06-4035-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, and PATHFINDER INTERNATIONAL,

Plaintiffs-Appellees,

—v.—

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ANDREW NATSIOS, in his official capacity as Administrator of the United States Agency for International Development, JULIE LOUISE GERBERDING, in her official capacity as Director of the U.S. Centers for Disease Control and Prevention, and her successors, MICHAEL O. LEAVITT, in his official capacity as Secretary of the U.S. Department of Health and Human Services, and his successors, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS BRIEF ON BEHALF OF AIDS ACTION AND 25 OTHER PUBLIC HEALTH ORGANIZATIONS AND PUBLIC HEALTH EXPERTS IN SUPPORT OF PLAINTIFFS-APPELLEES

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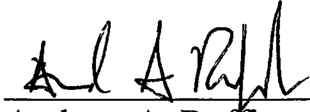
CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel for *amici* submit this corporate disclosure statement:

1. AIDS Action; the American Humanist Association; the American Jewish World Service; the Center for Health and Gender Equity; the Center for Reproductive Rights; the Center for Women Policy Studies; Community HIV/AIDS Mobilization Project; Gay Men's Health Crisis; Global AIDS Alliance; Global Health Council; Global Justice; the Guttmacher Institute; the Human Rights Center, University of California, Berkeley; Human Rights Watch; the International Planned Parenthood Federation, Western Hemisphere Region; the International Women's Health Coalition; the National Council of Jewish Women; Partners in Health; Physicians for Human Rights; Planned Parenthood Federation of America, Inc.; Population Action International; the Population Council; and the Sexuality Information and Education Council of the U.S., are incorporated nonprofit organizations. They have no parent corporations. They have no stock, and hence no shareholders.

2. AmFAR, The Foundation for AIDS Research; and the Religious Consultation on Population, Reproductive Health and Ethics, are unincorporated

nonprofit organizations. They have no parent corporations. They have no stock, and hence no shareholders.



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GLOSSARY

CDC	United States Centers for Disease Control and Prevention
HHS	United States Department of Health and Human Services
OGAC	Office of the Global AIDS Coordinator
PEPFAR	President's Emergency Plan for AIDS Relief
TVPA	Trafficking Victims Protection Act
UNAIDS	Joint United Nations Programme on HIV/AIDS
USAID	United States Agency for International Development

INTEREST OF THE *AMICI CURIAE*

Amici are nongovernmental organizations ("NGOs") and individuals who provide services or conduct programs, research, or advocacy in the global effort to combat HIV/AIDS and to stop needless deaths through prevention and access to treatment for all affected persons. The individual statements of interest for each *amicus* are listed in Appendix A. *Amici* are united in striving to provide and/or promote the most effective interventions to prevent the spread of HIV/AIDS and provide access to treatment based on accepted best principles and practices of public health. As such, *amici* follow basic principles of public health that accept that both structural and individual behavioral change are core components of sustainable, effective health interventions, and that all public health interventions can be judged according to ethical principles of respect, beneficence, the obligation to do no harm, and the principle of justice.

A number of the *amici* currently administer programs or provide health care services to people with HIV/AIDS or at high risk of transmission of the virus, or intend to administer such programs in the future. Some of these programs expressly target sex workers or include sex workers within their general scope. Such programs have a proven track record in reducing HIV infection and providing treatment to those with the virus.

Amici's shared mission in combating HIV/AIDS is seriously threatened by the condition attached to funding provided by the U.S. Agency for International Development ("USAID"), the United States Department of Health and Human Services ("HHS"), and the United States Centers for Disease Control and Prevention ("CDC") (collectively, the "Agencies," or the "Government") for international AIDS programs that NGOs—including U.S.-based organizations entitled to freedom of speech under the First Amendment of the Constitution—must adopt a policy explicitly opposing prostitution. That condition compels public health service providers in the global fight against AIDS to choose between forgoing U.S. funding and adopting a policy that alienates and marginalizes the high-risk communities with which they work and restricts speech and activities supported by non-government funds. For those *amici* who do not accept or receive U.S. funding, their ability to research and advocate with respect to HIV/AIDS in these high-risk communities is also harmed as fewer partnering public health providers are willing to take the risk that their activities will be considered "support" for, or insufficient opposition to, prostitution.

Amici submit this brief to assist the Court in understanding the public health context in which this compelled speech occurs and the policy's devastating effects on combating the AIDS pandemic. The parties have consented to the filing of *Amici*'s brief.

STATEMENT

Last year, an estimated 3.1 million people died of AIDS. At the same time, some 4.9 million people became newly infected with HIV: an average of more than 13,000 people a day.[1] The total number of people living with HIV reached its highest level, approximately 40.3 million, in 2005. The rapid increase in HIV infection worldwide and the tragedy of its human toll demands the comprehensive attention of governments and nongovernmental public health service providers around the world.

In his State of the Union address in January 2003, President Bush recognized the "severe and urgent crisis abroad" posed by the HIV/AIDS pandemic, and proposed the President's Emergency Plan for AIDS Relief (commonly known as "PEPFAR"), asking the Congress to commit $15 billion over five years to "turn the tide against AIDS."[2] Congress responded with the enactment of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("AIDS Leadership Act"), to authorize the appropriations requested by the President. Pub. L. No. 108-25, 117 Stat. 711 (2003) (codified at 22 U.S.C. § 7601 *et seq*). The stated purpose of the AIDS Leadership Act is to

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[1] JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS ("UNAIDS"), SPECIAL REPORT ON HIV PREVENTION, AIDS EPIDEMIC UPDATE 1 (Dec. 2005), http://www.unaids.org/epi/2005/doc/report_pdf.asp.

[2] Pres. George W. Bush, State of the Union Address (Jan. 28, 2003), http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html.

strengthen U.S. leadership and the effectiveness of its response to HIV/AIDS by establishing a comprehensive five-year global strategy, providing increased resources for multilateral and bilateral efforts to fight the disease, and "encouraging the expansion of private sector efforts and expanding public-private sector partnerships to combat HIV/AIDS." 22 U.S.C. § 7603. The central objective of the AIDS Leadership Act is the amelioration of the HIV/AIDS pandemic, which is reflected in the legislative finding that "HIV/AIDS is first and foremost a health problem." *Id.* § 7601(15).

By federal statute, the Agencies are authorized to enter into cooperative agreements and other arrangements with nongovernmental organizations. *Id.* § 2151. The AIDS Leadership Act provides that federal funds expended by the Agencies may not "be used to promote or advocate the legalization or practice of prostitution or sex trafficking." *Id.* § 7631(e). In addition, the Act prohibits federal funds from being "used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." *Id.* § 7631(f) (the "pledge requirement"). Four organizations are exempted from this requirement. *Id.* The pledge requirement was added by amendment in the House Committee on International Relations, and the Committee did not explain or justify the amendment. H.R. Rep. No. 108-60, at 28-31 (2003), *in* 2003 U.S.C.C.A.N. 712, 718. Initially, the Government did not

apply the pledge requirement to organizations based in the United States on advice from the Department of Justice that it would be unconstitutional. In 2005, however, the Government began to apply the requirement to domestic groups receiving funding under the AIDS Leadership Act.

This lawsuit followed, as did a similar suit filed in the United States District Court for the District of Columbia. In both cases, *amici*, including the majority of the undersigned, filed briefs in support of the plaintiffs. Both district courts agreed with the plaintiffs that the Government's application of the pledge requirement to the plaintiff domestic organizations was an unconstitutional restriction on their First Amendment rights. Opinion, JA 516; *DKT Int'l, Inc. v. United States Agency for Int'l Dev., et al.,* 435 F.Supp.2d 5 (D.D.C. 2006).

SUMMARY OF ARGUMENT

The public health imperatives of PEPFAR and the AIDS Leadership Act are undermined by the Government's requirement that public health organizations and other groups that receive funding under the AIDS Leadership Act must adopt a written policy "explicitly opposing prostitution and sex trafficking."[3] 22 U.S.C. § 7631(f). *Amici* do not challenge the government's

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[3] Because plaintiffs-appellees do not challenge the requirement that organizations oppose sex trafficking, *amici* do not address herein that aspect of 22 U.S.C. § 7631(f).

prerogative not to fund activities that promote or advocate the legalization or practice of prostitution or sex trafficking. The restriction on the use of *government* funding is already addressed by 22 U.S.C. § 7631(e). As implemented by the Government, the pledge requirement in Section 7631(f) goes well beyond the funding restriction by requiring recipient organizations to adopt a written, organization-wide policy opposing prostitution and to refrain from using their own *private* funding to engage in speech and activities that the Government perceives as being insufficiently opposed to sex work.[4] As implemented by the Government, the pledge requirement both compels service providers to speak when they may prefer to remain silent and restricts their ability to engage in proven public health interventions even with their privately raised funds.

