS Guidelines as requiring a mens rea element because such a requirement can provide a clearer guidance for funding recipients. Even if a statute does not explicitly contain a mens rea requirement, the Supreme Court has held that the government must prove the mens rea by showing that the defendant knew that his conduct was illegal.[137] Similar to *Liparota v. United States*, where the Court stated that absent indication of

132. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 195 (1991) (applying heightened scrutiny to reject government restrictions); *cf.* Velazquez v. Legal Servs. Corp., 164 F.3d 757, 766-67 (2d Cir. 1999) (noting that regulations may be subject to an as applied challenge if they are unduly burdensome and poorly justified).

133. *See Mukasey*, 552 F.3d at 924 (citing precedent that emphasized the potential consequences of ambiguous terms within statutes and administrative guidelines).

134. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126-27 (1989) (denouncing a ban on indecent commercial phone messages because it was not narrowly tailored to protect children from dial-a-porn messages); Loper v. New York City Police Dep't, 999 F.2d 699, 705 (2d Cir. 1993) (holding that a total ban on public begging is not narrowly tailored to achieve the prevention of the effects associated with begging).

135. *See AAPD 05-04*, *supra* note 25, at 3-4; *see also* AOSI I, *supra* note 6, at 271-72 (prohibiting government regulations that suppress dangerous ideas).

136. *See, e.g.*, O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 725-26 (1996) (stating that the government may not impose conditions on expressing or not expressing specific political views on outside contractors).

137. *See, e.g.*, Liparota v. United States, 471 U.S. 419, 425-27 (1985) (noting that eliminating a mens rea element from the statutes would criminalize a broad range of innocent conduct).

"contrary purpose" in the legislative history of a statute, a defendant must have known that his conduct was illegal, courts should interpret the Guidelines as having a mens rea requirement because the legislative history does not explicitly contrast the notion.[138] Additionally, like *Liparota*, where the Court stated that a mens rea requirement is especially necessary when the congressional purpose behind the statute is unclear, courts should require the government to prove knowledge of illegality.[139] For example, courts have ruled that unless Congress expressly communicates its intent to dispense with a mens rea requirement within a statute, criminal liability must be coupled with a notion of intent to commit the crime knowingly.[140]

Courts should apply a mens rea requirement because it provides adequate guidance, as has been shown in the anti-terrorism context.[141] Requiring the government to prove that a defendant committed a crime *knowing* that the disputed conduct is illegal provides a clearer standard for the defendant.[142] That concept in the HIV/AIDS funding context would instruct grantee organizations that if they knew that any portion of their activities or materials funded by the U.S. government were used for prostitution, they would be promoting prostitution. For example, courts interpreting the "promote" language should adopt the *Al Haramain* standard because it provides clearer guidance for recipient organizations as to what actions would be deemed to promote prostitution. Similar to *Al Haramain*, where the court stated that the organization promoted terrorism because it contributed financially to a designated terrorist organization, courts should rule that the NGO is not promoting prostitution because drop-in centers and condom distribution have not been proven to contribute to the spread of prostitution.[143]

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138. *See id.* at 425 (stating that a mature legal system emphasizes the mens rea element because it believes in "freedom of the human will" to choose between good and evil).

139. *See id.* at 427 (discussing the necessity of the rule of lenity, which can ensure a fair warning on criminal sanctions and balance between the legislative and judicial branch in determining criminal sanctions).

140. *See, e.g.*, Brown v. United States, 334 F.2d 488, 496 (9th Cir. 1964); United States v. Nguyen, 73 F.3d 887, 890 (9th Cir. 1995) (quoting Morissette v. United States, 342 U.S. 246, 251 (1952)) (implying the historical significance of requiring mens rea in the criminal context).

141. *Compare* Staples v. United States, 511 U.S. 600, 605 (1994) (interpreting a statute punishing possession of an unregistered firearm to require knowledge that the gun is unregistered), *with* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (interpreting "knowingly" to require knowledge that the performers in the video were actually minors).

142. *See generally* SAFEGUARDING, *supra* note 126 (stating that without specific targets, the U.S. government and law enforcement are ineffectively protecting our safety).

