08-4917-cv

To Be Argued By:
BENJAMIN H. TORRANCE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-4917-cv

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL,

Plaintiffs-Appellees,

—v.—

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, THOMAS R. FRIEDEN, in his official capacity as Director

(caption continued on inside cover)

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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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of the U.S. Centers for Disease Control and Prevention, and his successors, KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, and her successors, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, RAJIV SHAH, in his official capacity as Administrator of the United States Agency for International Development,

Defendants-Appellants.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases:

PAGE

PAGE

PAGE

Statutes and Regulations:

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Plaintiffs-Appellees,

—v.—

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, THOMAS R. FRIEDEN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, AND HIS SUCCESSORS, KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND HER SUCCESSORS, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, RAJIV SHAH, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

The government respectfully submits this reply brief in further support of its appeal from the district court's preliminary injunctions.

In their brief, plaintiffs repeatedly assert the central theme of their argument: that the Leadership Act's funding condition compels speech and discriminates based on viewpoint. But they disregard the fundamental nature of the program at issue: government funding for those who wish to seek it and who elect to abide by its conditions, including a condition that ensures that Congress's message is not undermined. The government cannot be said to be compelling the speech of organizations that can always opt out, and cannot be said to unconstitutionally discriminate based on viewpoint when it chooses partners that will further its policies and messages. For those reasons and others, the District of Columbia Circuit has upheld the same statute challenged here—in a decision plaintiffs all but ignore.

As demonstrated in the government's opening brief, the funding condition is constitutional. Congress, having chosen to express unequivocal opposition to sex trafficking and prostitution as an integral part of its program against HIV/AIDS, must be able to protect that message and ensure that its partners in the program will not undercut it. Any organization objecting to the program conditions Congress has

established is free not to participate. And organizations that do participate may work with affiliates to engage in protected expression outside the program, an alternative channel for speech that has been repeatedly upheld in the precedents of this Court and the Supreme Court. Plaintiffs lack standing because they have made no efforts to avail themselves of that alternative channel nor offered individualized proof that it imposes burdens on them; but even if they had standing, they could not demonstrate that they are likely to prevail on their First Amendment claims. In enacting the Leadership Act, Congress was well within its latitude to select its partners in its fight against HIV/AIDS according to the reasonable conditions at issue here. The preliminary injunctions accordingly should be reversed.

ARGUMENT

POINT I

THE LEADERSHIP ACT'S FUNDING CONDITION AS IMPLEMENTED IS CONSTITUTIONAL

A. The Leadership Act Does Not Compel Speech

As demonstrated in the government's opening brief, Revised Brief for Defendants-Appellants ("Gov't Br.") 53–57, there is no compulsion of speech when those who "wish[] to receive [government] funds . . . must communicate the message the government chooses to fund." *DKT International, Inc. v. USAID*, 477 F.3d 758, 764 (D.C. Cir. 2007).

That common-sense principle was reaffirmed by the Supreme Court this year in *Christian Legal Society v.*

Martinez, 130 S. Ct. 2971 (2010).* In that case, as here, an organization that sought financial and other benefits from the state was required to relinquish expressive rights in exchange for those benefits. *Id.* at 2978–80. The Court held that "in seeking what is effectively a state subsidy," the organization "faces only indirect pressure" to abandon its expressive activity, which it can fully exercise "if it forgoes the benefits" offered by the state. *Id.* at 2986. Less stringent scrutiny is therefore warranted when the government "is dangling the carrot of subsidy, not wielding the stick of prohibition." *Id.* Of particular note here, the Court held that more exacting First Amendment examination has only been applied to "regulations that *compelled* a group" to give up some expressive right, "with no choice to opt out." *Id.* at 2986; *accord Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991).

Nowhere do plaintiffs maintain that they have "no choice to opt out." Nor do they make any other effort to justify their repeated assertions, essential to their argument, that the Leadership Act "compels" speech, except to say that they would lose Leadership Act funding if they do not comply with the funding conditions. *E.g.*, Pls.' Br. 21. That, of course, is true, but an organization "enjoys no constitutional right to state subvention" of First Amendment-protected expression. *Christian Legal Society*, 130 S. Ct. at 2978. Plaintiffs' unwillingness to give up federal funding does not grant them a constitutional entitlement to keep it. *See Ysursa v. Pocatello Education Ass'n*, 129 S. Ct. 1093, 1098

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* Issued in June 2010, after the government's initial brief in this case.

