



MEMORANDUM

To: Interested Parties
From: Burt Neuborne, Rebekah Diller
Re: Constitutionality of Anti-Prostitution Pledge in the AIDS Act
Date: June 13, 2005

This memorandum analyzes the constitutionality of the federal government's requirement that international relief organizations adopt policies explicitly opposing prostitution and sex trafficking if they wish to participate in federally-funded programs designed to combat the worldwide spread of HIV/AIDS.¹

We conclude that the First Amendment bars Congress from requiring relief organizations based in the United States to adopt a specific policy position opposing prostitution as a condition of participating in federally-funded programs delivering HIV/AIDS prevention, treatment and related social services.

BACKGROUND: GLOBAL AIDS ACT

The anti-prostitution pledge requirement is contained in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act"), 22 U.S.C.A. § 7601 *et seq.* The Global AIDS Act implements the President's Emergency Plan for AIDS Relief ("PEPFAR"), a five-year global strategy to fight HIV/AIDS, focusing on education, research, prevention, treatment and care of persons living with HIV/AIDS. Funds under the act include focused efforts against AIDS in 15 of the world's most afflicted countries, largely in sub-Saharan Africa. The funds, which are distributed mainly by the Department of Health and Human Services ("HHS") and United States Agency for International Development ("USAID"), go to many U.S. organizations doing work abroad, as well as to foreign non-governmental organizations ("NGOs"), often as subgrantees of U.S. groups, and foreign governments.² PEPFAR is coordinated by a Global AIDS Coordinator, Randall Tobias, who has Ambassadorial rank.

The Global AIDS Act stipulates that it should be the policy of the United States to "eradicate prostitution and other sexual victimization" and contains findings that the sex industry and sex trafficking are "additional causes of and factors in" the spread of

¹ This memorandum does not constitute individualized legal advice and is not intended to create an attorney-client relationship.

² This memorandum does not address the constitutionality of requiring foreign organizations operating outside the U.S. to adopt policies opposing prostitution and sex trafficking as a condition of receiving U.S. government funds.

HIV/AIDS. 22 U.S.C.A. § 7601 (23). The act contains two restrictions regarding prostitution. The first provision (the “government funds restriction”) prohibits funds made available under the act from being spent on activities that “promote or advocate the legalization or practice of prostitution and sex trafficking.” 22 U.S.C.A. § 7631(e). This restriction, however, allows for the provision of health care to a prostitute. *Id.* (stating that provision should not be construed to preclude the provision to individuals of, inter alia, palliative care, treatment, test kits and condoms).

The second restriction (the “pledge requirement”) provides, in pertinent part, that “no funds made available to carry out 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.” 22 U.S.C.A. § 7631(f).³ The Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and United Nations agencies are exempt from the pledge requirement. *Id.*

The statute does not define what it means to “oppose” prostitution. Many grantees believe that prostitution is harmful. At the same time, some may also believe the best way to ameliorate the harm is to engage in legal reform to reduce penalties against sex workers and enable them to obtain medical treatment, legal recourse in cases of harassment and violence, and other protections. The statute does not specify whether the government would view the refusal to take a position regarding the legal status of sex work as compliant with the statute. However, this ambiguity creates the risk that the government would view such a refusal as a violation. Other grantees take no position whatsoever on prostitution or the question of legalization since they are health care organizations, not policy advocates, or they believe that remaining non-judgmental is the best way to ensure access to a population that is subject to stigma and discrimination and often pushed to the margins of society. Yet the statute requires them not only to take a policy position, but to take one that opposes prostitution.

Moreover, it seems implicit in the statute that an organization must not only have a policy in place, but must also comply with the policy. Given that the statute requires an organization-wide policy, the entire organization would have to tailor its speech, programming and activities to comport with that policy, even in areas of work supported by private, non-Global AIDS Act funding. The government has not provided any written guidance on what privately financed activities would run afoul of the pledge. However,

³ The Trafficking Victims Protection Act (“TVPA”), which provides funding for anti-trafficking activities and services in the U.S. and abroad, contains a similar though more explicit restriction:

No funds made available to carry out this chapter . . . may be used to implement any program that targets victims of severe forms of trafficking in persons . . . 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.