If organizations adopt explicit policies opposing prostitution and cease any activities that could be construed as insufficiently "opposed" to sex work, they are likely to alienate and marginalize the vulnerable communities in which HIV/AIDS is most likely to be contracted and spread. The compelled anti-prostitution pledge runs counter to U.S. and internationally recognized public health practice, and human rights standards protecting the right to health.

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[4] Consistent with the internationally recognized conventions of the public health sector, this brief uses the terms "sex work" and "sex workers" to refer to prostitution and those individuals engaged in prostitution.

Requiring NGOs that deal primarily with health and social services to take a political stance opposing sex work will negate their ability to approach sex workers with the non-judgmental and non-moralistic attitude that their years of experience have shown to be effective with these communities.

The Government's defense of the pledge requirement does not survive scrutiny at any level. Congress did not make any finding, nor was there any evidence before it, that the public health goals of the AIDS Leadership Act required NGOs to act as mouthpieces of the U.S. government. It did not make any finding, nor was there any evidence before it, that NGOs wishing to remain neutral on the issue would compromise the fight against HIV/AIDS. It did not make any finding, nor was there any evidence before it, that the U.S. government's position on prostitution and sex trafficking was being "garbled" or misunderstood. Nor did it explain how the pledge requirement could be reconciled with the federal government's longstanding recognition that such stigmatization harms people most at risk of HIV/AIDS, and undermines efforts to prevent the spread of HIV/AIDS and to treat its victims.

ARGUMENT

I. The AIDS Leadership Act Recognizes The Need For Governments To Partner With NGOs In Combating HIV/AIDS, But The Pledge Requirement Undermines The Effectiveness Of Their Collaboration.

The AIDS Leadership Act acknowledges that in order for efforts to be most effective, the United States must "encourage[e] active involvement of the private sector, including ... charitable foundations, private and voluntary organizations and nongovernmental organizations, faith-based organizations, community-based organizations, and other nonprofit entities." 22 U.S.C. § 7601(22)(F). Congress sought partnerships with nongovernmental organizations with experience in health care and HIV/AIDS counseling precisely because they "have proven effective in combating the HIV/AIDS pandemic and can be a resource in assisting indigenous organizations in severely affected countries." *Id.* § 7601(18). The pledge requirement makes these partnerships less likely and less effective: less likely, because some organizations will forgo U.S. funding rather than comply; less effective, because those NGOs that do seek U.S. funding must adopt a policy that threatens to alienate the communities with which they work.

A. Public Health Groups And Government Agencies With Extensive Experience In Combating HIV/AIDS Are Unanimous In The View That It Is Important Not To Stigmatize Vulnerable Populations.

Forcing NGOs to forswear neutrality and to become mouthpieces of the U.S. Government diminishes their effectiveness in the public health arena. Best practices for HIV/AIDS prevention and care developed by the most trustworthy authorities—NGOs, foreign governments, the Joint United Nations Programme on HIV/AIDS ("UNAIDS"), and United States agencies with public health expertise—emphasize strategies that engage, not alienate, vulnerable groups. The pledge requirement impedes NGOs' abilities to reach out to sex workers, to teach them skills that would make it possible for them to leave prostitution, to promote safer sex practices among sex workers and their clients, to provide medical treatment and care for HIV-positive sex workers and their families, and to engage in further research into effective practices for preventing the spread of HIV/AIDS.

Gaining the trust and cooperation of sex workers is a crucial component of the anti-HIV/AIDS programs that *amici* and other NGOs have implemented around the world. Sex workers tend to be a marginalized segment of the population—often poor, disenfranchised, and subject to abuse. "In nearly all settings, female sex workers are a stigmatized group of people. … [M]ost mainstream societies have relegated them to the margins, abused them, exploited

them and restricted their rights as citizens."[5, 6] Despite the difficulty of establishing contact and collaboration with sex workers, NGOs have persevered, because sex workers are crucial actors in efforts to prevent the spread of HIV:

> Early in the [AIDS] epidemic, sex workers were recognized as a key group to involve in HIV-prevention work.... However sex workers have been difficult to fully involve in HIV prevention, since the illegality of prostitution in many countries means that women and men who exchange sex for money may not always be visible or accessible. Sex work is also highly stigmatized in many societies and, in early reports about AIDS, the mass media often presented sex workers unhelpfully as "conduits of infection" rather than as individuals who might be especially vulnerable and/or who have a key role to play in HIV prevention.[7]

Brazil has explicitly recognized the key role that sex workers play in that country's successful anti-AIDS initiative. According to Brazil's national AIDS commissioner, physician Pedro Chequer: "We view sex workers as essential partners in our HIV prevention efforts. We partner with ... [NGOs] composed of and led by sex workers to formulate and implement our HIV prevention program. These NGOs have been tremendously effective in getting Brazilians to give up

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[5] All UNAIDS documents cited are available at http://www.unaids.org.

[6] UNAIDS, FEMALE SEX WORKER HIV PREVENTION PROJECTS: LESSONS LEARNT FROM PAPUA NEW GUINEA, INDIA AND BANGLADESH, BP040, UNAIDS CASE STUDY 9 (Nov. 2000).

[7] UNAIDS, INNOVATIVE APPROACHES TO HIV PREVENTION: SELECTED CASE STUDIES, BP107, UNAIDS BEST PRACTICE COLLECTION KEY MATERIAL 38 (Oct. 2000) (citations omitted).

dangerous sexual behavior, such as having sex with strangers without condoms."[8] In explaining why the country decided to turn down $40 million in U.S. assistance against AIDS rather than sign a statement condemning prostitution, Chequer stated, "we believed we could not conduct effective outreach to and programs with sex workers if our NGO partners were forced to state their explicit opposition to prostitution, as USAID was requiring."[9]

PEPFAR grantees believe that the pledge requirement would hinder their ability to provide health care to sex workers and other vulnerable populations. Since April 2004, *amicus* Partners In Health ("PIH") has received funding from USAID for its work in Haiti where, among other things, it supplies antiretroviral HIV/AIDS medications, works to prevents maternal-to-child transmission of HIV, and offers HIV testing and counseling. The pledge requirement restricts PIH's ability to provide programs preventing and treating HIV/AIDS (as well as comprehensive health services) to sex workers, thereby further stigmatizing and isolating them and endangering their health and their lives.

In its guidance to NGOs, UNAIDS has consistently affirmed the importance of eradicating the stigma that vulnerable groups experience. UNAIDS notes that sex workers are sometimes reticent to take advantage of HIV/AIDS

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[8] JA 135 ¶ 6.

[9] *Id.* ¶ 8.

prevention and care programs, citing as a deterrent the "unwelcoming or judgmental attitudes on the part of staff."[10] One of the projects lauded by UNAIDS as a successful model of Asia's best efforts at preventing HIV infection among female sex workers is instructive. Sex workers whom the initiative (centered in Papua New Guinea) was designed to help initially felt alienated, because they believed that the project's mission was to condemn or abolish prostitution. Therefore, "[s]taff training was intensified to try to overcome all expression of the moralistic stance and poor gender-related attitudes sometimes exhibited by the male staff."[11] UNAIDS concluded: "*Training to diminish moralistic and judgmental attitudes among staff* proved to be successful and a valuable lesson to all observers. The project showed that the *development of meaningful relationships with target groups* is a key issue, requiring time and empathy."[12]

NGOs have also come to realize that the stigma of sex work raises an important human rights concern. Stigma and discrimination expose sex workers and those who work with them to violence and other forms of abuse. In many

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[10] UNAIDS, SEX WORK AND HIV/AIDS, BP021, UNAIDS TECHNICAL UPDATE 8 (June 2002).

[11] LESSONS LEARNT FROM PAPUA NEW GUINEA, INDIA AND BANGLADESH, BP040, *supra* note 6, at 26.

[12] *Id.* at 52 (emphasis in original).

countries, sex workers are routinely subjected to violations of their fundamental rights by the police, both at the time of their arrest and while in detention.[13] Peer educators providing HIV/AIDS outreach to these women frequently suffer many of the same abuses.[14] These human rights violations facilitate the spread of the virus by interfering with education and outreach, and driving those most vulnerable to infection away from HIV prevention and treatment efforts.

An NGO that has established cooperation and trust with sex workers is much more likely to assist in discovering and preventing sexual exploitation and violence directed at sex workers. For example, in Bishkek, Kyrgyzstan, since 2003 the NGO "Tais Plus" has had a project responding to violence for people in sex work. Tais Plus, and similar HIV/AIDS projects in the region, have described their work as an essential first point of contact for marginalized sex workers experiencing violence from police and private actors, as neither traditional rights

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[13] *See, e.g.*, HUMAN RIGHTS WATCH, EPIDEMIC OF ABUSE: POLICE HARASSMENT OF HIV/AIDS OUTREACH WORKERS IN INDIA (July 9, 2002), http://www.hrw.org/reports/2002/india2/; HUMAN RIGHTS WATCH, RAVAGING THE VULNERABLE: ABUSES AGAINST PERSONS AT HIGH RISK OF HIV IN BANGLADESH (Aug. 2003), http://www.hrw.org/reports/2003/bangladesh0803/; HUMAN RIGHTS WATCH, UNPROTECTED: SEX, CONDOMS, AND THE HUMAN RIGHT TO HEALTH IN THE PHILIPPINES 32-34 (May 2004), http://hrw.org/reports/2004/philippines0504/.