(2009); *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983). As in *Planned Parenthood Federation v. USAID*, "[t]he harm alleged in the complaint is the result of choices made by [funding recipients] to take [US]AID's money." 915 F.2d 59, 63 (2d Cir. 1990).

Although plaintiffs assert a general rule that any required policy statement "as a condition of participation" in a government program is compelled speech, Pls.' Br. 31, the cases they cite do not establish that. As the District of Columbia Circuit recognized in upholding the Leadership Act's funding condition, the cases of *Wooley v. Maynard,* 430 U.S. 705 (1977), *Speiser v. Randall,* 357 U.S. 513 (1958), and *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), did not concern voluntary acceptance of government money; instead, they all involved rules by which the government "coerced its citizens into promoting its message" on pain of losing generally available, already existing public benefits such as education, tax exemptions, or access to the roads. *DKT*, 477 F.3d at 762 n.2. In short, there was no realistic "choice to opt out."* As plaintiffs here indisputably have

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* Plaintiffs also cite *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) (plurality), and *Abood v. Detroit Board of Education*, 431 U.S. 209, 234–35 (1977). Those cases actually permitted the government to compel unwilling employees to support union political activities as long as they are "germane to collective bargaining," though compelled contributions that did not meet that test were struck down. 500 U.S. at 522 (internal quotation marks omitted); *accord* 431

the choice to decline the government's "[o]ffer[] to fund organizations who agree with the government's viewpoint and will promote the government's program," they are not unconstitutionally compelled to speak. *Id.**

U.S. at 235. Similarly, the government here does not dispute that funding conditions must be "germane" to the program's purpose. Gov't Br. 19. The balance struck in *Abood* and *Lehnert* merely reflects the principle invoked by the government in its opening brief: that while government employees and independent contractors do not surrender all First Amendment rights, the government retains "a significant degree of control" over the "words and actions" of those who act for it. Gov't Br. 33–34.

* Plaintiffs state that the government's citation to *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), which describes Congress's spending power and its ability to attach conditions to federal funding, is improper because that case "did not involve any restriction on individual rights" and only governs the "unique relationship between states and the federal government." Pls.' Br. 39. Both contentions ignore not only the broad language of *Dole*, but the fact that this Court cited *Dole* in determining the appropriate level of scrutiny in *Brooklyn Legal Services*—a case not only central to the determination of this appeal, but one in which First Amendment rights were at issue and no state was involved. 462 F.3d 219, 229–30 (2d Cir. 2006).

B. The Leadership Act Does Not Unconstitutionally Discriminate Based on Viewpoint

Plaintiffs also repeatedly assert that the Leadership Act must be unconstitutional because it constitutes "viewpoint discrimination." Certainly, the Act favors those groups with a policy against prostitution and sex trafficking over those without one. 22 U.S.C. § 7631(f). But as described in the government's opening brief, there is no constitutional prohibition on Congress's support for its own message. Gov't Br. 32–36, 41–47; *Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000) ("government's right . . . to use its own funds to advance a particular message"). As the Supreme Court has said, "viewpoint-based funding decisions can be sustained [under the First Amendment] in instances in which the government is itself the speaker, or instances . . . in which the government used private speakers to transmit specific information pertaining to its own program." *Legal Services Corp. v. Velazquez* ("*Velazquez II*"), 531 U.S. 533, 541 (2001) (internal quotation marks and citation omitted). When it engages in such a program to promote a message through funding private speakers, the government may "require those agents not [to] convey contrary messages," and "it follows that in choosing its agents, the government may use criteria to ensure that its message is conveyed in an efficient and effective fashion." *DKT*, 477 F.3d at 762; *accord Rosenberger v. University of Virginia*, 515 U.S. 819, 833 (1995) (government may take "appropriate steps" to ensure that its message is "neither garbled nor

distorted").* None of this is unconstitutional viewpoint discrimination, but simply a reasonable part of the government's effort to protect the message it imparts.

And it is especially reasonable when the government is acting abroad. Gov't Br. 34–35, 51, 56–57. In the foreign arena the government has a stronger interest in controlling its associations that reflect on the image of the United States, while it has a lessened ability to monitor organizations it funds. *DKT Memorial Fund, Inc. v. USAID*, 887 F.2d 275, 290–91 (D.C. Cir. 1989); *see City of New York v. Permanent Mission of India*, No. 08-1805-cv, 2010 WL 3221889, at *13, __ F.3d __ (2d Cir. Aug. 17, 2010) (executive branch has "greatest power" under Constitution "in the context of foreign affairs" (internal quotation marks omitted)). Those factors, and the deference accorded to the government in matters of foreign policy, mean that the government