22 U.S.C.A. § 7110(g)(2) (emphasis added). Many of the arguments concerning the constitutional infirmities of the AIDS Act restriction also apply to the TVPA restriction, though we limit our analysis here to the Global AIDS Act.

as noted above, the ambiguity in the statute creates a risk that the government would view advocacy for legalization or reduced penalties or actions in support of such advocacy as a violation.

Initially, the government only applied the pledge requirement to foreign NGOs, due to the Department of Justice's ("DOJ") guidance that domestic enforcement would be unconstitutional.⁴ However, a September 2004 letter from the DOJ Office of Legal Counsel withdrew that earlier advice⁵ and the administration has begun enforcing the pledge requirement against domestic organizations.

USAID and HHS have released guidelines implementing the pledge requirement. Both agencies have stated that grant recipients must certify their compliance with both the government funds restriction and anti-prostitution pledge prior to receiving funds.⁵ The guidelines do not further define "opposing prostitution" nor do they provide guidance on what activities are permissible and impermissible under the pledge requirement. Under the guidelines, if a recipient is found to violate any of the prostitution-related restrictions, the agencies may unilaterally terminate the funding agreement.⁶ In addition, HHS has informed applicants that they must agree to allow HHS to inspect any documents that "relate to the organization's compliance" with the anti-prostitution requirements.⁷ We also are not aware of new Global AIDS Act funding guidelines from the Department of State, Department of Labor, or Department of Defense, which also distribute PEPFAR money.

The pledge requirement, compounded with the lack of real guidance as to its parameters, poses problems for relief organizations on several levels. While all of the recipient organizations are concerned about harms caused by prostitution, some, as a matter of policy, do not take political positions and do not wish to be drawn into a debate

⁴ See Letter from Daniel Levin, Acting Assistant Attorney General to Hon. Alex M. Azar II, General Counsel, Department of Health and Human Services (Sept. 20, 2004), at 1 (hereinafter "Levin letter") (stating that DOJ initially told HHS that pledge requirement could only be applied to foreign organizations acting overseas).

⁵ *Id.* (stating that DOJ withdrew its earlier, "tentative" advice and that there are "reasonable arguments" to support the pledge requirement's constitutionality).

⁵ USAID, Acquisition & Assistance Policy Directive, AAPD 05-04, Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 – Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking, at 5-6, at http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf (hereinafter "USAID Guidelines"); Department of Health and Human Services, Centers for Disease Control and Prevention, Expansion and Support of HIV/AIDS/STI/TB Information, Education, and Communication and Behavioral Change Communication Activities in Ethiopia, at Section IV.5, at <http://www.cdc.gov/od/pgo/funding/05075.htm> (hereinafter "CDC Ethiopia Guidelines"); Department of Health and Human Services, Centers for Disease Control and Prevention, Increasing Access to HIV Counseling and Testing (VCT) and Enhancing HIV/AIDS Communications, Prevention, and Care in Botswana, Lesotho, at Section IV.5, at <http://www.cdc.gov/od/pgo/funding/AA006.htm> (hereinafter "CDC VCT Guidelines").

⁶ *Id.* HHS's guidelines further state a grant recipient found to be in violation of the requirement would have to refund the entire grant amount.

⁷ CDC Ethiopia Guidelines, *supra* note 5, at Section IV.5; CDC VCT Guidelines, *supra* note 5, at Section IV.5.

over the appropriate legal or moral status of sex workers, particularly because they operate in multiple countries which have varying legal regimes regarding prostitution. Others may not wish to adopt a formal declaration stigmatizing the very individuals whom they reach out to in their HIV prevention and treatment efforts, particularly when stigma has been shown to be one of the primary factors fueling the AIDS epidemic. Brazil, for example, recently refused \$40 million in U.S. AIDS funds because the pledge would interfere with its model approach to AIDS prevention, which involves dealing in an accepting way with sex workers.⁸