[14] EPIDEMIC OF ABUSE, *supra* note 13, at 3.

organizations nor the governments in Central Asia have responded to the violence against sex workers.[15]

UNAIDS has concluded that promoting the human rights of sex workers is a public health "best practice" in the fight against HIV/AIDS.[16] In 1998, the Office of the United Nations High Commissioner for Human Rights and UNAIDS:

> jointly developed international guidelines on HIV/AIDS and human rights, a tool that applies human rights law and norms to the specific context of HIV/AIDS and identifies what states can and should do in the light of their human rights obligations. Commitment to these principles was reinforced in the Declaration of Commitment on HIV/AIDS, adopted at the United Nations General Assembly Special Session on HIV/AIDS in 2001.[17]

Significantly, the United States agencies most expert in public health have likewise concluded that fighting stigma and valuing the human rights of vulnerable groups are important components of the fight against HIV/AIDS. The U.S. Government's Centers for Disease Control and Prevention ("CDC") has warned that stigmatization of vulnerable groups "profoundly affect[s] prevention

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[15] *See* CENT. AND E. EUROPEAN HARM REDUCTION NETWORK ("CEEHRN"), SEX WORK, HIV/AIDS AND HUMAN RIGHTS IN CENT. EUROPE 66 (July 2005).

[16] *See* SEX WORK AND HIV/AIDS, *supra* note 10, at 14.

[17] WORLD HEALTH ORG., CHANGING HISTORY, WORLD HEALTH REP. 2004 47 (2004), http://www.who.int/whr/2004/en/.

efforts" worldwide because of its "pernicious effects": stigmatized people are threatened with shunning and physical harm, and therefore avoid seeking HIV/AIDS testing, information and other related services.[18]

The CDC's materials for training health care workers overseas to reduce the transmission of HIV/AIDS from mothers to their children emphasize the reasons that stigma associated with HIV/AIDS needs to be confronted:

> Stigma is disruptive and harmful at every stage of the HIV/AIDS continuum, from prevention and testing to treatment and support. For example, people who fear discrimination and stigmatization are less likely to seek HIV testing while persons who have been diagnosed may be afraid to seek necessary care.[19]

USAID, which provides substantial funding for HIV/AIDS prevention and treatment overseas, likewise has consistently recognized that "[s]tigma and discrimination push people in high-risk groups (*e.g.*, sex workers, injecting drug users) underground, making them [more] difficult to reach through prevention

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[18] CENTERS FOR DISEASE CONTROL AND PREVENTION, HIV PREVENTION STRATEGIC PLAN THROUGH 2005 23 (Jan. 2001), http://209.85.165.104/search?q=cache:OkbbsDvdfqUJ:www.cdc.gov/hiv/pubs/prev-strat-plan.pdf+%22hiv+prevention+strategic+plan+through+2005%22&hl=en&gl=us&ct=clnk&cd=1.

[19] CENTERS FOR DISEASE CONTROL AND PREVENTION, TRAINING MODULE 5 FOR REDUCING MOTHER-TO-CHILD-TRANSMISSION OF HIV/AIDS, GENERIC TRAINING PACKAGE PARTICIPANT MANUAL 5-8, http://www.cdc.gov/nchstp/od/gap/pmtct/Participant%20Manual/Adobe/Module_5PM.pdf.

programs and thus creating more opportunities for HIV/AIDS to spread to the general population."[20] For at least the past several years, USAID has recognized that "[o]vercoming the stigma attached to HIV/AIDS and the resulting discrimination is essential to combating the epidemic."[21] To further these objectives, USAID funds a variety of studies researching ways to reduce and eliminate stigmatization of and discrimination against groups associated with the spread of HIV/AIDS.[22] The Agency monitors the impact that stigma has on prevention and treatment, including "association of the disease with marginal groups, such as homosexuals, drug injectors, and sex workers… ."[23]

More recently, USAID Administrator Randall Tobias (then Coordinator for the Office of the Global AIDS Coordinator ("OGAC")) emphasized the importance of combating the stigmatization of vulnerable groups and the need to eliminate it. For example, Tobias recognized that "[t]he need for

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[20] U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT ("USAID"), LEADING THE WAY: USAID RESPONDS TO HIV/AIDS – 1997-2000 11 (Sept. 2001), http://www.synergyaids.com/documents/3013_USAID_HIV_AIDSreport2.pdf.

[21] USAID, USAID'S EXPANDED RESPONSE TO HIV/AIDS 16 (June 2002).

[22] *See, e.g.*, USAID, LEADING THE WAY, *supra* note 20, at 35; USAID, WORKING REPORT MEASURING HIV STIGMA: RESULTS OF A FIELD TEST IN TANZANIA (June 2005), http://www.synergyaids.com/resources.asp?id=5976.

[23] *See, e.g.*, USAID, EXPANDED RESPONSE GUIDE TO CORE INDICATORS FOR MONITORING AND REPORTING ON HIV/AIDS PROGRAMS 69 (Jan. 2003), http://www.usaid.gov/our_work/global_health/aids/TechAreas/monitoreval/expandresponse.pdf.

public leadership in fighting stigma is tremendous."[24] Indeed, in each of its reports to Congress on the implementation of PEPFAR, OGAC has stated that reducing stigma is one of the major components of reducing the global spread of HIV/AIDS.[25] The pledge requirement undermines a key strategy advocated by both the CDC and USAID: fighting stigma associated with the most vulnerable populations.

> Programs that successfully prevent HIV transmission among [sex worker] populations, and provide health care and treatment support, are those that build trust while ameliorating stigma and discrimination. Frequently this means supporting sex workers' demands for their rights as workers and citizens, including fair treatment by the police and ethical regulation of health and safety in the sex industry. It is folly to suggest that successful programs could possibly maintain their relationship with sex workers if they advocated for their continued criminalization, arrest and prosecution.[26]

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[24] Randall Tobias, U.S. Global AIDS Coordinator, U.S. Dep't of State, Working Together as Partners in the Global HIV/AIDS Fight, Remarks at the Nat'l Ass'n of People With AIDS Staying Alive 2005: Positive Living Summit (Aug. 21, 2005), http://www.state.gov/s/gac/rl/rm/51304.htm.

[25] U.S. DEP'T OF STATE, OFFICE OF THE GLOBAL AIDS COORDINATOR, ACTION FOR TODAY, A FOUNDATION FOR TOMORROW: THE PRESIDENT'S EMERGENCY PLAN FOR AIDS RELIEF 30 (Feb. 8, 2006), http://www.state.gov/s/gac/rl/c16742.htm; U.S. DEP'T OF STATE, OFFICE OF THE GLOBAL AIDS COORDINATOR, ENGENDERING BOLD LEADERSHIP: THE PRESIDENT'S EMERGENCY PLAN FOR AIDS RELIEF 33 (March 4, 2005), http://www.state.gov/documents/organization/43885.pdf.

[26] Penelope Saunders, *Prohibiting Sex Work Projects, Restricting Women's Rights: The International Impact of the 2003 U.S. Global AIDS Act*, 7 HEALTH AND HUMAN RIGHTS: AN INTERNATIONAL JOURNAL 179, 187 (2004) (emphasis added).

In sum, for NGOs dedicated to reducing the spread of HIV, the freedom to refuse to adopt a judgmental position regarding a group so vulnerable to infection is necessary in order to provide effective medical and social services.

B. The Pledge Requirement Is Already Impeding NGOs' Efforts To Combat HIV/AIDS.

Practitioners who have spent years in the field working with sex workers in the context of HIV/AIDS confirm that the pledge requirement alienates the very people whose trust is so crucial for their work. One project in Cambodia, which was run by Médecins Sans Frontières and provided health care, condoms and interactive workshops aimed at empowering female sex workers, was among the eight or so programs criticized in hearings before the House Committee on International Relations on June 19, 2002 as being complicit in human trafficking, because its workers had failed to call the police.[27] This testimony did not appreciate "how integrally involved local police forces already were—through routine extortion of bribes, as regular clients and as the rumoured owners of some brothels."[28] These criticisms severely curtailed the activities of the center.

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[27] *See* Joanna Busza, *Having the Rug Pulled from Under Your Feet: One Project's Experience of the US Policy Reversal on Sex Work,* 21 HEALTH POLICY & PLANNING 329, 330-331 (2006).

[28] *Id.* at 330.