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* *Rumsfeld v. Forum for Academic & Institutional Rights*, on which plaintiffs rely (and which upheld a federal statute against a First Amendment challenge), is inapposite because it determined that the law at issue "does not affect" private parties' speech. 547 U.S. 47, 64 (2006). Plaintiffs cite the Court's observation that "there is nothing in this case approaching a Government-mandated pledge or motto." Pls.' Br. 30, 35 (citing 547 U.S. at 62). But, first, the Court approached the statute as a direct regulation rather than a funding condition. 547 U.S. at 59–60. Second, the observation that a pledge was not involved in that case says nothing about when a policy requirement would be permissible under the First Amendment.

has greater leeway to protect the integrity of its message. *DKT*, 477 F.3d at 762.

Even when the government is not promoting a message through its funding program, it may "cho[ose] to fund one activity to the exclusion of another" without committing unconstitutional viewpoint discrimination; the government does not "unconstitutionally discriminate[] on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals . . . because the program in advancing those goals necessarily discourages alternative goals." *Rust*, 500 U.S. at 193–94. And while even with the greater leeway afforded government funding programs, the government may still not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas," *Regan*, 461 U.S. at 548 (internal quotation marks and alteration omitted), the Leadership Act has neither that aim nor effect. Unlike in *Velazquez v. Legal Services Corp.* ("*Velazquez I*"), 164 F.3d 757, 771–72 (2d Cir. 1999), *aff'd in relevant part*, *Velazquez II*, 531 U.S. 533, where a ban on arguing certain positions in litigation meant those arguments, which could only be effectively asserted in a courtroom, could in essence not be expressed, any ideas contrary to the government's anti-sex-trafficking, anti-prostitution message can be readily voiced anywhere at any time. Nor is this a case where "the government's interests are so attenuated from the benefit condition as to amount to a pretextual device for suppressing dangerous ideas," *Brooklyn Legal Services*, 462 F.3d 219, 230 (2d Cir. 2006) (citing *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998))—the condition (requiring the government's partners to oppose sex trafficking and prostitution) is closely related to the government's

interest (in conveying an anti-trafficking anti-prostitution message as part of its HIV/AIDS program). Gov't Br. 44.

C. Leadership Act Recipients Have an Adequate Alternative Channel for Expression That Satisfies Constitutional Standards

1. The Adequate Alternative Channel Test Governs

With no compulsion of speech or unconstitutional viewpoint discrimination, the Leadership Act's funding condition should not be subject to heightened First Amendment scrutiny. As this Court has held, heightened scrutiny cannot be squared with the government's latitude to set spending priorities and impose conditions on funding programs. Gov't Br. 41–42 (citing *Brooklyn Legal Services*, 462 F.3d at 329–33).

According to the test endorsed by this Court, a funding condition that "burdens the First Amendment rights of recipients of government benefits" must be upheld "if the recipients are left with adequate alternative channels for protected expression." *Velazquez I*, 164 F.3d at 766, *quoted in Brooklyn Legal Services*, 462 F.3d at 231. That test is confirmed by the Supreme Court's most recent decision upholding a government declination to provide a subsidy, in part because of the " 'substantial alternative channels that remain open for . . . communication to take place.' " *Christian Legal Society*, 130 S. Ct. at 2991 (quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53 (1983)). "[O]ther available avenues for the group to exercise its First Amendment rights lessen

the burden created by" government conditions on its funding. *Id.**

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* In *Christian Legal Society*, the Court noted that alternative channels would not suffice if the restrictions were viewpoint discriminatory. But that case involved a "limited public forum," and "public forums" are areas or facilities "used for purposes of . . . communicating thoughts between citizens, and discussing public questions" where, for that very reason, restrictions based on viewpoint are prohibited. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009) (internal quotation marks omitted). Here, the Leadership Act's funding program does not create a forum, nor do plaintiffs argue that it does. *See Rosenberger*, 515 U.S. at 833 (distinguishing *Rust*, in which government transmitted information related to its program, from a program created to "encourage private speech").