Still others are concerned that signing the mandated pledge will place them at risk for losing funding or, worse, prosecution for misrepresenting the organization's activities should the government later decide that they, or their allies, have engaged in activities that the government deems to be inconsistent with their pledge. For example, would an organization be able to support, with private funds, work following the Sonagachi model (named after the red light district of Calcutta, India, where the model was developed and found to be enormously successful) designed to prevent the spread of HIV by organizing sex workers and conducting peer-based outreach? Or, would this model that has been cited by UNAIDS as a "best-practice" be deemed impermissibly pro-prostitution, rendering any support for it grounds for finding an organization in violation of the pledge?⁹

This concern is underscored by a recent letter from Senator Tom Coburn to President Bush demanding the investigation of one AIDS Act grantee's HIV prevention activities aimed at sex workers and their clients for being insufficiently anti-prostitution.¹⁰ In his letter, Sen. Coburn accuses the grantee of exploiting victims of the sex trade by holding education-oriented parties in areas where commercial sex is common to spread an HIV-prevention message. He also asks for a review of the grantee's development of an educational game that incorporates HIV prevention messages aimed at high-risk groups. He does not charge that the grantee promoted the legalization or decriminalization of prostitution. Rather, his complaint seems to be that in the course of attempting to educate sex workers the grantee was enabling the sex workers to have fun. US AID may well reject this extreme interpretation of the anti-prostitution requirement, but the fact that a Senator finds this interpretation plausible underscores the vagueness of the requirement and the resulting danger that a hostile political spotlight may be placed on any grantee's activities at any time.

LEGAL ANALYSIS

Under governing First Amendment precedent, the scope of Congress's power to impose restrictions on private grantees receiving government funding arises in three

⁸ Michael M. Phillips & Matt Moffett, Brazil Refuses U.S. AIDS Funds, Rejects Conditions, *Wall St. J.*, May 2, 2005, at A3.

⁹ United Nations Programme on HIV/AIDS, Female sex worker HIV prevention projects: Lessons learnt from Papua New Guinea, India and Bangladesh, UNAIDS Case Study (November 2000).

¹⁰ Letter from Sen. Tom Coburn to President George W. Bush (May 19, 2005), at 2.

contexts: (1) efforts to limit the use to which the government's funds may be put; (2) efforts to limit the grantee's use of its private funds; and (3) efforts to limit a grantee's right to retain and express its own political beliefs. We outline below the limits of government power in each context as applied to the pledge requirement.¹¹

I. GOVERNMENT POWER TO REGULATE THE USE OF PUBLIC FUNDS

The power to regulate private grantees is at its peak when Congress seeks to limit the grantees' use of Congress's own funds. Since a legitimate concern exists that public funds should be used to advance the public purposes for which they were appropriated, the Supreme Court has recognized that grantees may be forbidden to use public funds to engage in activities beyond the scope of the relevant government program.

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court upheld a ban on the discussion of abortion by a federally-funded doctor with a pregnant patient. The Court's majority reasoned that since the narrow purpose of the federal program was the dissemination of government-approved information on family planning (which excluded abortion), a federally-funded doctor could not use federal funds to discuss abortion because providing abortion-related information would go beyond the scope of the narrowly-defined government program. Four Justices dissented, arguing that the Court's view of the government program in *Rust* ignored the program's broader purpose of advancing the prenatal health of poor women. All nine Justices agreed, however, that use of public funds could be confined to the legitimately-defined contours of the particular program.

While *Rust* represents the high-water mark of government power to control the use of government funds by private grantees, the Supreme Court has more recently made it clear that even when Congress seeks to regulate the use of public funds, government may not impose viewpoint-based restrictions on grantees who are not speaking for the government. In *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001), the Supreme Court distinguished *Rust* (saying that it was a case in which the government paid for doctors to advance a specific governmental message) and invalidated a Congressional prohibition on challenges by federally-funded legal services lawyers and their clients to the constitutionality of federal welfare statutes. The Court reasoned that the government restriction was a viewpoint-based restriction on the speech of the lawyers and their clients that distorted the free flow of information and argument necessary to the proper operation of the adversary judicial process.