"Perhaps most damaging to the community was programmatic 'self-censorship' adopted after the publicized criticism."[29]

Likewise, NGOs that provide health services and conduct operations research on factors contributing to vulnerability to HIV/AIDS will be unable to engage in research or scientific debate about the impact of different policies and practices on the health and safety of the sex workers on whose behalf they claim to work. "In interviews conducted by the Global Health Council, NGOs describe a pattern of self-censorship, including avoiding discussing the [anti-prostitution pledge] in public, hesitating to join list-serves and public meetings on sex work, and in one case, shutting down a website and a magazine."[30]

Close working relationships between NGOs and sex workers are widely recognized as a crucial component of any intervention that seeks to diminish the spread of HIV in the sex worker population. Marginalized and stigmatized, sex workers are often suspicious of outside aid groups. The most successful interventions have consciously adopted a neutral, non-moralistic stance toward prostitution. Such a stance has won them the trust of the population whom they are trying to serve. Requiring NGOs to declare their opposition to prostitution

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[29] *Id.* at 331.

[30] Maurice I. Middleberg, *The Anti-Prostitution Policy in the US HIV/AIDS Program*, 9 HEALTH AND HUMAN RIGHTS 3, 8 (2006).

will erode these working relationships, undermine the mutual exchange of life-saving information, and eventually unravel the positive results that years of dedicated work have brought.

II. The Government's Defense of the Pledge Requirement Does Not Survive Scrutiny.

The pledge requirement, applied to U.S. individuals and entities, is a fundamental restriction on speech that cannot withstand First Amendment scrutiny at any level—be it strict, intermediate, or the "balancing of interests" test advocated by the Government. The government's position that it will fund only organizations with express written policies opposing prostitution is a "regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest." *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383-84 (1984). This is the "purest example of a 'law ... abridging the freedom of speech ... .'" *Id.* (citation omitted). Moreover, the government is not content for NGOs to remain silent but compels them, if they are to receive funding critical to their public health mission, to "be an instrument for fostering public adherence to an ideological point of view" that they may find unacceptable. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). In doing so, the government "'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official

control.'" *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

The district court properly rejected the Government's assertion that the pledge requirement is simply a condition on government funding that falls outside the scope of First Amendment restrictions. "[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit." *Rumsfeld v. Forum for Acad. & Inst. Rights*, 126 S.Ct. 1297, 1307 (2006) (citations omitted). Unlike *Rust v. Sullivan*, 500 U.S. 173 (1991), where a government restriction on federally funded reproductive health projects left the grantee "unfettered" in its non-federally funded activities, *id.* at 196, the restriction at issue here extends to speech and activities financed wholly with private funds. And unlike *Forum for Academic and Institutional Rights*, where the federal government conditioned funding for universities on a requirement that "d[id] not dictate the content of the speech at all," 126 S.Ct. at 1308, the restriction at issue here is the clearest example of "a *Government-mandated pledge or motto* that the [funding recipient] must endorse." *Id.* (emphasis added).

Disputes over the proper level of scrutiny are irrelevant, because the pledge requirement fails any of these tests. The requirement is unjustified in the legislative history and undermines, rather than advances, the public health goals of

the AIDS Leadership Act. The Government summarizes the pledge requirement as "germane" to the effective implementation of the Government's strategy to fight HIV/AIDS, Brief for Defendants-Appellants ("Gov't Br.") at p. 28, because "Congress *could* reasonably determine that the government's efforts to stamp out prostitution and sex trafficking would be most effective if programs and services to prevent HIV/AIDS are offered through organizations that have adopted policies opposing two underlying causes of HIV/AIDS." Gov't Br. at p. 30 (emphasis added). Despite the Government's *post hoc* attempt to impute these rationales to Congress, Congress made no findings and heard no evidence on either. The law is clear that "Congress' stated interests" in enacting legislation, not "new interpretations of these interests" advanced by the parties, are the appropriate lens for analyzing whether a restriction on speech furthers an important or compelling objective. *Turner Broad. Sys., Inc., v. FCC*, 520 U.S. 180, 190-1 (1997). '"[D]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake … ."' *League of Women Voters*, 468 U.S. at 387 (quoting *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978)). The legislative history discloses no compelling or even legitimate health-related objective behind the pledge requirement, much less any effort to tailor the requirement to further such an objective.

In enacting the AIDS Leadership Act, Congress recognized that "HIV/AIDS is *first and foremost* a health problem." 22 U.S.C. § 7601(15) (emphasis added). Congress also recognized that "[t]he magnitude and scope of the HIV/AIDS crisis" demanded a "comprehensive, long-term, [and] international response focused upon addressing the causes, reducing the spread, and ameliorating the consequences of the HIV/AIDS pandemic." *Id.* § 7601(21). While Congress found that prostitution is degrading to women and children and should be eradicated, *id.* § 7601(23), Congress also found that high-risk populations could best be helped by implementing "national and community-based multisector strategies" that would "increase the participation of at-risk populations in programs designed to encourage behavioral and social change and reduce the stigma associated with HIV/AIDS." *Id.* § 7601(21)(C). The Act contemplates that "particular emphasis" on education and prevention is necessary for "specific populations that represent a particularly high risk of contracting or spreading HIV/AIDS, including those exploited through the sex trade … ." *Id.* § 2151b-2(d)(3)(A).

The pledge requirement runs counter to all of these objectives and fails to advance the Act's overarching goal of addressing HIV/AIDS as "first and foremost a health problem." *Id.* § 7601(15). It limits the NGOs that are able to partner with the U.S. government; the policy statement it requires will alienate and

stigmatize those whom it is intended to help and who are at greatest risk of contracting or spreading the disease; and it prevents organizations from undertaking speech or activities with their private funding that have proven effective in combating HIV/AIDS but that may be determined to be supportive of sex work and sex workers.

The pledge requirement was added to the Act by amendment in the House Committee on International Relations, and the Committee did not explain or justify the amendment. H.R. Rep. No. 108-60 at 28-31, *in* 2003 U.S.C.C.A.N. 712, 718. There was no pre-enactment hearing for the Leadership Act, and 2004 implementation hearings did not directly address the pledge.[31] In this respect, the pledge requirement closely resembles the restriction held unconstitutional in *League of Women Voters*, 468 U.S. 364. The Public Broadcasting Act advanced the goal of ensuring that local public television stations operated free from government influence and control. *Id.* at 369-70. In *League of Women Voters*, as here, the disputed provision (which denied federal funds to local public television stations if they engaged in editorializing) was added virtually without debate by a House amendment. *Id.* at 371, 387. During litigation challenging the provision,

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[31] *See The United States Government Strategy for Fighting HIV/AIDS: Implementation of Public Law 108-25, Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. (2004).

the government supplied two rationales for the amendment. *Id.* at 384-5. As here, the rationales were not apparent from the legislative history. The Supreme Court therefore anchored its analysis in the "overall legislative scheme," *id.* at 388, holding that the restraint held no clear relationship to the general purpose of preserving stations' autonomy. Here, similarly, no evidence before Congress supported a finding that the pledge was necessary in order to achieve the Act's public health objectives.

Congress did not consider evidence on the rationales that the Government now proffers for the pledge requirement. *See Turner*, 520 U.S. at 191. First, the Government argues that its "viewpoint-based" program will be undermined, and its message garbled, unless NGOs endorse the government's view in both their publicly and privately funded operations. Gov't Br. at 30. In debate on the pledge amendment in the House committee, its sponsor, Representative Christopher Smith, cited no justification specifically for extending the pledge requirement to NGOs' privately-funded activities.[32] Nor did debate on the pledge provision examine its First Amendment implications.

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[32] *United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Markup Before the H. Comm. on Int'l Relations*, 108th Cong. 148-150 (March 4, 2004).

Moreover, neither the AIDS Leadership Act's overall scheme nor Section 7631(f) itself supports the Government's argument that Congress enacted the pledge in order to ensure that NGOs communicate a federal message in a unified manner. The AIDS Leadership Act, advocating "multisector strategies," accommodates diverse approaches among NGO partners. *See* 22 U.S.C. § 7601(21)(C). The pledge provision itself exempts four organizations, including one that, like the Plaintiffs-Appellees, is a United States NGO, the International AIDS Vaccine Initiative. *Id.* § 7631(f). As such, if Congress truly sought, through the pledge requirement, for NGOs to speak with a single voice—the voice of the United States government—it is underinclusive. *See League of Women Voters*, 468 U.S. at 391-2 (citing the "manifest imprecision" of a ban on television editorializing, since it failed to regulate nationally distributed programs, focusing solely on local stations).

Finally, *amici* vigorously contest the notion that they are viewed in their public health ventures as spokespersons of United States policy. Moreover, more narrowly tailored means would adequately ensure that NGOs' opinions are not attributed to the United States. For example, NGOs could be required to post signs or include disclaimers in any published literature, informing readers that their views do not represent those of the United States. *See id.* at 395 (holding that Congress' funding condition banning stations from editorializing was not narrowly

tailored, since a disclaimer would adequately ensure that stations' views were not imputed to the federal government).

