



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 17, 2007

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter, dated June 29, 2007, regarding the funding eligibility restrictions of the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA") and the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("AIDS Act"), which prohibit federal funding of programs for groups that promote or advocate the legalization or practice of prostitution or sex trafficking. You requested an explanation of the Department's legal positions regarding the restrictions that Congress enacted in these statutes, and you requested copies of documents related to the legal positions.

In September 2003, the Department offered its views on the TVPRA during Congress's consideration of the legislation. Although the letter stated that "we are not prepared to take the position that subsection 7(7) (proposed section 113(g)(2) of the [TVPRA]) is unconstitutional," we expressed the concern that the so-called "organization restrictions" raised "serious First Amendment concerns and may not withstand judicial scrutiny" and, therefore, recommended that the provision be struck from the bill. Letter for Hon. F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs at 8 (Sept. 24, 2003). Then, in February 2004, the Department provided tentative advice to the Department of Health and Human Services ("HHS") and the U.S. Agency for International Development ("USAID") that the organization restrictions set forth in 22 U.S.C. § 7110(g)(2) and 22 U.S.C. § 7631(f) could, under the Constitution, be applied only to foreign organizations acting overseas.

After reviewing the matter further, in September 2004 the Department provided a letter to HHS withdrawing the earlier tentative advice. The Department concluded that

[t]he statutes are clear on their face that the organization restrictions were intended by Congress to apply without the limitations identified in our earlier advice. . . and, in these circumstances, given that the provisions do not raise separation of powers concerns and that there are reasonable arguments to support

their constitutionality, we believe that HHS may implement these provisions. If the provisions are challenged in court, the Department stands ready to defend their constitutionality in accordance with its longstanding practice of defending congressional enactments under such circumstances.

Letter for Alex M. Azar II, General Counsel, HHS, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel (Sept. 20, 2004). We reasoned, “applying the longstanding principle that as a general matter (particularly outside of the separation-of-powers context) the Executive Branch will implement a congressional enactment so long as there exist reasonable arguments supporting its constitutionality, that there are clearly reasonable arguments supporting the constitutionality of both the program funds restrictions and the organization restrictions contained in the TVPRA and the AIDS Act.” *Id.* In a June 27, 2005 letter, we explained to you the Department’s determination that there are reasonable arguments to defend the organization restrictions in the TVPRA and the AIDS Act, notwithstanding the constitutional concerns, and informed you that, consistent with the Department’s longstanding position on defending the constitutionality of congressional enactments, we would defend the statutes against challenges in court.

The D.C. Circuit recently upheld the constitutionality of the entity-based eligibility condition imposed by the AIDS Act. *DKT International, Inc. v. U.S. Agency for International Development*, 477 F.3d 758 (D.C. Cir. 2007). In so doing, it noted that a grantee may engage in the disfavored speech through a “sufficiently separate” corporate affiliate. *Id.* at 763. In connection with similar litigation pending in the Second Circuit, *Alliance for Open Society International, Inc. v. U.S. Agency for International Development (“AOSI”)*, No. 06-4035-cv (2d Cir.), the Department of Justice has stated that it would announce guidance on what constitutes such a “sufficiently separate” affiliate for these purposes by July 23rd.

With respect to your request for documents and correspondence on this issue, enclosed are copies of the government’s briefs in the *DKT* and *AOSI* litigation. There are substantial confidentiality interests associated with our non-public documents, which consist of advisory and deliberative materials and internal legal analyses. Disclosure of these documents outside the Executive Branch would harm the deliberative processes of the Executive Branch and undermine the ability of the Department to provide, and of senior Administration officials to receive, candid legal advice. Additionally, non-public documents created by the Department in connection with these lawsuits are protected attorney work product. We believe that the Department’s reasoning in support of the constitutionality of the funding eligibility restrictions of the AIDS Act, as articulated in the enclosed government briefs in the *DKT* and *AOSI* litigation, should provide the Committee with a full understanding of the Department’s legal position.

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We hope that this information is helpful. If you would like assistance regarding any other matter, please do not hesitate to contact this office.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian A. Benczkowski". The signature is fluid and cursive, with the first name "Brian" being the most prominent.

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Tom Davis
Ranking Minority Member