Similarly, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court invalidated a state university's refusal to subsidize newspapers operated by student religious groups, while subsidizing newspapers operated by non-religious student groups. The Court reasoned that denying religious groups access

¹¹ The lack of clear guidance in the statute and failure of the government grant documents to inform recipients of the government's expectations also raise vagueness and due process notice concerns. However, we only address the core First Amendment infirmities of the statute in this memorandum.

to a newspaper subsidy that was readily available to secular groups constituted forbidden viewpoint-based discrimination, where the university was funding independent speech, not its own speech.¹²

It is unclear at the time of this writing whether the government uses any of its Global AIDS Act funding to promote speech by independent speakers, as in *Velazquez* and *Rosenberger*. If it does, then prohibiting the use of grant funds to “promote or advocate the legalization . . . of prostitution,” 22 U.S.C.A. § 7631(e), while permitting the use of such funds to promote or advocate the criminalization of prostitution may be unconstitutional. However, insofar as the purpose of the funding is not to finance independent speakers, but rather to enable recipient programs to provide medical and social services to communities afflicted by HIV/AIDS, then *Rust* would be more applicable, and the government would be better situated to claim that it may bar grantees from using program funds to take any position on the appropriate legal status of prostitution.

II. GOVERNMENT POWER TO RESTRICT THE USE OF PRIVATE FUNDS

The pledge requirement reaches far beyond the use of federal funds. Given the requirement that entities adopt organization-wide policies, organizations will have to structure their privately financed activities, programs and speech to comply with the required anti-prostitution policy.

Congress’s power over a federal grantee is dramatically diminished when government seeks to limit the use of the grantee’s private funds. In *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), the Supreme Court upheld Congress’s prohibition on lobbying by 501(c)(3) groups that Congress exempts from federal taxation. Viewed as a limit on the uses to which federal tax subsidies (i.e. public funds) may be put, *Regan* is unremarkable because lobbying was viewed by the Court as outside the

¹² *United States v. American Library Association*, 539 U.S. 194 (2003), represents the Supreme Court’s most recent attempt to tackle the extent to which the government can place viewpoint-based restrictions on the uses to which grantees can put its funding. In that case, the Court upheld a requirement that computer terminals in public libraries operating with federally subsidized Internet access contain filtering software designed to protect minors from obscene, pornographic, or harmful material. The Court’s four-person plurality reasoned that government is free to define the purpose for which subsidized Internet access is provided, especially where the government purpose coincides with the usual library practice of excluding pornography from permanent collections, and restricting a minor=s access to sexually explicit material. The plurality attempted to narrow the *Velazquez* majority’s ruling regarding the limits on the government’s ability to place viewpoint-discriminatory limits on government funding. However, the plurality failed to obtain a crucial fifth vote for its interpretation, and it therefore cannot be considered controlling. Rather, the controlling opinion in the case is that of Justice Kennedy, who concurred on the narrow ground that the interference with speech was *de minimis*, since the filters were removable on demand by adults. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (when no opinion has the support of a majority of the Supreme Court justices, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds”). Consequently, *American Library Association* set no precedent regarding the government’s ability to place viewpoint-discriminatory restrictions on government funding.

purposes for which the federal tax subsidy was granted. The *Regan* Court made it clear, however, that since tax-exempt groups must be afforded an alternative channel to engage in the constitutionally protected activity of lobbying, the groups could not be prohibited from raising and spending private funds to engage in lobbying, as long as the private funds were raised and spent by a 501(c)(4) affiliate having a formally separate legal existence.

Most dramatically, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Supreme Court was confronted with a Congressional ban on the broadcast of editorial opinions by television stations receiving federal subsidies. The Supreme Court upheld the ban on the use of federal funds, but struck down the ban on the use of private funds by grantees to fund editorial opinion.

Thus, under existing First Amendment law, we do not believe that Congress may require international aid organizations based in the United States to refrain from raising and spending private funds to advocate policies and carry out programs that the current government opposes, including policies and programs that the government may deem as promoting the legalization of prostitution or otherwise insufficiently “opposed” to prostitution, as a condition of continuing to participate in foreign aid programs.