Also unsupported is the Government's assertion that the pledge serves public health goals by requiring NGOs, in both privately and publicly funded activities, to seek to eradicate prostitution as a behavioral risk associated with HIV/AIDS. Congress considered no evidence on whether compelling NGOs to promote an anti-prostitution message furthers the Act's public health objectives. The lack of evidence before Congress is particularly troubling in light of the clear tension between a compelled anti-prostitution policy, and federal agencies' (particularly USAID's) often-voiced view that HIV/AIDS relief efforts must combat the stigma suffered by vulnerable populations. *See supra* at 14-17.

The Government's brief masks this lack of legislative support by citing prolifically the legislative history of an entirely separate statute, the Trafficking Victims Protection Act ("TVPA"). *See* Gov't Br. at 10-13, 18, 22, 31. While statements in hearings on the TVPA link sex trafficking to prostitution, and link both practices to HIV/AIDS,[33] those hearings do not contain any evidence on public health best practices for treating and preventing HIV/AIDS among sex

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[33] *See, e.g., Trafficking in Women and Children in East Asia and Beyond: Hearing Before the H. Subcomm. on East Asian and Pacific Affairs,* 108th Cong. 23 (Apr. 9, 2003) (prepared statement of Donna M. Hughes, Ph.D.).

workers. This stands to reason, since the TVPA is not a public health statute. In short, the Government has failed to demonstrate that any compelling or important interest, consistent with the public health goals of the Act, motivated Congress to adopt the pledge requirement.

The pledge requirement contradicts accepted best practices for fighting HIV/AIDS and current U.S. efforts to fight stigma among vulnerable populations. By compelling NGOs that work with sex workers to take a position opposing prostitution, the pledge requirement forces these groups to alienate and marginalize the very individuals that they intend to help. This conflicts directly with the AIDS Leadership Act's recognition that efforts to "reduce the stigma associated with HIV/AIDS" are essential to combating the HIV/AIDS pandemic. 22 U.S.C. § 7601(21)(C). There is no government interest that would overcome the fundamental, substantial and harmful restriction on speech embodied in the pledge requirement.

CONCLUSION

For the reasons set forth above and in the Appellees' brief, the decision of the district court should be affirmed.

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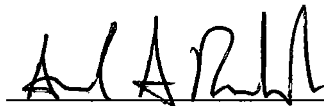
CERTIFICATE OF COMPLIANCE WITH RULE 32(a) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 6,033 words, excluding Appendix A and the Special Appendix and parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.



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APPENDIX A
STATEMENTS OF INTEREST OF *AMICI CURIAE*

A. ORGANIZATIONS

1. AIDS ACTION

AIDS Action is a national organization based in Washington, DC, dedicated to the development, analysis, cultivation, and encouragement of sound policies and programs in response to the HIV epidemic through the dissemination of information and the building and use of advocacy on behalf of all those living with and affected by HIV. AIDS Action collaborates with the greater public health community to enhance HIV prevention programs and care and treatment services, and to secure comprehensive resources on a federal level to address community needs until the epidemic is over. AIDS Action fundamentally opposes the stigmatization of all people living with HIV and of people at risk for HIV. Stigmatization of people living with HIV is counter to currently accepted "best practices" which require a non-judgmental and culturally competent approach to reaching out to people at risk for, or living with, HIV.

2. AMERICAN HUMANIST ASSOCIATION

The American Humanist Association ("AHA") is a nationwide, nonprofit humanist organization, dedicated to raising public awareness and acceptance of humanism, and advancing humanist values. The AHA focuses on defending religious liberty and protecting the fundamental rights of every individual. The AHA views access to healthcare and freedom of expression as fundamental rights. Through its Feminist Caucus, founded in 1977, the AHA specifically works to protect and expand gender equality, reproductive freedom, and access to reproductive healthcare.

3. THE AMERICAN JEWISH WORLD SERVICE

American Jewish World Service ("AJWS") is an international development organization dedicated to alleviating poverty, hunger and disease among the people of the developing world regardless of race, religion or nationality. AJWS believes that if we are to make progress fighting poverty and the global AIDS pandemic, we must protect the human rights of vulnerable populations, including sex workers; participate in national and international advocacy campaigns to uphold these rights; and support education and health programs that address sex workers' needs. In our work with community-based organizations across the developing world, we recognize that each of our partners operates in a unique environment and we are sensitive that our policy positions must not contradict local solutions. We therefore do not take a position on the legalization of prostitution. AJWS does not act to change the laws of foreign nations; however, we believe that we cannot make widespread progress worldwide if basic rights are denied to one segment of the population.

4. THE CENTER FOR HEALTH AND GENDER EQUITY

The Center for Health and Gender Equity ("CHANGE") is a U.S.-based non-governmental organization that seeks to ensure that U.S. international assistance promotes evidence-based approaches to reproductive and sexual health. CHANGE researches the effects of U.S. policies on the health and rights of women, girls, and other populations in poor countries and engages in legislative advocacy based on our research. Additionally, although CHANGE does not accept federal funds, it advocates for increased funding for U.S. Government-supported international programs in HIV/AIDS and reproductive health.

5. CENTER FOR REPRODUCTIVE RIGHTS

The Center for Reproductive Rights ("the Center") is a national public interest law firm based in New York City dedicated to preserving and expanding reproductive rights in the United States and throughout the world. The Center's domestic and international programs engage in litigation, policy analysis, legal research, and public education seeking to achieve women's equality in society and ensure that all women have access to appropriate and freely chosen reproductive health services, including contraceptives. The Domestic Legal Program of the Center specializes in litigating reproductive rights cases throughout the United States and is currently lead or co-counsel in a majority of the reproductive rights litigation in the nation.

6. THE CENTER FOR WOMEN POLICY STUDIES

The Center for Women Policy Studies was founded in 1972 with a mission to shape public policy to improve women's lives. A hallmark of the Center's work is the multiethnic feminist lens through which all issues affecting women and girls are viewed. In all of its work, the Center looks at the combined impact of gender, race, ethnicity, class, age, disability, and sexual orientation. The Center represents the interests of women around the world whose access to information, health services and social services is impeded by U.S. funding restrictions on NGOs that do not adopt a "policy explicitly opposing prostitution." It also represents the interests of women-centered programs and organizations that – because of the policy – face detrimental speech and activity restrictions.

7. COMMUNITY HIV/AIDS MOBILIZATION PROJECT

The mission of the Community HIV/AIDS Mobilization Project ("CHAMP") is to ensure access to comprehensive HIV/AIDS prevention education and tools, with a particular focus on those most at risk of acquiring HIV. It believes that the current U.S. government standard that requires a repudiation of sex work in order to receive U.S. funding has jeopardized vital HIV prevention efforts.

8. AmFAR, THE FOUNDATION FOR AIDS RESEARCH

AmFAR, The Foundation for AIDS Research, is one of the world's leading nonprofit organizations dedicated to the support of AIDS research, HIV prevention, treatment education, and the advocacy of sound AIDS-related public policy. Since 1985, amfAR has invested more than $233 million in its programs and has awarded grants to more than 2,000

research teams worldwide. AmfAR's mission is to prevent HIV infection and the disease and death associated with it, and to protect the human rights of all people threatened by the epidemic of HIV/AIDS. Over the years, amfAR has supported research, education, and policy activities addressing HIV prevention among vulnerable populations, including sex workers, in the U.S. and globally. AmfAR is a signatory on a May 2005 letter to President Bush opposing the application of the anti-prostitution requirement in PEPFAR to U.S.-based organizations, and has been quoted in the press on this subject. Therefore, amfAR has a substantial interest in the proper resolution of this case.

9. GAY MEN'S HEALTH CRISIS

Gay Men's Health Crisis ("GMHC") is a not-for-profit, volunteer-supported and community-based organization committed to national leadership in the fight against HIV/AIDS. Our mission is to reduce the spread of HIV disease; help people with HIV maintain and improve their health and independence; and keep the prevention, treatment and cure of HIV an urgent national and local priority. Founded in 1981, and based in New York City, GMHC provides HIV prevention and care services to thousands of people living with or at risk for HIV/AIDS and advocates for evidence-based, effective prevention and care interventions globally. Inevitably, this work requires us to engage with individuals at high risk of transmission of the HIV virus, including sex workers. Because this case implicates the ability of organizations such as GMHC to employ "best practices" in the fight against the spread of HIV/AIDS, its resolution is a matter of significant concern to GMHC and to the people it serves.

10. THE GLOBAL AIDS ALLIANCE

The Global AIDS Alliance ("GAA") is a nonprofit organization based in Washington, DC, whose mission is to galvanize the political will and financial resources needed to address the global AIDS crisis and reduce its impacts on poor countries that have been hardest hit by the pandemic. GAA has carved out a leadership role in shaping AIDS policy discussions and mobilizing campaigns to break through entrenched bureaucratic inaction and speed the pace of the global response to HIV/AIDS. GAA recognizes the need for a holistic perspective of the structural roots of and responses to the HIV/AIDS crisis. Sex workers are among the populations most vulnerable to HIV and play an important role in transmission or prevention thereof.

