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The Leadership Act and Its Policy Requirement

CHANGING LAWS, NOT REALITY

*Our focus has to be on changing reality, not changing laws.*¹

-Nicholas D. Kristof and Sheryl WuDunn

INTRODUCTION

In 2009 alone, 2.6 million people were newly infected with HIV.² With the aim of reducing the number of people contracting HIV/AIDS, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), which provides funds to encourage partnerships between various members of the international community, including several nongovernmental organizations (NGOs).³ Such partnerships often take the form of NGO funding,⁴ administered through the U.S. Agency for International Development (USAID).⁵ While this may sound straightforward, there is a catch.

Many of the international NGOs working on the ground provide programming to individuals who are identified as having a high risk of contracting HIV, such as sex workers. As a condition of Leadership Act funding, however, recipient organizations must affirmatively adopt a policy statement, which declares that the organization opposes prostitution and

¹ NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE* 32 (2009).

² JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS), *UNAIDS REPORT ON THE GLOBAL AIDS EPIDEMIC* 16 (2010).

³ 22 U.S.C. § 7601 (2006). While the Leadership Act contains funding and programs to eradicate HIV/AIDS, Malaria and Tuberculosis, the focus of this note is the portion of the Leadership Act that targets HIV/AIDS. The Leadership Act took effect in 2003, and Congress reauthorized the act in 2008. 22 U.S.C.A. § 7601 (West 2008).

⁴ The premise underlying such public private partnerships is that all parties can work together in order to best make use of each group's individual areas of expertise, thereby strengthening the overall impact of preventing and treating HIV/AIDS throughout the developing world. 22 U.S.C. § 7621(a)(3) (2006).

⁵ 22 U.S.C.A. § 7631(a) (West 2008).

sex trafficking (Policy Requirement).⁶ Failure to adopt such a policy renders the organization ineligible for funding through the Leadership Act.⁷

Pathfinder International (Pathfinder), the Alliance for Open Society International (AOSI), and DKT International (DKT) are among the NGOs that have received funding through the Leadership Act.⁸ Through two separate lawsuits, these three NGOs have challenged the Policy Requirement's legitimacy under the First Amendment.⁹ They claim that the Policy Requirement violates the First Amendment by imposing an unconstitutional condition on the receipt of Leadership Act funds.¹⁰ The outcomes of those suits have resulted in a circuit split, which will soon be resolved by the Supreme Court.¹¹

In *DKT International, Inc. v. U.S. Agency for International Development*, the U.S. Court of Appeals for the District of Columbia Circuit held that the federal government could constitutionally require its agents to convey a specific message and similarly require the agents to refrain from participating in contrary behavior or communicating a contrary message.¹² In contrast, in *Alliance for Open Society International v. U.S. Agency for International Development (AOSI)*, the U.S. Court of Appeals for the Second Circuit found that the Policy Requirement raised significant constitutional concerns, and it therefore upheld preliminary injunctions enjoining USAID from enforcing the Policy Requirement against Leadership Act funding recipients.¹³

This note examines the inherent contradictions that exist within the Leadership Act and how the statute's Policy Requirement not only unconstitutionally impinges upon grantees' First Amendment rights but also undermines the very aim of the Leadership Act itself—preventing the spread of HIV/AIDS. By forcing grantees to adopt the government's anti-prostitution stance, the Leadership Act effectively blocks NGOs from working with a high-risk group that would likely benefit

⁶ 22 U.S.C. § 7631(f) (2006).

⁷ *Id.*

⁸ See *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 928 (2013); *DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 477 F.3d 758 (D.C. Cir. 2007).

⁹ *Alliance for Open Soc'y Int'l*, 651 F.3d at 225; *DKT Int'l*, 477 F.3d at 759.

¹⁰ *Alliance for Open Soc'y Int'l*, 651 F.3d at 225; *DKT Int'l*, 477 F.3d at 759.

¹¹ See *Alliance for Open Soc'y Int'l*, 651 F.3d 218, *cert. granted*, 133 S. Ct. 928 (2013).

¹² *DKT Int'l*, 477 F.3d at 763-64.

¹³ *Alliance for Open Soc'y Int'l*, 651 F.3d at 223.

the most from education and support regarding how to prevent or treat HIV/AIDS—girls and women working as sex workers.