The arguments of amici curiae American Humanist Association et al. ("amici") fail for similar reasons. Amici draw an analogy to public universities, Amici Br. 6–9, but "[t]he classroom is peculiarly the 'marketplace of ideas,' " *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), plainly a program "create[d] . . . to encourage private speech," *Rosenberger*, 515 U.S. at 833. In this case, by contrast, the Leadership Act is "meant to convey and ha[s] the effect of conveying a government message, and . . . thus constitute[s] government speech." *Pleasant Grove*, 129 S. Ct. at 1134. In the service of that government speech the government may "use[] private speakers to transmit specific information pertaining to its own program," "appropriate[] public funds to promote a particular

Under the program-integrity guidelines issued in conjunction with the Leadership Act, organizations that wish to receive Leadership Act funds and to express views inconsistent with the Act's policy requirement may do so through affiliates, as long as there is enough separation between the groups that the government's program requirements are not undermined.* Although that avenue has been approved by this Court and the Supreme Court in *Velazquez I*, *Brooklyn Legal Services*, *Regan*, and *FCC v. League of Women Voters*, 468 U.S. 364 (1984), plaintiffs attack it nonetheless. Pls.' Br. 48–53. First, they contend that one organization's ability to express itself does not cure the speech-related regulation of another. *Id.* 48, 52. But that is nothing more than a challenge to the very idea of using an affiliate as an avenue for protected expression, and therefore contradicts the case law approving it.

Plaintiffs next claim that *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010), "concluded that allowing an affiliate to speak cannot remedy a restriction on an

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policy of its own," "disburse[] public funds to private entities to convey [the] governmental message"—and has the leeway to "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee," *Rosenberger*, 533 U.S. at 833.

* The organization may receive Leadership Act funding while an affiliate engages in speech inconsistent with the anti-sex-trafficking anti-prostitution policy, or vice versa; the only requirement is that the relationship between the two comply with the program-integrity guidelines. (SPA 183–89, 200–04).

organization's First Amendment rights." Pls.' Br. 48–49. That reads *Citizens United* far too broadly. The Court in that case held that an "outright ban" on speech by corporations, "backed by criminal sanctions," could not be mitigated by the "burdensome alternative" of allowing the corporation to create a political action committee. 130 S. Ct. at 897. The Court elaborated on the numerous obstacles to creating a PAC—the expense of creating them, the "extensive regulations" limiting them, the detailed reporting requirements attached to them—and held that in light of these "onerous restrictions" a corporation "may not be able" to use this mechanism for speech. *Id.* at 897–98. Even putting aside the crucial First Amendment difference between an outright ban on speech and a condition attached to a voluntary selective funding program, the analysis in *Citizens United* is entirely consistent with the framework in *Brooklyn Legal Services*: "Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression," but "an alternative is inadequate if the government substantially or unduly burdens the ability to create the alternative" such that recipients are "in effect precluded from doing so." 462 F.3d at 231–32. Indeed, *Brooklyn Legal Services* even foreshadowed *Citizens United*, noting that plaintiffs could demonstrate that the rules were invalid by proving they "created prohibitive costs of compliance," *id.* at 232, such as those imposed on PACs. *Citizens United* thus has no effect on the proper analysis in this case—and, as noted above, *Christian Legal Society*, decided after *Citizens United*, reaffirmed the principle that

alternative channels for expression alleviate potential First Amendment harms, 130 S. Ct. at 2991.

Next, plaintiffs contend that the guidelines governing separation between recipients and their affiliates are not "tailored to achieving the purposes of the Leadership Act." Pls.' Br. 49. Plaintiffs' objection is difficult to understand; the government's opening brief repeatedly explains that the purpose of the guidelines is, on the one hand, to comply with the Act's requirement that funding recipients have a policy opposing sex trafficking and prostitution in furtherance of Congress's anti-trafficking, anti-prostitution message, while at the same time alleviating the burden on recipients and conforming to the requirements of the First Amendment. *E.g.*, Gov't Br. 31, 48–53. Plaintiffs criticize the government for modeling the Leadership Act guidelines on the Legal Services Corporation rules that this Court has "thus far declined to invalidate," Pls.' Br. 49—or, put differently, "upheld." But the government was expressly sensitive to the differences in context, and the Leadership Act guidelines' greater flexibility reflects those differences. Gov't Br. 50 (citing SPA 188–89, 201–03).

