

Congress of the United States
Washington, DC 20515

July 20, 2007

The Honorable Michael O. Leavitt
Secretary
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Dear Mr. Secretary:

We are writing with regard to a restriction on the free speech of U.S. and foreign organizations that receive U.S. global AIDS or anti-trafficking funding.

Since the enactment of the AIDS and Anti-Trafficking Acts of 2003, both U.S. and foreign grantees have been prohibited from spending U.S. funds to promote, support, or advocate “the legalization or practice of prostitution.”¹ This is a constitutional restriction on the actual use of U.S. funds. However, a different provision in each law also requires that recipients have organization-wide positions against prostitution.² In effect, this provision puts limitations on what an organization can advocate with private funds, not just those it receives from the government.

Initially, this provision was not applied to U.S.-based groups. However, a September 2004 Department of Justice letter to the Department of Health and Human Services advised that the pledge could indeed be applied to U.S. organizations.³

¹ The Trafficking Victims Protection Reauthorization Act provides: “No funds made available to carry out this division ... may be used to promote, support, or advocate the legalization or practice of prostitution.” Pub. L. No. 108-193 (2003) §7(7). The AIDS Act provides: “No funds made available to carry out this Act ... may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.” Pub. L. No. 108-25 (2003) §301(e).

² The Trafficking Victim Protection Reauthorization Act provides: “No funds made available to carry out this division, or any amendment made by this division, may be used to implement any program that targets victims of severe forms of trafficking in persons described in section 103(8)(A) of this Act through any organization that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution. The preceding sentence shall not apply to organizations that provide services to individuals solely after they are no longer engaged in activities that resulted from such victims being trafficked.” Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193 (2003) §7(7). The AIDS Act provides: “No funds made available to carry out this Act, or any amendment made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.” United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25 (2003) §301(f).

³ Letter from Acting Assistant Attorney General Daniel Levin to Alex M. Azar, General Counsel, Department of Health and Human Services (Sept. 20, 2004).

Groups working to address the causes and consequences of prostitution are concerned that the pledge requirement increases stigmatization and hinders outreach; and there is international public health consensus that effective outreach to marginalized populations is crucial to HIV prevention.⁴

There is a possibility that these constitutional and public health issues could be addressed now. The Department of Justice recently told a federal court that the government plans to establish guidelines for the global AIDS program that maintain the anti-prostitution pledge requirement, but permit organizations to have “separate affiliates” that will not be required to have such a policy.⁵ This could represent a welcome change in the application of the law if the affiliate requirements truly provide sufficient alternative channels for expression. However, the Department told the court that these policies will be based on the affiliate requirements for Legal Services Corporation grantees. This type of requirement would require organizations to set up legally and physically separate affiliates, with separate staff, in order to use private funds to speak freely about prostitution and AIDS.⁶

The questionable constitutionality of the pledge as applied to U.S. groups calls into question the validity of such restrictive requirements. It could also unduly burden the cooperating agencies participating in our programs and introduce wasteful duplication of costs. This is of particular concern because many funding recipients operate in multiple countries, and registering separate entities in each may be difficult or impossible.

Less restrictive frameworks — such as those the Administration has endorsed and applied to faith-based groups — are available. The Administration has stated that as long as faith-based grantees ensure that no federal funds are spent on inherently religious activities and that federally

⁴ Letter from Over 200 Organizations to President Bush (May 18, 2005) (online at www.genderhealth.org/pubs/20050518LTR.pdf). In a 2004 article in the medical journal *The Lancet*, over 100 religious, political, public health and scientific leaders urged the international community “to unite around an inclusive evidence-based approach to slow the spread of sexually transmitted HIV.” Within such an approach, they wrote that “[t]he identification and direct involvement of most-at-risk and marginalized populations is crucial.” D. Halperin, et al, *The Time Has Come for Common Ground in Preventing Sexual Transmission of HIV*, *The Lancet*, 913-914 (Nov. 27, 2004).

⁵ Letter from U.S. Attorney Michael J. Garcia to the Honorable Catherine O’Hagan Wolfe, Clerk of the Court, U.S. Court of Appeals for the Second Circuit (June 8, 2007) (online at www.brennancenter.org/dynamic/subpages/download_file_49138.pdf).

⁶ *Legal Services Corporation; Program Integrity of Recipient* (45 C.F.R. § 1610.8). Such restrictions have been documented as extremely burdensome on Legal Services Corporation-funded organizations. Some have had to spend significant sums running duplicate offices instead of providing more services; others, unable to meet the strict requirements, have been unable to serve those low-income clients who are not eligible for LSC-funded services. Brennan Center for Justice, *Why We Need to Fix the Legal Services Restriction on State, Local, and Private Money* (Mar. 14, 2007) (online at www.brennancenter.org/dynamic/subpages/download_file_48195.pdf).

The Honorable Michael O. Leavitt
July 20, 2007
Page 3

funded activities are conducted either at a different time or in a different place than any privately funded, religious activities, no government funding or endorsement of religious activities will occur.⁷ This model could be used in the global AIDS and trafficking programs to give organizations a meaningful alternative.

According to a recent letter from the Department of Justice, new guidance related to the pledge requirement in the global AIDS program may be issued as soon as next week.⁸ We urge you to issue minimally restrictive guidelines that respect both the constitutional rights of U.S. groups and the important public health goals of all recipient organizations.

Sincerely,



Henry A. Waxman
Chairman
Committee on Oversight
And Government Reform



Tom Lantos
Chairman
Committee on Foreign Affairs



Donald M. Payne
Chairman
Committee on Foreign Affairs
Subcommittee on Africa and
Global Health



Barbara Lee
Member of Congress

⁷ Executive Order No. 13279, White House Office of Faith-Based & Community Initiatives, *Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government* (2002) (online at http://www.whitehouse.gov/government/fbci/guidance_document_01-06.pdf).

⁸ Letter from Principal Deputy Assistant Attorney General Brian Benczkowski to Rep. Henry A. Waxman (July 17, 2007).