11. GLOBAL HEALTH COUNCIL

The Global Health Council, formerly the National Council of International Health, is a United States-based, nonprofit membership organization that was created in 1972 to identify priority world health problems and to report on them to the U.S. public, legislators, and government agencies. The Council, headquartered both in White River Junction, Vermont and in Washington, District of Columbia, is now is the world's largest membership alliance dedicated international health advocacy. The Council's membership is comprised of health-care professionals and organizations that include non-governmental organizations, foundations, corporations, government agencies, and academic institutions. The Council's membership elects its 13-person Board of Directors, which sets the Council's policy priorities. Of the Council's 188 U.S.-based, non-governmental organizational members, approximately one-third of these receive U.S. Government funding to implement HIV/AIDS programs in poor countries. Other

U.S.-based, non-governmental members have indicated to the Council that they would like to apply for federal funding to support their international HIV/AIDS projects.

12. GLOBAL JUSTICE

Global Justice is a non-profit organization based in Washington, DC which houses the Student Global AIDS Campaign (SGAC), a national movement with more than 85 chapters at high schools, colleges, and universities across the United States committed to bringing an end to AIDS in the U.S. and around the world through education, informed advocacy, and media work. Our efforts to mobilize resources and political will to end the AIDS pandemic are undermined by the US policy, which flies in the face of sound public health and alienates sex-workers from the very effective prevention and treatment efforts we seek to promote.

13. THE GUTTMACHER INSTITUTE

The Guttmacher Institute is an independent, nonprofit corporation that advances sexual and reproductive health in the United States and around the world through an interrelated program of research, policy analysis and public education. The Institute works to protect, expand and equalize access to information, services and rights that will enable women and men to avoid unplanned pregnancies and prevent and treat sexually transmitted infections including HIV. The Institute is acutely aware of the pressing need to improve the quality of policy and programs concerning sexual and reproductive health in the United States, and regards achieving this goal as its primary responsibility. Understanding that the political, cultural and economic power of the United States can have considerable impact on sexual and reproductive health throughout the world, the Institute places a similarly high priority on monitoring and analyzing the effects of U.S. policy on women and men in other countries.

14. THE HUMAN RIGHTS CENTER, UNIVERSITY OF CALIFORNIA, BERKELEY

Founded in 1994 with the assistance of the Sandler Family Supporting Foundation, U.C. Berkeley's Human Rights Center is a unique interdisciplinary research and teaching enterprise that reaches across academic disciplines to conduct research in emerging issues in international human rights and humanitarian law. The Center complements and supports the work of nongovernmental human rights organizations by drawing upon the creativity and expertise of scholars from several diverse university programs and departments such as anthropology, demography, education, ethnic studies, geography, journalism, law, political science and public health.

15. HUMAN RIGHTS WATCH

Human Rights Watch ("HRW"), the largest U.S.-based international human rights organization, was established in 1978 to report on violations of human rights worldwide. HRW's work includes documenting human rights violations that fuel the HIV/AIDS epidemic, and

impede access to HIV/AIDS prevention and care services, as well as conducting advocacy to address such abuses. The proper resolution of this case is therefore a matter of substantial interest to HRW.

16. THE INTERNATIONAL PLANNED PARENTHOOD FEDERATION, WESTERN HEMISPHERE REGION

The International Planned Parenthood Federation, Western Hemisphere Region ("IPPF/WHR") and its 46 member associations are committed to promoting the rights of women and men to decide freely the number and spacing of their children and to the highest possible level of sexual and reproductive health. IPPF/WHR provides more than 18 million services — from contraceptive counseling and supplies to HIV prevention, testing and treatment — to the neediest people in the region. Imposition of a requirement on USAID grantees to denounce prostitution will impede the effectiveness of the work of all organizations receiving U.S. assistance for HIV/AIDS prevention and treatment, potentially including member associations of IPPF/WHR.

17. THE INTERNATIONAL WOMEN'S HEALTH COALITION

The International Women's Health Coalition ("IWHC") is a nonprofit organization that works to generate health and population policies, programs, and funding that promote and protect the rights and health of girls and women worldwide. For the past 20 years, IWHC has been working with partner organizations in Africa, Asia and Latin America. Central to our efforts is the belief that global well-being and social and economic justice can only be achieved by ensuring women's human rights, health, and equality. IWHC supports programs and policies to enable women to equally and effectively engage in decisions about their sexual and reproductive rights and health; experience a healthy and satisfying sexual life free from discrimination, coercion, and violence; make free and informed choices about childbearing; and have access to the information and services they need to enhance and protect their health.

18. THE NATIONAL COUNCIL OF JEWISH WOMEN

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and to ensure individual rights and freedoms for all through its network of 90,000 members, supporters, and volunteers nationwide. The National Council of Jewish Women believes that individual liberties and rights guaranteed by the Constitution are keystones of a free and pluralistic society and must be protected and preserved. Further, we endorse the protection of every female's right to reproductive health and we are dedicated to eliminating the obstacles that limit reproductive freedom. Consistent with our priorities and resolutions, NCJW joins this brief.

19. PARTNERS IN HEALTH

Partners In Health (PIH), a Boston-based non-profit organization, provides health care to patients worldwide, with an emphasis on serving the most marginalized populations, including but not limited to persons who are forced into sex work. PIH has received a grant from USAID in support of its work in Haiti. Therefore, the challenged pledge requirement would apply to PIH, and restrict its ability to provide programs preventing and treating HIV/AIDS (as well as comprehensive health services) to sex workers, thereby further stigmatizing and isolating them and endangering their health and their lives.

20. PHYSICIANS FOR HUMAN RIGHTS

Physicians for Human Rights ("PHR") mobilizes health professionals to advance the health and dignity of all people through action that promotes respect for, protection of, and fulfillment of human rights. PHR has conducted a number of investigations relating to HIV/AIDS, and maintains an ongoing Health Action AIDS Campaign through which PHR works with health professionals in AIDS-torn Uganda. Based upon its experience, PHR believes that it is critical to engage sex workers as well as women involved in occasional transactional sex in HIV prevention and treatment efforts. Forcing grantees to oppose prostitution will make such engagement difficult, if not impossible and will only further stigmatize and marginalize these devalued individuals and groups, making their access to health and other services all the more challenging. Furthermore, the "pledge requirement" violates the First Amendment by requiring private organizations to adopt the government's point of view and by restricting what they can say and do with their private funding.

21. PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. ("PPFA")

Planned Parenthood Federation of America, Inc. ("PPFA"), a New York not-for-profit corporation, is America's oldest and most trusted sexual and reproductive health care advocate and provider. PPFA provides leadership to 116 affiliates that manage approximately 800 medical centers around the country and provide medical services and sexuality education to nearly five million women, men, and teens each year. PPFA and its network of affiliates work with organizations around the world to protect and promote global sexual and reproductive health and rights. This includes efforts to ensure that all women and men have the means to meet their sexual and reproductive health care needs, including the means to prevent the spread of HIV/AIDS.

22. POPULATION ACTION INTERNATIONAL

Population Action International ("PAI"), an independent policy advocacy group working to strengthen political and financial support worldwide for population programs grounded in individual rights. Through research and advocacy, PAI seeks to make clear the linkages among population, reproductive health, the environment, and development. At the heart

of PAI's mission is its commitment to universal access to family planning and related health services, and to educational and economic opportunities, especially for girls and women. Although PAI receives no U.S. government funding, and hence is not itself required to adopt an organizational policy opposing prostitution, it nevertheless believes that the requirement is an unconstitutional infringement on the rights and independence of other organizations with which it cooperates and on whose behalf PAI advocates, limiting those partners' ability to implement programs to prevent the spread of HIV/AIDS based on sound public health practice.

23. THE POPULATION COUNCIL

The Population Council ("the Council") is a nonprofit research organization that seeks to improve the well-being and reproductive health of current and future generations around the world and to help achieve a humane, equitable, and sustainable balance between people and resources. The Council's activities include conducting fundamental biomedical research in human reproduction; developing contraceptives and products such as microbicides to prevent the sexual transmission of HIV; doing studies to improve the quality and cost-effectiveness of services related to family planning and HIV/AIDS; conducting research on health and behavior, family dynamics and gender, and causes and consequences of population change; and strengthening professional resources in developing countries through collaborative research, fellowships, and training. Council staff members conduct research and programs in 70 countries.

The HIV/AIDS pandemic has had and will continue to have a devastating impact on the poor and disadvantaged including the victims of sex trafficking, forced labor, and those engaged in prostitution. With respect to this pandemic, the Council believes that the paramount public health objective is to provide health-related assistance to people in order to lessen human suffering and to prevent or reduce the spread of HIV/AIDS. The proper resolution of this case is therefore a matter of interest to the Council.