In several places, plaintiffs point to the fact that the Leadership Act applies to each recipient organization as a whole, rather than being limited to specific activities, and therefore affects the privately funded expression the organization seeks to undertake. Pls.' Br. 9–13, 21–22, 32–33; 22 U.S.C. § 7631(f). But that was true in the LSC cases as well, where each grantee organization was prohibited from engaging in restricted activities no matter how they were funded. *Velazquez I*, 164 F.3d at 759–60. In those decisions, this Court rejected nearly

identical arguments to the ones plaintiffs now advance, that the rules "unreasonably burden a grantee's ability to use nonfederal funds to engage in restricted activity." *Id.* at 765. In fact, the solution endorsed by *Velazquez I* and *Brooklyn Legal Services*—using affiliate organizations as an alternative channel for expression—derives from the very fact that a recipient organization, as a whole, will be subject to the funding conditions. Plaintiffs' arguments to the contrary are therefore nothing more than an attack on the idea of a separate affiliate as an avenue for speech, an idea endorsed not only by this Court in *Brooklyn Legal Services* and *Velazquez I* but by the Supreme Court in *Regan*, 461 U.S. at 546 (by permitting restricted organization to form unrestricted affiliate, "Congress has not infringed any First Amendment rights or regulated any First Amendment activity" but "has simply chosen not to pay for" subsidy recipient's speech), and *League of Women Voters*, 468 U.S. at 400 (statute would "plainly be valid" if unrestricted affiliate were permitted while speech prohibition remained on recipient).*

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* Plaintiffs' assertion that *League of Women Voters* "expressly rejected" anything less than heightened scrutiny for a funding condition is baseless. Pls.' Br. 35–36. The footnote plaintiffs rely on simply distinguished precedents cited by the dissent by describing what the Court had not considered—in cases where the statutes were upheld, and therefore there was no need to reach alternative justifications for their validity. 468 U.S. at 401 n.27.

Plaintiffs thus describe *Rust* incorrectly. Pls.' Br. 37–38. While that case only involved restrictions on particular projects, and project participants were permitted to engage in the prohibited speech in other places, it is not correct that *Rust* enunciated a First Amendment "principle" that entities as a whole cannot be subject to speech-related conditions. 500 U.S. at 178–81, 196. The *Rust* Court did say that " 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* at 197. But it made clear that that characteristic is necessary but not sufficient for an unconstitutional-condition claim. Addressing the same issue plaintiffs raise here—that a recipient "is not able to segregate its activities according to the source of its funding"—the Court reaffirmed that establishment of an affiliate is a constitutionally adequate solution, as recognized in *League of Women Voters* and *Regan*. *Id.* at 197–98 (internal quotation marks omitted); *accord Legal Aid Society of Hawaii v. Legal Services Corp.*, 145 F.3d 1017, 1028–29 (9th Cir. 1998).

Finally, plaintiffs claim that requirements governing separation between federally funded activities and religious activities within faith-based organizations would be preferable to the requirements actually imposed by the Leadership Act guidelines. Pls.' Br. 49–51. To begin with, that argument is simply a variation on one this Court has already rejected: *Brooklyn Legal Services* held in a similar context that Congress may constitutionally "accommodate a religious organization

in the distribution of its funds" without "level[ing] the field for all other restrictions the government may place on totally unrelated programs." 462 F.3d at 233–34. Even if that holding were not fatal to plaintiffs' claim here, the comparison between subsidies to faith-based organizations and Leadership Act funds is inapt. The regulation plaintiffs cite implemented an executive order and generally sought to remove unwarranted barriers to the participation of faith-based organizations in all USAID programs. 69 Fed. Reg. 61,716, 61,716–17 (Oct. 20, 2004). But the Leadership Act guidelines implement a statutory requirement that an organization receiving funds as part of this specific program have a policy consistent with that program's message and goals, and consistent with Congress's decision to limit funding to organizations that will not undermine the government's message. They therefore appropriately govern separation of organizations rather than activities. And the faith-based regulation required separation between religious and federally funded activities "in time or location" (the commenter plaintiffs describe requested that separation in both time and location be imposed), *id.* at 61,717, 61,719; the Leadership Act guidelines actually require neither, instead taking balanced account of all the circumstances to assess separation. (SPA 188–89, 203–04). There is thus no basis for importing the faith-based regulations into the Leadership Act context, much less a constitutional requirement to do so.

2. Plaintiffs Have Shown No Undue Burden on Alternative Channels of Expression

Under the *Brooklyn Legal Services* standard, plaintiffs must demonstrate that there are "restrictions that unduly burden the[ir] ability . . . to set up adequate alternative channels for protected expression such that they are in effect precluded from doing so." 462 F.3d at 232. This they have not done.*

As a matter of law, plaintiffs are simply wrong that the government would require any affiliate to receive private funding, thus creating a barrier to using an affiliate as an alternative channel. Pls.' Br. 9, 33 n.7, 52–53. Plaintiffs cite only a declaration of one of their principals to support this claim, *id.* 9 (citing JA 743–44); that declaration, in turn, relies on 22 C.F.R. § 203.3, a USAID regulation governing "private voluntary organizations" or PVOs. But as the