143. *See* Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 585 F. Supp. 2d 1233, 1240 (D. Or. 2008) (outlining an executive order finding that contributing money to a designated terrorist organization is always deemed as

Moreover, courts should adapt *Al Haramain*'s ruling that a recipient does not promote terrorism if it does not have a significant financial relationship with organizations that promote prostitution. Similar to *Al Haramain*, where the court stated that a significant financial relationship is a leading factor in determining terrorism promotion, courts should rule that recipients are in compliance with the financial separation requirement by not providing any funds to organizations that have not adopted a policy condemning prostitution.[144] The guidelines incorrectly require recipient organizations to control their affiliates' activities, yet do not take a mens rea requirement into consideration when determining noncompliance.

3. Courts Should Apply the Direct Subsidy Theory of Zobrest *and the* Witters *Approach to the HIV/AIDS Funding Context*

The recipient organizations' HIV/AIDS-relief activities do not resemble a direct subsidy of prostitution activities.[145] Courts interpreting the "promoting" language in the international development context should adopt the meaning of "promoting" used in *Zobrest*, where the court ruled that providing interpreters to a deaf student attending a Catholic high school was not considered promoting religion because the interpreter service was part of a general government program designed to provide equal benefits to all children with qualifying disabilities.[146] Additionally, the Supreme Court has held that when a government funds a program that is in no way skewed towards religion, the program does not promote religion, and therefore, does not violate the Establishment Clause.[147] Thus, courts interpreting the Leadership Act should strike down the restriction on funding based on promoting prostitution because the Leadership Act was designed to benefit all vulnerable populations and because HIV/AIDS services distribute benefits neutrally to anyone deemed a victim.[148]

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promoting terrorism); *see also* Letter from Rep. Tom Lantos, Chair, Committee on on Oversight and Reform et al., to Henrietta Fore, Acting Administrator, USAID (July 20, 2007) (on file with the author) (proposing the agency consider a less restrictive framework).

144. *See Al Haramain*., 585 F. Supp. 2d at 1243 (addressing the issue of financial affiliation as a criterion for the definition of "promote").

145. *Cf.* Mehlika Hoodbhoy et al., *Exporting Despair: The Human Rights Implications of U.S. Restrictions on Foreign Health Care Funding in Kenya*, 29 FORDHAM INT'L L.J. 1, 3 (2005) (suggesting that current U.S. funding policies that even restrict non-subsidized activities are in violation of international human rights obligations).

146. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 2, 10 (1993) (distinguishing this program from others where schools were directly subsidized to pursue religious activities).

147. *See id.* at 10-11; *see also* Wolman v. Walter, 433 U.S. 229, 244 (1977); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 (1973) (reiterating that non-biased funding is not problematic).

148. *See* H.R. REP. NO. 110-546, pt. 1, at 34 (2008) (stating that HIV/AIDS

Courts should also strike down the pledge requirement and the guidelines because the primary beneficiaries of the Leadership Act funds are the vulnerable populations, not the recipient organizations. For example, in *Witters*, the Court stated that because the sectarian schools receiving IDEA funds are only incidental beneficiaries, the IDEA funds were not promoting religion.[149] Under the reasoning from *Witters*, a court should hold that the HIV/AIDS victims are the primary beneficiaries of the Leadership Act, while the NGOs and charities disbursing the funds only benefit incidentally.[150] Therefore, courts should strike down the pledge requirement because the Leadership Act funds were intended to benefit the victims, not to benefit the organizations receiving the funds.

Moreover, the legislative history of the Leadership Act indicates that funds were designed to help all HIV/AIDS victims, especially young women and children in more vulnerable, remote locations.[151] Following that logic, as in *Witters*, where the Supreme Court ruled that a government program supplying funds to a deaf theology student did not promote religion because the funds were equally available to all deaf students, the Leadership Act funds should not be subject to the pledge requirements because the funds were intended to be equally distributed to all HIV/AIDS victims.[152] Thus, courts should strike down the pledge requirement and the USAID and HHS Guidelines because Leadership Act funds were intended to benefit all HIV/AIDS victims. Furthermore, in the Establishment Clause context, for a program to promote religion, the government itself must have advanced religion through its own activities and influence.[153] Similarly, in the Leadership Act context, the government is not advancing prostitution through the activities of the recipient organizations. Funds that offer a neutral service to all victims need not be characterized as promoting prostitution.[154] In providing HIV/AIDS funds, the U.S. government's sole

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prevention programs should be tailored to each community).

149. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 488-90 (1986) (stating that the decision to support religious education is not made by the government because the funds go directly to individual recipients).