Part I of this note outlines the key components of the Leadership Act. Part II surveys the unconstitutional conditions doctrine, viewpoint-based restrictions, and the government speech doctrine. Part III examines the circuit split created by *AOSI* and *DKT International*. Part IV analyzes how the Policy Requirement violates grantees' First Amendment rights and discusses its negative policy implications.

I. THE LEADERSHIP ACT

The Leadership Act's stated purpose is to "strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics."¹⁴ In particular, the Leadership Act provides resources to reduce the transmission and spread of HIV/AIDS among girls and women, whom the Act identifies as particularly vulnerable populations.¹⁵

As part of the legislative negotiations leading up to the Leadership Act, Congress issued factual findings that women are highly susceptible to contracting HIV/AIDS due largely to their vulnerable social positions in many cultures.¹⁶ Unsurprisingly, Congress also found that sex work and "other sexual victimization . . . degrad[e] . . . women and children."¹⁷ Congress acknowledged that the sex industry was one of the causes of the HIV/AIDS epidemic, and the Leadership Act notes that in Cambodia alone, up to 40 percent of sex workers have HIV.¹⁸ Finally, Congress stated that, according to the United Nations Programme on HIV/AIDS (UNAIDS), "gender issues are critical components in the effort to prevent HIV/AIDS."¹⁹

According to Congress, a strong solution to the HIV/AIDS crisis requires a holistic international approach that targets the root causes underlying the spread of HIV/AIDS.²⁰ Congress noted that such an approach requires education and work on a local level that spurs social and behavioral changes among high-risk

¹⁴ 22 U.S.C.A. § 7603 (West 2008).

¹⁵ *Id.* § 7603(3)(A), (D).

¹⁶ *Id.* § 7601(3)(B).

¹⁷ *Id.* § 7601(23).

¹⁸ *Id.*

¹⁹ *Id.* § 7601(36)(C).

²⁰ *Id.* § 7601(21).

populations.²¹ In order to implement this holistic, localized, and targeted approach, Congress made Leadership Act funding available to NGOs.²² It found that collaborative work with NGOs is an essential component to the international community's success in its efforts to vanquish HIV/AIDS.²³ Therefore, Congress designed the Leadership Act to prioritize the maintenance and development of partnerships with NGOs.²⁴

Congress, however, imposed a crucial and highly restrictive condition on its funding.²⁵ The Policy Requirement reads:

No funds made available to carry out this chapter, or any amendment made by this chapter, 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.²⁶

Concerns about the constitutionality of the Policy Requirement arose almost immediately. In February 2004, shortly after the Leadership Act took effect, the Department of Justice's Office of Legal Counsel (OLC) warned that the Policy Requirement would be unconstitutional if applied to U.S.-based organizations.²⁷ USAID heeded this warning for several months

²¹ *Id.* § 7601(21)(C) (“The magnitude and scope of the HIV/AIDS crisis demands a comprehensive, long-term, international response . . . including . . . development and implementation of national and community-based multisector strategies that address the impact of HIV/AIDS on the individual, family, community, and national and increase the participation of at-risk populations in programs designed to encourage behavioral and social change . . .”).

²² *Id.* § 7631(c).

²³ *Id.* § 7621(a)(4) (“Sustaining existing public-private partnerships and building new ones are critical to the success of the international community's efforts to combat HIV/AIDS and other infectious diseases around the globe.”).

²⁴ *Id.* § 7621(b)(1) (“It is the sense of Congress that—the sustainment and promotion of public-private partnerships should be a priority element of the strategy pursued by the United States to combat the HIV/AIDS pandemic and other global health crises[.]”).

²⁵ 22 U.S.C. § 7631(e)-(f) (2006).

²⁶ *Id.* § 7631(f).

²⁷ *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 225 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 928 (2013). The OLC initially refused to release the memorandum that cautioned that the Policy Requirement could not be constitutionally enforced against U.S. organizations. The Brennan Center for Justice, which represents AOSI, Pathfinder International, Global Health Council, InterAction and the Open Society Institute in the Second Circuit proceedings filed a Freedom of Information Act (FOIA) request to recover that memorandum and any other materials from the OLC relating to enforcement of the Policy Requirement. *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Justice*, No. 09 Civ. 8756 (VM), 2011 WL 4001146, at *1-2 (S.D.N.Y. Aug. 30, 2011), *aff'd in part, rev'd in part*, 697 F.3d

and did not enforce the Policy Requirement.²⁸ In September 2004, however, the OLC changed its position and asserted that “there are reasonable arguments to support the[] constitutionality’ of applying the Policy Requirement to U.S.-based organizations.”²⁹ So, in 2005, USAID began to enforce the Policy Requirement against its U.S.-based grantees.³⁰