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* Even if heightened scrutiny were to apply, the government's interest in protecting the efficacy and integrity of its program to halt the spread of HIV/AIDS, by ensuring that funding recipients who are partners in that program do not undermine the government's message, are so substantial that the funding eligibility condition satisfies heightened scrutiny. As explained in the government's opening brief, particularly in the international context in which the programs and services at issue are provided, the First Amendment does not prohibit the government from regulating conduct or speech by funding recipients that could associate the United States with the very practices it is working to eradicate. Gov't Br. 34–35, 51.

government earlier explained,* that regulation does not apply here: there is no requirement that an organization be a PVO to receive Leadership Act funding from USAID. Plaintiffs have no authority to the contrary, and their assertions that private-funding requirements erect a barrier to forming affiliates must fail.

Otherwise, as a matter of fact, plaintiffs have not met their burden** of showing that they are "in effect precluded" from utilizing this alternative channel of communication. Although they assert that the "record is replete with uncontested evidence about the prohibitive costs of complying with" the Leadership Act separation guidelines, Pls.' Br. 51–52, *accord id.* 14, 17, they ignore the procedural posture of this case. The evidence they offer cannot be fairly described as "uncontested" because the government has never had an opportunity to contest it: the district court decided both the 2006 and 2008 injunctions solely on the papers submitted by the parties, without discovery or fact-finding. "It is settled law in this Circuit that motions for preliminary injunctions should not be decided on the basis of affidavits when disputed issues of fact exist." *Kern v. Clark*, 331 F.3d 9, 12 (2d Cir. 2003) (internal quotation marks omitted). Indeed, the district court

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* Gov't's Mem. in Opp. to Pls' Mot. to File a Second Am. Compl. and for a Prelim. Inj. dated Mar. 17, 2008 (dkt. entry no. 77), at 30 n.14.

** *Brooklyn Legal Services*, 462 F.3d at 231–32 ("whether the plaintiffs have demonstrated as a factual matter . . . . "; "were plaintiffs able to prove their allegations as a matter of fact . . . .").

expressly recognized that plaintiffs' claims were unproved: "As for the Associations' claims that the Policy Requirement and its Guidelines do not provide an adequate alternative channel for their protected speech in light of the alleged burdens on their members, these claims will undoubtedly require a more thorough factual development to establish the extent of the burden on the Associations' members." (SPA 164).* Additionally, as the government argued in its initial brief, Gov't Br. 25–27, plaintiffs' assertions about the alleged general hurdles to using affiliates cannot suffice to demonstrate what must be proved in this case: that particular organizations operating in specific places with specific rules and conditions face prohibitive burdens in utilizing the alternative channel for expression.

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* The district court did say later in its 2008 opinion that "the Associations operate internationally in dozens of countries, many of them developing states still lacking administrative rules under which foreign entities may function effectively, which increases the burdens imposed by even identical regulations." (SPA 175). That conclusion cited no evidence, and provided no specifics about which countries were at issue, which rules were lacking, and which burdens may have increased. And as the district court said two paragraphs later, the factor that it considered to "[n]otably" increase the burden on plaintiffs was the former regulation's consideration of separate "management[] and governance" (SPA 178), which has since been excised from the regulation (SPA 188–89, 202–04).

Plaintiffs' failure to meet their burden is of all the more consequence in light of this Court's, and the Supreme Court's, recent emphasis on the high barriers to obtaining a preliminary injunction. A plaintiff seeking a preliminary injunction must prove four elements: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 129 S. Ct. 365, 374 (2008); *accord Salinger v. Colting*, 607 F.3d 68, 79–80 (2d Cir. 2010). And the plaintiff must do so without the benefit of any presumptions of harm or that any other element of the test has been satisfied. *Salinger*, 607 F.3d at 78 n.7, 80. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 129 S. Ct. at 375–76. Having not made that showing, plaintiffs in this case are not entitled to a preliminary injunction.

D. Plaintiffs' Vagueness Challenge Must Fail

In the alternative, plaintiffs argue that the statute and guidelines are unconstitutionally vague.*

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* The district court did not address this point, having granted the preliminary injunctions on other grounds (SPA 138–39, 179), and for that reason the government did not address it in its opening brief. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon

To begin with, plaintiffs misstate the standard to be applied. When Congress places conditions on the receipt of federal funds disbursed under the spending clause, the "vagueness" hurdle is low: "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Finley*, 524 U.S. at 589. "In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity," and "undeniably opaque" and "imprecise" considerations may be upheld even in a First Amendment case. *Id.* at 588–89. Congress must impose conditions "unambiguously, enabling the [recipients] to exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 203; *accord Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Thus the Leadership Act need only "unambiguously" impose a condition, clear enough that plaintiffs can choose whether or not to participate in the program. "[T]he exact nature of the conditions may be largely indeterminate, provided that the existence of the conditions is clear, such that [recipients] have notice that compliance with the conditions is required." *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003) (internal quotation marks omitted).