150. *See, e.g.*, POLICY BRIEF, *supra* note 3, at 3-4 (stating that funds are used to provide safety and training shelters).

151. *See* H.R. REP. NO. 110-546, pt. 1, at 34 (2008) (recognizing the increased vulnerability of certain populations due to the lack of education and access to preventative care).

152. *See id.* at 30; *see also* Gentile v. State Bar, 501 U.S. 1030, 1048-49 (1991) (stating that classic terms of degree, such as "general" and "elaboration" do not provide sufficient guidance as to whether conduct is unlawful).

153. *See* Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 825 (1995) (stating that the ultimate question in determining religious endorsement is whether any use of government funds could be attributed to the government); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337 (1987).

154. *See, e.g.*, *Witters*, 474 U.S. at 489 (finding that neutrally available funds are not

purpose is not to eradicate prostitution.[155] Therefore, courts should rule that Leadership Act fund recipients are not promoting prostitution because the government is not using its activities and influence to promote prostitution through the recipient organizations.

IV. POLICY IMPLICATIONS AND SUGGESTIONS

A. USAID and HHS Should Issue New Guidelines Clearly Indicating How Recipient Organizations Can Separate Private and Public Funds.

Field experts praise less restrictive frameworks as less stigmatizing and more effective in reaching out to HIV/AIDS affected populations.[156] USAID and HHS should issue clearer guidelines because public health organizations have argued that the pledge requirement and the ensuing guidelines run contrary to best practices in combating the spread of HIV/AIDS.[157] These organizations cite "trust and credibility" among vulnerable populations as the cornerstone of effective anti-HIV/AIDS and anti-trafficking strategies.[158] Because such populations are so marginalized, they are often difficult to identify, requiring extensive relationship-building efforts to establish trust. Research conducted by organizations like the Center for Health and Gender Equity (CHANGE) state specific methods proven to be effective yet impossible to implement without genuine trust. One strategy includes drop-in centers, which provide sex workers with a safe space for gathering as well as services. Within these centers, sex workers are provided "language classes, beauty courses, computer access, and livelihood training."[159]

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deemed to support religion).

155. *See* H.R. REP. NO. 110-546, pt. 1, at 2 (2008) (implying that the purpose of the Leadership Act is to treat HIV/AIDS victims and that prostitution regulation is only one means).

156. *See* Ira C. Lupu & Robert Tuttle, *Legal Update:* ACLU of Massachusetts v. Leavitt, *U.S. District Court, District of Massachusetts*, RELIGION & SOC. POL'Y. ORG (March 7, 2000) (on file with the author); *see also Waxman Letter*, *supra* note 81 (denouncing the counterproductive effects of stigmatizing restrictions).

157. *See*, *e.g.*, POLICY BRIEF, *supra* note 3, at 4-5 (explaining the irony of prohibiting activities hailed as effective in combating HIV/AIDS by experts).

158. *See id.* (describing the success of drop-in centers and the integral role of trust development); *see also* Ban Ki Moon, Secretary General of the United Nations, Address to the International AIDS Conference (Aug. 4, 2008) *available at* http://www.un.org/News/Press/docs/2008/sgsm/1727.doc.htm (reiterating the need to protect sex workers).

159. *See* POLICY BRIEF, *supra* note 3, at 3 (suggesting that adding permanent value to the lives of victims through productive education is the most effective way to prevent and treat HIV/AIDS); *cf.* Planned Parenthood Fed'n v. Agency for Int'l Dev., 915 F.2d 59, 61-62 (2d Cir. 1990) (upholding the USAID regulations because they were the least restrictive means of implementing a non-justiciable foreign policy decision).

The Guidelines should clearly state how to separate private and public funds because doing so will allow recipient organizations to expand effective empowerment programs. In empowerment programs, sex workers are trained as peer educators on HIV transmission and prevention methods, and these programs also set up collectives to ensure that all prostitutes in a given area use and promote condoms.[160] CHANGE research states that these programs are only successful because organizations do not judge sex workers' activities, and the pledge requirements would "sabotage the trust beneficiaries have in them, critically undercutting the success of these programs."[161]