In 2007, to further clarify the Policy Requirement and guard against legal action, the Department of Health and Human Services (HHS) and USAID promulgated guidelines clarifying the scope of the Policy Requirement’s application.³¹ The guidelines stipulate that Leadership Act recipients may work with affiliate organizations that do not adopt an anti-prostitution policy statement, as long as the recipient maintains “objective integrity and independence from any affiliated organization that engages in activities *inconsistent* with the recipient’s opposition to the practices of prostitution.”³² Importantly, however, the guidelines fail to explain what constitutes activity that would be “inconsistent” with the Policy Requirement. The application of the Policy Requirement raised immediate First Amendment concerns under the unconstitutional conditions doctrine and spurred additional discussion of the government speech doctrine, both of which will be explained in depth in the following section.

II. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE, VIEWPOINT BASED DISCRIMINATION, AND THE RISE OF THE GOVERNMENT SPEECH DOCTRINE

This part outlines the jurisprudence forming the core of the unconstitutional conditions doctrine, explains viewpoint-

184, 208-09 (2d Cir. 2012). To date, the OLC has released a portion of the February 2004 memorandum, though with large portions redacted. Constitutionally Permissible Funding Restrictions for Sex Trafficking and HIV/AIDS Prevention, Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of Justice, 2011 WL 4001146, (S.D.N.Y. Aug. 30, 2011) (No. 09-cv-8756-VM), available at http://brennan.3cdn.net/2fdb4d2e5c42284e0a_fcm6bxtl3.pdf.

²⁸ *Alliance for Open Soc’y Int’l*, 651 F.3d at 225 (alteration in original).

²⁹ *Id.* (quoting the OLC). The OLC declined to release the September 2004 opinion that deemed the Policy Requirement to be constitutional. The U.S. District Court for the Southern District of New York granted the Brennan Center’s FOIA request in August 2011. *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law*, 2011 WL 4001146, at *7. However, the September 2004 OLC memorandum was not covered by the court’s order. *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U. S. Dep’t of Justice*, 697 F.3d 184, 208-09 (2d Cir. 2012).

³⁰ *Alliance for Open Soc’y Int’l*, 651 F.3d at 225.

³¹ *Id.* at 225-26.

³² 45 C.F.R. § 89.3 (2010) (emphasis added).

based discrimination, and discusses the government speech doctrine. The confusing and complicated nature of the doctrines and relevant case law led to the circuit split between *DKT International* and *AOSI*, and the Supreme Court should aim to clarify the doctrines when it decides *AOSI*.

A. *The Unconstitutional Conditions Doctrine*

Congress passed the Leadership Act pursuant to the Spending Clause of the Constitution, which grants it the power to “provide for the common Defense and general Welfare of the United States.”³³ Pursuant to its spending power, Congress may condition its award of funding on compliance with “federal statutory and administrative directives.”³⁴ This concept has given rise to the unconstitutional conditions doctrine, which at its most basic level, stands for the idea that the federal government may not condition the “receipt of a benefit or subsidy [in a manner that impinges] upon a recipient’s constitutionally protected rights.”³⁵

Analysis under the unconstitutional conditions doctrine contains two key elements: a “conditioned government benefit”³⁶ and an “affected constitutional right.”³⁷ The unconstitutional conditions doctrine applies to all government-conferred benefits, even gratuitous benefits—that is, those benefits that the government was not compelled to provide in the first place,³⁸ such as funding through the Leadership Act. Importantly, the government cannot grant a benefit on a whim or without reason; benefits and spending must be in pursuit of the “general Welfare of the United States.”³⁹

³³ U.S. CONST. art I, § 8, cl. 1.

³⁴ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotation marks omitted).

³⁵ *Alliance for Open Soc’y Int’l*, 651 F.3d at 231 (citing *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). Scholar Kathleen Sullivan explains that, “Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.” Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421-22 (1989). Once a benefit impinges on a constitutionally protected right, the unconstitutional conditions doctrine then dictates that the condition is subject to strict scrutiny. *Id.*

³⁶ Sullivan, *supra* note 35, at 1422.

³⁷ *Id.*

³⁸ Kathleen Sullivan characterizes such benefits as “gratuities” or “matters of political grace to be deferentially reviewed.” *Id.* at 1424.