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below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Although ultimately a matter for the Court's discretion, that general rule is stronger when, as here, the issue has not been fully briefed. *Schonfeld v. Hilliard*, 218 F.3d 164, 184 (2d Cir. 2000); *accord Reiseck v. Universal Communications of Miami, Inc.*, 591 F.3d 101, 108 (2d Cir. 2010).

Even if the due process standard (on which plaintiffs rely) were applicable, the Leadership Act would be constitutional. Under the due process clause, a statute is impermissibly vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits [or] if it authorizes or even encourages arbitrary and discriminatory enforcement." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010) (internal quotation marks omitted). The second question, regarding guidelines for enforcement, is the "more important." *Betancourt v. Bloomberg*, 448 F.3d 547, 552 (2d Cir. 2006). In addition, "[t]he degree of statutory imprecision that due process will tolerate varies with the nature of the enactment and the correlative needs for notice and protection from unequal enforcement." *Advance Pharmaceutical, Inc. v. United States*, 391 F.3d 377, 396 (2d Cir. 2004) (internal quotation marks and citations omitted). "A civil statute is generally deemed unconstitutionally vague only if it commands compliance in terms so vague and indefinite as really to be no rule or standard at all." *Id.* (internal quotation marks omitted). On the other hand, "[w]hen a statute is capable of reaching expression sheltered by the First Amendment, the vagueness doctrine demands a greater degree of specificity than in other contexts." *VIP of Berlin*, 593 F.3d at 186 (internal quotation marks omitted). That sterner test should not apply here for the reasons stated above: because plaintiffs have an adequate alternative channel for expression according to this Court's case law, their First Amendment expression is not threatened.

No matter which standard is used, or whether it is applied stringently or forgivingly, the Leadership Act

and its guidelines provide sufficient guidance. In fact, plaintiffs essentially concede as much: they admit they are able to "abide by" 22 U.S.C. § 7631(e), which prohibits them from using federal funds "to promote or advocate the legalization or practice of prostitution or sex trafficking." Pls.' Br. 42–43; (JA 366). That language is no more specific than the language they challenge in § 7631(f), and plaintiffs should not be heard to assert vagueness selectively.

Plaintiffs' argument regarding the statute revolves around their contention that it "do[es] not specify" what activities by recipients are allowed. Pls.' Br. 54–57. But they are not entitled to "meticulous specificity, which would come at the cost of flexibility and reasonable breadth." *Betancourt*, 448 F.3d at 552 (internal quotation marks omitted). "[B]ecause few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions." *United States v. Sun & Sand Imports Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984) (internal quotation marks omitted). Moreover, this Court has recognized that there will be some discretion in the application of statutes: even for a law that imposes criminal sanctions, where stringent vagueness review is warranted, "[t]he Constitution does not ban all discretion on the part of police officers or prosecutors as effective law enforcement often requires the exercise of some degree of police judgment." *Thibodeau v. Portuondo*, 486 F.3d 61, 69 (2d Cir. 2007) (internal quotation marks omitted).

Plaintiffs complain that the government did not address hypothetical situations presented as comments in the rulemaking process, Pls.' Br. 55, but no authority requires the government to do so. To the contrary, "the evaluation of whether a statute is vague as applied to a litigant must be made with respect to the litigant's actual conduct and not with respect to hypothetical situations at the periphery of the statute's scope." *VIP of Berlin*, 593 F.3d at 189 (internal quotation marks and alterations omitted). "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous." *United States v. Petrillo*, 332 U.S. 1, 7 (1947); *accord Sun & Sand*, 725 F.2d at 187–88.

Nor is plaintiffs' protestation of "significant civil liability and criminal penalties" persuasive. Pls.' Br. 21, 56–57 & n.15. The statutes they cite both have scienter requirements. Under 18 U.S.C. § 1001, a person must "knowingly and willfully" make a false statement. *United States v. Bakhtiari*, 913 F.2d 1053, 1059 n.1 (2d Cir. 1990). The False Claims Act similarly requires false statements to be made "knowingly," and defines that to mean acting with actual knowledge of, or with deliberate ignorance of or reckless disregard to, the falsity of the information. 31 U.S.C. § 3729(a) & (b); *Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001). "Such a scienter requirement generally saves a statute from unconstitutional vagueness." *Advance Pharmaceutical*, 391 F.3d at 398.