III. GOVERNMENT POWER TO DEMAND FUNDING RECIPIENTS ADOPT A PARTICULAR POLITICAL VIEWPOINT.

The anti-prostitution pledge requirement does not merely regulate grantees’ actions. It requires each international aid organization recipient to adopt a formal policy stating the group’s opposition to prostitution. Moreover, prospective grantees must implement their anti-prostitution policies with the understanding that their implementation of the policy must track the government’s viewpoint on what it means to oppose prostitution. There is a risk that the government will require groups, at a minimum, to oppose the legalization of prostitution.

Some who believe prostitution causes harm also believe that penalties against prostitutes should be eliminated or reduced in order to focus enforcement efforts against pimps, brothel owners and traffickers. A requirement by USAID and other agencies that compels these organizations to oppose decriminalization would constitute a mandate that is not authorized by the statute itself.¹³ Nor is such a mandate consistent with the legislative history underlying the statute. Indeed, the legislative history shows that Senate Majority Leader Bill Frist contemplated that compliance would entail affirming opposition to the harms caused by prostitution. In a colloquy on the Senate floor with Senator Leahy, Senator Frist acknowledged the need to support organizations that work with prostitutes and stated that “the answer is to include a statement in the contract or grant agreement ... that the organization is opposed to the practice of prostitution and sex

¹³ Unlike the Trafficking Act, which contains explicit language banning advocacy of legalization, the AIDS Act requires opposition to prostitution, but is silent on whether an organization must oppose legalization. See *supra*, n 2.

trafficking because of the psychological and physical risks they pose for women.” *See* 149 Cong. Rec. S6457 (May 15, 2003)

Regardless of whether the statute authorizes agencies to equate opposition to prostitution with opposition to any legal reforms reducing the penalties imposed on sex workers, we believe that any effort by the government to require prospective grantees to adopt policies opposing prostitution and/or its legalization in order to participate in the foreign aid program would violate the First Amendment. Government power over international aid organizations is at its lowest ebb when Congress seeks to force them, as prospective grantees, to proclaim agreement with the government’s viewpoint as a condition of participating in a federally-funded foreign aid program. The Court has repeatedly held that government may not compel an individual or corporation to pledge allegiance to the government’s viewpoint on a contested moral or political issue in order to participate in a government program.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Supreme Court refused to permit West Virginia to compel dissenting schoolchildren to salute the flag in order to receive a public school education. In *Spieser v. Randall*, 357 U.S. 513 (1958), the Supreme Court refused to permit California to require veterans to declare that they did not advocate the forcible overthrow of the government in order to receive a property tax exemption. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court refused to permit Michigan to require dissenting public employees to support union political activities with which they disagreed. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Supreme Court refused to permit New Hampshire to require dissenting automobile owners to display license plates bearing the motto “Live Free or Die” in order to drive on the public highway. In *Board of Commissioners of Wabaunsee Co. v. Umbeher*, 518 U.S. 668 (1996), the Supreme Court refused to permit the cancellation of a trash hauling contract because the contractor had vigorously criticized the local government. In *O’Hare Truck Service v. City of Northlake*, 518 U.S. 668 (1996), the Supreme Court refused to countenance the removal of a tow truck operator from the city’s rotation list as a penalty for refusing to support the mayor’s re-election. Finally, in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), in the context of commercial speech which receives a lower level of First Amendment protection than political speech, the Supreme Court struck down a regulation requiring participants in a government-sponsored agricultural program to support generic (as opposed to branded) mushroom advertising. *See also Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 (1867) (requirement that ex-rebels disavow Confederate sympathies before being permitted to preach violates the Constitution); *Ex parte Garland*, 4 Wall. (71 U.S.) 333 (1867) (requirement that ex-rebels disavow Confederate sympathies before admission to the bar violates the Constitution).

In each case, the Supreme Court refused to permit government to condition participation in a government program on a coerced endorsement of the government’s viewpoint. If government cannot compel dissenting children to salute the flag as a condition of attending a public school, or dissenting veterans to promise not to advocate

the forcible overthrow of the government as a condition of receiving a property tax exemption, or dissenting mushroom growers to endorse the principle that branded mushrooms are roughly equivalent to generic mushrooms as a condition of participating in a government agricultural program, surely Congress cannot compel dissenting international aid organizations to announce a belief that sex workers should be viewed as criminals or otherwise condemned as a condition of participating in government foreign aid programs designed to stem the spread of HIV/AIDS.