24. RELIGIOUS CONSULTATION ON POPULATION, REPRODUCTIVE HEALTH AND ETHICS

The Religious Consultation on Population, Reproductive Health and Ethics ("The Consultation") is a 501C 3 nongovernmental organization consisting of some 100 international scholars of world religions. All the participating scholars of The Consultation are committed to women's health and reproductive freedom and to the maintenance of reasonable demographic goals. All our scholars are feminists (half being women) and committed to countering the excessive influence of right wing, fundamentalist religion by giving voice to alternative religiously grounded moral visions and values. The Consultation is concerned with the abuses and forms of discrimination that attend sexual expression in society.

25. THE SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE U.S.

The Sexuality Information and Education Council of the U.S. ("SIECUS") has served as a leading national voice for sexuality education, sexual health, and sexual rights for over 40 years. SIECUS affirms that sexuality is a fundamental part of being human, one that is worthy of dignity and respect. SIECUS advocates for the right of all people to accurate

information, comprehensive education about sexuality, and sexual health services. SIECUS works to create a world that ensures social justice and sexual rights.

People engaged in sex work have a right to the information, services, and supplies they need to stay healthy. SIECUS also understands that outreach to sex workers is critical to stemming the HIV/AIDS pandemic. SIECUS believes that the current U.S. government policy that requires a repudiation of sex work in order to receive U.S. funding undermines the ability of organizations to work with sex workers and conduct vital harm reduction programs.

B. INDIVIDUALS

1. Dr. Jim Yong Kim

Dr. Jim Yong Kim is Center Director, François Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health. Formerly, as the Director of the World Health Organization's HIV/AIDS Department, he focused on initiatives to help developing countries scale up their treatment, prevention, and care programs. As the current Center Director of the François Xavier Bagnoud Center for Health and Human Rights at the Harvard School of Public Health, he is committed to identifying, promoting, and implementing effective HIV strategies. Providing services to people engaged in sex work is vital to effectively addressing the HIV/AIDS pandemic. The pledge in question only serves to further marginalize one of the world's most vulnerable groups and, therefore, weakens the global efforts to prevent and treat HIV/AIDS.

SPECIAL APPENDIX
STATUTORY PROVISIONS

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22 U.S.C. § 7601. Findings

Congress makes the following findings:

(1) During the last 20 years, HIV/AIDS has assumed pandemic proportions, spreading from the most severely affected regions, sub-Saharan Africa and the Caribbean, to all corners of the world, and leaving an unprecedented path of death and devastation.
(2) According to the Joint United Nations Programme on HIV/AIDS (UNAIDS), more than 65,000,000 individuals worldwide have been infected with HIV since the epidemic began, more than 25,000,000 of these individuals have lost their lives to the disease, and more than 14,000,000 children have been orphaned by the disease. HIV/AIDS is the fourth-highest cause of death in the world.
(3)(A) At the end of 2002, an estimated 42,000,000 individuals were infected with HIV or living with AIDS, of which more than 75 percent live in Africa or the Caribbean. Of these individuals, more than 3,200,000 were children under the age of 15 and more than 19,200,000 were women.
(B) Women are four times more vulnerable to infection than are men and are becoming infected at increasingly high rates, in part because many societies do not provide poor women and young girls with the social, legal, and cultural protections against high risk activities that expose them to HIV/AIDS.
(C) Women and children who are refugees or are internally displaced persons are especially vulnerable to sexual exploitation and violence, thereby increasing the possibility of HIV infection.
(4) As the leading cause of death in sub-Saharan Africa, AIDS has killed more than 19,400,000 individuals (more than 3 times the number of AIDS deaths in the rest of the world) and will claim the lives of one-quarter of the population, mostly adults, in the next decade.
(5) An estimated 2,000,000 individuals in Latin America and the Caribbean and another 7,100,000 individuals in Asia and the Pacific region are infected with HIV or living with AIDS. Infection rates are rising alarmingly in Eastern Europe (especially in the Russian Federation), Central Asia, and China.
(6) HIV/AIDS threatens personal security by affecting the health, lifespan, and productive capacity of the individual and the social cohesion and economic well-being of the family.
(7) HIV/AIDS undermines the economic security of a country and individual businesses in that country by weakening the productivity and longevity of the labor force across a broad array of economic sectors and by reducing the potential for economic growth over the long term.
(8) HIV/AIDS destabilizes communities by striking at the most mobile and educated members of society, many of whom are responsible for security at the local level and governance at the national and subnational levels as well as many teachers, health care personnel, and other community workers vital to community development and the effort to combat HIV/AIDS. In some countries the overwhelming challenges of the HIV/AIDS epidemic are accelerating the outward migration of critically important health care professionals.
(9) HIV/AIDS weakens the defenses of countries severely affected by the HIV/AIDS crisis through high infection rates among members of their military forces and voluntary peacekeeping personnel. According to UNAIDS, in sub-Saharan Africa, many military forces have infection rates as much as five times that of the civilian population.
(10) HIV/AIDS poses a serious security issue for the international community by--
(A) increasing the potential for political instability and economic devastation, particularly in those countries and regions most severely affected by the disease;

(B) decreasing the capacity to resolve conflicts through the introduction of peacekeeping forces because the environments into which these forces are introduced pose a high risk for the spread of HIV/AIDS; and
(C) increasing the vulnerability of local populations to HIV/AIDS in conflict zones from peacekeeping troops with HIV infection rates significantly higher than civilian populations.
(11) The devastation wrought by the HIV/AIDS pandemic is compounded by the prevalence of tuberculosis and malaria, particularly in developing countries where the poorest and most vulnerable members of society, including women, children, and those individuals living with HIV/AIDS, become infected. According to the World Health Organization (WHO), HIV/AIDS, tuberculosis, and malaria accounted for more than 5,700,000 deaths in 2001 and caused debilitating illnesses in millions more.
(12) Together, HIV/AIDS, tuberculosis, malaria and related diseases are undermining agricultural production throughout Africa. According to the United Nations Food and Agricultural Organization, 7,000,000 agricultural workers throughout 25 African countries have died from AIDS since 1985. Countries with poorly developed agricultural systems, which already face chronic food shortages, are the hardest hit, particularly in sub-Saharan Africa, where high HIV prevalence rates are compounding the risk of starvation for an estimated 14,400,000 people.
(13) Tuberculosis is the cause of death for one out of every three people with AIDS worldwide and is a highly communicable disease. HIV infection is the leading threat to tuberculosis control. Because HIV infection so severely weakens the immune system, individuals with HIV and latent tuberculosis infection have a 100 times greater risk of developing active tuberculosis diseases thereby increasing the risk of spreading tuberculosis to others. Tuberculosis, in turn, accelerates the onset of AIDS in individuals infected with HIV.
(14) Malaria, the most deadly of all tropical parasitic diseases, has been undergoing a dramatic resurgence in recent years due to increasing resistance of the malaria parasite to inexpensive and effective drugs. At the same time, increasing resistance of mosquitoes to standard insecticides makes control of transmission difficult to achieve. The World Health Organization estimates that between 300,000,000 and 500,000,000 new cases of malaria occur each year, and annual deaths from the disease number between 2,000,000 and 3,000,000. Persons infected with HIV are particularly vulnerable to the malaria parasite. The spread of HIV infection contributes to the difficulties of controlling resurgence of the drug resistant malaria parasite.
(15) HIV/AIDS is first and foremost a health problem. Successful strategies to stem the spread of the HIV/AIDS pandemic will require clinical medical interventions, the strengthening of health care delivery systems and infrastructure, and determined national leadership and increased budgetary allocations for the health sector in countries affected by the epidemic as well as measures to address the social and behavioral causes of the problem and its impact on families, communities, and societal sectors.
(16) Basic interventions to prevent new HIV infections and to bring care and treatment to people living with AIDS, such as voluntary counseling and testing and mother-to-child transmission programs, are achieving meaningful results and are cost-effective. The challenge is to expand these interventions from a pilot program basis to a national basis in a coherent and sustainable manner.
(17) Appropriate treatment of individuals with HIV/AIDS can prolong the lives of such individuals, preserve their families, prevent children from becoming orphans, and increase