With respect to the guidelines governing the separation of a funding recipient and its affiliate, plaintiffs' argument is, in essence, that determinations

are made case by case. Pls.' Br. 57–59. That is not only permissible under the standards for vagueness, but entirely reasonable and even necessary given that "absolute precision is not possible" in language. *Bristol-Meyers Co. v. FTC*, 783 F.2d 554, 560 (2d Cir. 1984) (upholding "case-by-case analysis" against vagueness challenge); *see VIP of Berlin*, 593 F.3d at 190 n.9 (quoting approvingly from case holding that "definitions . . . must necessarily be determined on a case-by-case basis and are therefore not capable of precise mathematical calculation"); *United States v. Girard*, 601 F.2d 69, 71–72 (2d Cir. 1979) (vagueness and overbreadth can be "cured on a case by case basis"). Neither the necessarily case-specific nature of the agencies' determinations nor the guidelines' lack of absolute precision merits invalidating the rules as unconstitutionally vague.*

Finally, in the process of revising the guidelines, the agencies made clear—in the published preamble to a final rule—their willingness "to work with recipients to address individual questions regarding the separation criteria, and to help remedy violations before taking enforcement action." (SPA 202). As this Court has said, when "the agency is willing to give pre-enforcement

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* Rejecting a nearly identical challenge to the LSC regulations, as this Court did in *Velazquez I*, the Ninth Circuit held that precisely because "[w]e do not know" how LSC would apply their rules—in which, as here, "no factor is determinative and the LSC will make a case-by-case determination"—the plaintiffs had failed to demonstrate that the rules imposed harm on them. *Legal Aid Society of Hawaii*, 145 F.3d at 1027.

advice to [affected parties] concerned with the applicability" of the rules, that is a "persuasive" factor in determining that the rules are not impermissibly vague. *Sun & Sand*, 725 F.2d at 187.*

POINT II

PLAINTIFFS LACK STANDING

Plaintiffs' arguments in support of their standing to sue depend entirely on their contentions that their speech is compelled or is discriminated against based on viewpoint. *E.g.*, Pls.' Br. 21, 23, 25, 26–27. For the reasons stated above, those contentions fail, and accordingly so does plaintiffs' standing.

Plaintiffs attempt to recast the alternative channel of expression as a "licensing regime," Pls.' Br. 23–24, which in First Amendment jurisprudence is a scheme in which speech must be approved in advance by a government official. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320–21 (2002). Plaintiffs provide no justification for this characterization, and there is simply no analogy. Plaintiffs, by choosing to accept

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* Plaintiffs complain that past efforts to obtain guidance about what activities would violate the statute were not successful. Pls.' Br. 10–11, 55. Even assuming the truth of that (which is contradicted in the record (JA 389)), plaintiffs have apparently never sought the government's views since the recent rule, and rely on declarations that merely state their "fears" that they "could have faced possible charges" based on how federal agencies "may construe" the requirements (JA 745–46, 880–82).

government funding, have agreed to speech-related conditions, but may take advantage of an alternative channel for expression by working with an affiliate. No permit or license to speak is required, nor does any government official review proposed speech in advance.

In response to the government's point on associational standing, plaintiffs cite *Rumsfeld v. Forum for Academic & Institutional Rights* ("*FAIR*"), 547 U.S. 47, 64 (2006), but that case is also no help to them. In *FAIR*, a statute denied federal funding to schools that did not permit equal access to military job recruiters; every school was affected in the same way, and therefore the Supreme Court stated (in a footnote) that the association of schools had standing. *Id.* at 50–53 & n.2. Nothing about that case undercuts the government's argument here, that the Leadership Act and its guidelines will—according to plaintiffs' own contentions—affect each organization, operating under the specific conditions and in the specific countries where it works, in a different way. Gov't Br. 24–30. Nor does *Hunt v. Washington State Apple Advertising Comm'n*: the harms suffered by the association's members there fell into three clear categories, 432 U.S. 333 (1977), rather than the organization-specific alleged harms at issue here, which will vary depending on the country, the work the organization does, affiliates it may already have, and many other factors.

CONCLUSION

The preliminary injunctions should be reversed.

Dated: New York, New York
September 27, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6697 words in this brief.

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Case Name: AOSI v. USAID

Docket Number: 08-4917-cv

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