Accordingly, in our opinion, a requirement that international aid organizations involuntarily endorse the government's viewpoint by certifying that they "oppose prostitution" in the way the government defines those terms as a condition of continuing to participate in foreign aid programs aimed at combating the spread of HIV/AIDS violates the First Amendment. Justice Jackson's stirring words for the Supreme Court in *West Virginia State Board of Education v. Barnette*, uttered in the dark days of WW II, state the First Amendment principle that governs this controversy:

... freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. 319 U.S. at 642. (Emphasis added).

IV. GOVERNMENT JUSTIFICATIONS FOR THE PLEDGE

In its letter concluding that "reasonable arguments" exist to support the constitutionality of applying the pledge requirement to domestic organizations, DOJ asserts that the restriction is permissible if it is "closely tailored to the purposes of the grant program."¹⁴ We believe this assertion must fail as a matter of fact and law.

The letter cites only two cases, neither of which supports the requirement that funding recipients adopt as organizational policy a government-prescribed viewpoint. *South Dakota v. Dole*, 480 U.S. 203, 206-08 (1987), is a case concerning Congress's ability to use the spending power to influence the setting of drinking ages by the states and the states' powers under the Twenty-first Amendment to regulate the sale of alcoholic beverages. *Dole* does not address in any way the ability of the federal government to attach conditions to funding that burden First Amendment rights of private organizations.

Nor does *American Communications Workers v. Douds*, 339 U.S. 382 (1950), support the pledge requirement. In *Douds*, the Supreme Court upheld a requirement that officials of labor unions operating under the protection of the National

¹⁴ Levin letter, *supra* n.3.

Labor Relations Act disclaim membership in the Communist Party as a condition of holding union office. The *Douglas* Court held that the disclaimer was reasonably related to the prevention of political strikes. *Douglas*, however, was fatally undermined by *United States v. Brown*, 381 U.S. 437 (1965), which held that the criminal provisions of the same statute operated as an unconstitutional bill of attainder. Indeed, later Supreme Court cases place far greater restrictions on the government's power to condition participation in government programs on a promise not to advocate a sincerely held belief. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (invalidating rule conditioning continued employment as a teacher on oath that not a member of Communist Party); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (invalidating rule conditioning bar admission on oath that not member of organization that advocates overthrow of government by force and violence).

Moreover, the statute upheld in *Douglas* did not purport to place any restrictions on advocacy or belief. *Douglas* imposed a restriction on formal membership in the Communist Party at a time when party membership was equated by Congress with a conspiracy to overthrow of the government by force and violence. The disclaimer imposed by US AID goes far beyond *Douglas* by purporting to control advocacy and belief.

The government relies on *Douglas* and *Dole* for the proposition that requiring grantees to oppose prostitution in a way that satisfies the government's notion of what such opposition entails is "closely tailored to the purposes" of the Global AIDS Act. On a factual level, it is difficult to imagine that the government could demonstrate that neutrality on, or advocacy by international aid organizations for legal reform of prostitution aimed at reducing penalties imposed on sex workers would adversely affect the delivery of humanitarian medical and social services designed to prevent and treat HIV/AIDS. Indeed, were the matter to be litigated, we believe that an overwhelming showing could be made that forcing dissenting international aid organizations to adopt a policy "opposing prostitution" will actually interfere with the effective delivery of medical and social services to at-risk communities.

V. CONCLUSION

We believe that were a prospective grantee to challenge the constitutionality of a requirement that it certify its opposition to prostitution and modify its privately funded activities to comply with that mandated policy as a condition of participating in foreign aid programs designed to combat the spread of HIV/AIDS, the requirement should be invalidated as both a violation of the First Amendment, and, in the event that the government defines opposition to prostitution as requiring opposition to the legalization of the prostitution, an unjustified expansion of the statutory mandate that grantees oppose prostitution.