productivity of such individuals by allowing them to lead active lives and reduce the need for costly hospitalization for treatment of opportunistic infections caused by HIV.
(18) Nongovernmental organizations, including faith-based organizations, with experience in health care and HIV/AIDS counseling, have proven effective in combating the HIV/AIDS pandemic and can be a resource in assisting indigenous organizations in severely affected countries in their efforts to provide treatment and care for individuals infected with HIV/AIDS.
(19) Faith-based organizations are making an important contribution to HIV prevention and AIDS treatment programs around the world. Successful HIV prevention programs in Uganda, Jamaica, and elsewhere have included local churches and faith-based groups in efforts to promote behavior changes to prevent HIV, to reduce stigma associated with HIV infection, to treat those afflicted with the disease, and to care for orphans. The Catholic Church alone currently cares for one in four people being treated for AIDS worldwide. Faith-based organizations possess infrastructure, experience, and knowledge that will be needed to carry out these programs in the future and should be an integral part of United States efforts.
(20)(A) Uganda has experienced the most significant decline in HIV rates of any country in Africa, including a decrease among pregnant women from 20.6 percent in 1991 to 7.9 percent in 2000.
(B) Uganda made this remarkable turnaround because President Yoweri Museveni spoke out early, breaking long-standing cultural taboos, and changed widespread perceptions about the disease. His leadership stands as a model for ways political leaders in Africa and other developing countries can mobilize their nations, including civic organizations, professional associations, religious institutions, business and labor to combat HIV/AIDS.
(C) Uganda's successful AIDS treatment and prevention program is referred to as the ABC model: "Abstain, Be faithful, use Condoms", in order of priority. Jamaica, Zambia, Ethiopia and Senegal have also successfully used the ABC model. Beginning in 1986, Uganda brought about a fundamental change in sexual behavior by developing a low-cost program with the message: "Stop having multiple partners. Be faithful. Teenagers, wait until you are married before you begin sex.".
(D) By 1995, 95 percent of Ugandans were reporting either one or zero sexual partners in the past year, and the proportion of sexually active youth declined significantly from the late 1980s to the mid-1990s. The greatest percentage decline in HIV infections and the greatest degree of behavioral change occurred in those 15 to 19 years old. Uganda's success shows that behavior change, through the use of the ABC model, is a very successful way to prevent the spread of HIV.
(21) The magnitude and scope of the HIV/AIDS crisis demands a comprehensive, long-term, international response focused upon addressing the causes, reducing the spread, and ameliorating the consequences of the HIV/AIDS pandemic, including--
(A) prevention and education, care and treatment, basic and applied research, and training of health care workers, particularly at the community and provincial levels, and other community workers and leaders needed to cope with the range of consequences of the HIV/AIDS crisis;
(B) development of health care infrastructure and delivery systems through cooperative and coordinated public efforts and public and private partnerships;
(C) development and implementation of national and community-based multisector strategies that address the impact of HIV/AIDS on the individual, family, community, and nation and increase the participation of at-risk populations in programs designed to encourage behavioral and social change and reduce the stigma associated with HIV/AIDS; and

(D) coordination of efforts between international organizations such as the Global Fund to Fight AIDS, Tuberculosis and Malaria, the Joint United Nations Programme on HIV/AIDS (UNAIDS), the World Health Organization (WHO), national governments, and private sector organizations, including faith-based organizations.
(22) The United States has the capacity to lead and enhance the effectiveness of the international community's response by--
(A) providing substantial financial resources, technical expertise, and training, particularly of health care personnel and community workers and leaders;
(B) promoting vaccine and microbicide research and the development of new treatment protocols in the public and commercial pharmaceutical research sectors;
(C) making available pharmaceuticals and diagnostics for HIV/AIDS therapy;
(D) encouraging governments and faith-based and community-based organizations to adopt policies that treat HIV/AIDS as a multisectoral public health problem affecting not only health but other areas such as agriculture, education, the economy, the family and society, and assisting them to develop and implement programs corresponding to these needs;
(E) promoting healthy lifestyles, including abstinence, delaying sexual debut, monogamy, marriage, faithfulness, use of condoms, and avoiding substance abuse; and
(F) encouraging active involvement of the private sector, including businesses, pharmaceutical and biotechnology companies, the medical and scientific communities, charitable foundations, private and voluntary organizations and nongovernmental organizations, faith-based organizations, community-based organizations, and other nonprofit entities.
(23) Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic. One in nine South Africans is living with AIDS, and sexual assault is rampant, at a victimization rate of one in three women. Meanwhile in Cambodia, as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast Asia. Victims of coercive sexual encounters do not get to make choices about their sexual activities.
(24) Strong coordination must exist among the various agencies of the United States to ensure effective and efficient use of financial and technical resources within the United States Government with respect to the provision of international HIV/AIDS assistance.
(25) In his address to Congress on January 28, 2003, the President announced the Administration's intention to embark on a five-year emergency plan for AIDS relief, to confront HIV/AIDS with the goals of preventing 7,000,000 new HIV/AIDS infections, treating at least 2,000,000 people with life-extending drugs, and providing humane care for millions of people suffering from HIV/AIDS, and for children orphaned by HIV/AIDS.
(26) In this address to Congress, the President stated the following: "Today, on the continent of Africa, nearly 30,000,000 people have the AIDS virus-- including 3,000,000 children under the age of 15. There are whole countries in Africa where more than one-third of the adult population carries the infection. More than 4,000,000 require immediate drug treatment. Yet across that continent, only 50,000 AIDS victims--only 50,000--are receiving the medicine they need.".
(27) Furthermore, the President focused on care and treatment of HIV/AIDS in his address to Congress, stating the following: "Because the AIDS diagnosis is considered a death sentence, many do not seek treatment. Almost all who do are turned away. A doctor in rural South Africa describes his frustration. He says, 'We have no medicines. Many hospitals tell people, you've got

AIDS, we can't help you. Go home and die.' In an age of miraculous medicines, no person should have to hear those words. AIDS can be prevented. Anti-retroviral drugs can extend life for many years * * * Ladies and gentlemen, seldom has history offered a greater opportunity to do so much for so many.".

(28) Finally, the President stated that "[w]e have confronted, and will continue to confront, HIV/AIDS in our own country", proposing now that the United States should lead the world in sparing innocent people from a plague of nature, and asking Congress "to commit $15,000,000,000 over the next five years, including nearly $10,000,000,000 in new money, to turn the tide against AIDS in the most afflicted nations of Africa and the Caribbean".

22 U.S.C. § 7631. Assistance to combat HIV/AIDS

(a) Omitted

(b) Authorization of appropriations

(1) In general

In addition to funds available under section 104(c) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b(c)) for such purpose or under any other provision of that Act, there are authorized to be appropriated to the President, from amounts authorized to be appropriated under section 7671 of this title, such sums as may be necessary for each of the fiscal years 2004 through 2008 to carry out section 104A of the Foreign Assistance Act of 1961, as added by subsection (a) [22 U.S.C.A. § 2151b-2].

(2) Availability of funds

Amounts appropriated pursuant to paragraph (1) are authorized to remain available until expended.

(3) Allocation of funds

Of the amount authorized to be appropriated by paragraph (1) for the fiscal years 2004 through 2008, such sums as may be necessary are authorized to be appropriated to carry out section 104A(d)(4) of the Foreign Assistance Act of 1961, as added by subsection (a) [22 § 2151b-2(d)(4)], relating to the procurement and distribution of HIV/AIDS pharmaceuticals.

(c) Relationship to assistance programs to enhance nutrition

In recognition of the fact that malnutrition may hasten the progression of HIV to AIDS and may exacerbate the decline among AIDS patients leading to a shorter life span, the Administrator of the United States Agency for International Development shall, as appropriate--

(1) integrate nutrition programs with HIV/AIDS activities, generally;
(2) provide, as a component of an anti-retroviral therapy program, support for food and nutrition to individuals infected with and affected by HIV/AIDS; and
(3) provide support for food and nutrition for children affected by HIV/AIDS and to communities and households caring for children affected by HIV/AIDS.

(d) Eligibility for assistance

An organization that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961, as added by subsection (a) [22 U.S.C.A. § 2151B-2] or under any other provision of this chapter (or any amendment made by this chapter) to prevent, treat, or monitor HIV/AIDS shall not be required, as a condition of receiving the assistance, to endorse or utilize a multisectoral approach to combatting HIV/AIDS, or to endorse, utilize, or participate in a

prevention method or treatment program to which the organization has a religious or moral objection.

(e) Limitation

No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(f) Limitation

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, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

(g) Sense of Congress relating to food assistance for individuals living with HIV/AIDS

(1) Findings

Congress finds the following:
(A) The United States provides more than 60 percent of all food assistance worldwide.
(B) According to the United Nations World Food Program and other United Nations agencies, food insecurity of individuals infected or living with HIV/AIDS is a major problem in countries with large populations of such individuals, particularly in African countries.
(C) Although the United States is willing to provide food assistance to these countries in need, a few of the countries object to part or all of the assistance because of fears of benign genetic modifications to the foods.
(D) Healthy and nutritious foods for individuals infected or living with HIV/AIDS are an important complement to HIV/AIDS medicines for such individuals.
(E) Individuals infected with HIV have higher nutritional requirements than individuals who are not infected with HIV, particularly with respect to the need for protein. Also, there is evidence to suggest that the full benefit of therapy to treat HIV/AIDS may not be achieved in individuals who are malnourished, particularly in pregnant and lactating women.

(2) Sense of Congress

It is therefore the sense of Congress that United States food assistance should be accepted by countries with large populations of individuals infected or living with HIV/AIDS, particularly African countries, in order to help feed such individuals.