Additionally, the pledge requirement and the implementation of the USAID and HHS Guidelines have caused a chilling effect on HIV/AIDS funding.[162] Not only are individual drop-in centers and prostitutes affected immediately, self-censorship of donor organizations have led to the abandonment of entire sex worker programs.[163] For example, CHANGE cites numerous interviews where senior NGO officials state that the pledge's ambiguous language makes them "feel hesitant to bid on USAID funds for sex work programs."[164] Also, NGO officials reported that they have cleared their websites of "references to sex workers or their rights" and that they are avoiding media coverage "for fear of facing accusations of promoting sex work."[165] These are not abstract fears. For example, SANGRAM, a leading Indian NGO engaged in HIV/AIDS prevention work, successfully trained and educated prostitutes as educators of male clients. However, after its beneficiaries feared being labeled as promoting prostitution, SANGRAM did not sign the prostitution pledge, refused further funding and gave back the remainder of its existing funds.[166]

B. USAID and HHS Should Issue New Guidelines that Clarify What

160. *See* POLICY BRIEF, *supra* note 3, at 3 (proffering the notion that sex workers are the most effective mechanism for educating and reaching other vulnerable sex workers).

161. *See id.* (refusing to accept the government's position that HIV/AIDS can be effectively prevented and treated without empowering sex workers).

162. *See id.* at 4 (stating that the pledge and the guidelines sabotage trust within effective prevention programs).

163. *See id.*; *cf.* INT'L FED. OF RED CROSS & RED CRESCENT SOCY'S, LAW AND LEGAL ISSUES IN INT'L DISASTER RESPONSE: A DESK STUDY 133 (2007), *available at* http://www.ifrc.org/what/disasters/idrl/research/publications.asp (describing the difficulties faced by international relief organizations due to stringent funding regulations).

164. *See* POLICY BRIEF, *supra* note 3, at 5 (citing an interview with a senior international NGO official by Veronica Magar (May 22, 2006)).

165. *See id.* (citing interviews with NGO leaders by Veronica Magar (May 2006)).

166. *See* Esther Kaplan, *Pledges and Punishment*, ALTERNET (March 15, 2006), *available at* http://www.alternet.org/story/33284 (stating that the pledge requirement further stigmatizes vulnerable prostitutes and destroys needed trust).

Programs Are Specifically Prohibited.

Recipient organizations have no way of knowing whether they are implementing impermissible activities because the current Guidelines do not define what specific activities are prohibited. The funding agencies must remember not to undercut programs following best practices within the global public health community. For example, direct engagement with sex workers is required to promote condom use and to train sex workers on negotiation of protection strategies with clients.[167] However, due to the vagueness of the Guidelines, many recipient organizations are cancelling such programs out of fear that such programs will be viewed as supporting sex workers.[168] Therefore, USAID and HHS must draft regulations that do not limit the recipients' ability to work openly with high-risk populations such as sex workers.

Additionally, the Guidelines must not exacerbate stigma and discrimination against sex workers. The issue is not whether one supports prostitution; rather, the issue is recognizing the critical dangers associated with prostitution and human trafficking and how the guidelines are fueling social stigma. A recipient organization's declaration that it does not support prostitution will further drive sex workers underground, away from crucial HIV/AIDS services and treatment.[169]

V. CONCLUSION

USAID and HHS should suspend issuance of the guidelines and the administration should not enforce the Leadership Act's pledge requirement. Not only does the pledge requirement unconstitutionally force fund recipients to adopt policies consistent with the government's viewpoint on prostitution, the Guidelines have also failed to clarify what actions promote prostitution.[170] Moreover, the Guidelines impose impracticable restrictions that are both unworkable and will threaten the effectiveness of HIV/AIDS prevention and treatment programs.[171] Therefore, to fulfill Congress' intention of reaching all HIV/AIDS victims equally through education and training, the pledge requirement should be repealed and the Guidelines

167. *See generally* 22 U.S.C. § 7621 (2006) (emphasizing the importance of cooperation with the private sector, especially organizations that already have ties in developing countries).

168. *See* POLICY BRIEF, *supra* note 3, at 4-5 (stating that burdensome separation requirements do not allow recipient organizations to set up effective affiliates).

169. *See*, *e.g.*, *Brazil Refusal*, *supra* note 26, at 2 (implying that the Brazilian government's recognition of the effectiveness of the sex workers in combating HIV/AIDS has improved prevention and treatment in the region).

170. *See* POLICY BRIEF, *supra* note 3, at 4 (lambasting the anti-prostitution pledge for ignoring public health best practices).

171. *AOSI I*, *supra* note 6, at 270.

should be modified to impose practicable and less burdensome restrictions.