³⁹ U.S. CONST. art. I, § 8, cl. 1; *Dole*, 483 U.S. at 207; Sullivan, *supra* note 35, at 1425 n.35.

While the unconstitutional conditions doctrine applies to all benefits, the doctrine applies only to those constitutional rights that turn on the “exercise of autonomous choice by the rightholder,”⁴⁰ such as freedom of speech. In order to trigger the unconstitutional conditions doctrine, the right in question must be one that is subject to strict scrutiny, a standard of review dictating that a government condition that impinges on a constitutionally protected right is unconstitutional unless “it is narrowly tailored to serve a compelling government interest.”⁴¹ The Second Circuit, through its synthesis of Supreme Court jurisprudence, found that the infringements on speech in *AOSI* and *DKT International* are subject to strict scrutiny.⁴²

The unconstitutional conditions doctrine and its corresponding case law have been characterized as a “minefield”⁴³ and a “troubled area of jurisprudence in which a court ought not entangle itself unnecessarily.”⁴⁴ This note examines the ambiguities of the doctrine, which lie at the heart of the circuit split. While there are numerous Supreme Court cases that analyze the unconstitutional conditions doctrine, the cases of *Regan v. Taxation with Representation*,⁴⁵ *FCC v. League of Women Voters of California*,⁴⁶ and *Rust v. Sullivan*⁴⁷ provide the basis for the unconstitutional conditions doctrine’s application in *AOSI* and *DKT International*.

In *Regan*, Taxation With Representation (TWR), a nonprofit organization, filed suit after the Internal Revenue Service denied its application for tax exempt status under § 501(c)(3) because TWR engaged in substantial political lobbying, which § 501(c)(3) prohibits.⁴⁸ Under *Regan*, the Court held that Congress’s choice to decline to subsidize TWR’s political lobbying did not violate that organization’s First Amendment rights, and therefore the denial of subsidies was

⁴⁰ Sullivan, *supra* note 35, at 1426.

⁴¹ *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984); Sullivan, *supra* note 35, at 1427.

⁴² *Alliance for Open Soc’y Int’l*, 651 F.3d at 236; *see also* *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 430 F. Supp. 2d 222, 258-61 (S.D.N.Y. 2006), *aff’d*, 651 F.3d 218 (2d Cir. 2011) (synthesizing Supreme Court unconstitutional conditions jurisprudence and application of strict scrutiny to instances when a condition improperly infringed upon a recipient’s First Amendment rights).

⁴³ Sullivan, *supra* note 35, at 1415-16.

⁴⁴ *Rust v. Sullivan*, 500 U.S. 173, 205 (1991).

⁴⁵ 461 U.S. 540 (1983).

⁴⁶ 468 U.S. 364 (1984).

⁴⁷ 500 U.S. 173 (1991).

⁴⁸ *Regan*, 461 U.S. at 543-45.

not an unconstitutional condition.⁴⁹ The Court construed the prohibition against the use of tax-deductible donations for lobbying as a choice by Congress to simply not subsidize TWR's lobbying activities with public funds—a decision that the Court previously upheld in *Cammarano v. United States*.⁵⁰ However, the Court noted that if TWR made use of a dual structure, it could continue to use tax-deductible donations for its publishing and litigation activities under § 501(c)(3)⁵¹ and also receive non-tax-deductible donations for its lobbying activities under § 501(c)(4). The Court reasoned that such a structure would not raise constitutional concerns but rather would reflect a Congressional decision to provide funding to support activities it deemed to be in the public interest.⁵² The choice not to subsidize TWR's lobbying activities indicated Congress's concern that the organization might use public funds to “promote the private interests of their members”—a benefit that would effectively be “at the expense of taxpayers at large.”⁵³

A year later, the unconstitutional conditions doctrine lay at the heart of *League of Women Voters*, when the Court held that Congress could not constitutionally condition the receipt of a grant on the requirement that grantee stations refrain from any and all editorializing.⁵⁴ The Court explained that editorializing warrants heavy First Amendment protections⁵⁵ and held that restrictions on broadcast outlets may only stand when they satisfy heightened scrutiny—that is, when “the restriction is narrowly tailored to further a substantial governmental

⁴⁹ *Id.* at 550-51. In *Regan*, the plaintiff, nonprofit organization Taxation Without Representation (TWR) filed suit after the Internal Revenue Service (IRS) denied TWR's application for tax exempt status as a § 501(c)(3) organization. *Id.* at 542. The IRS denied TWR's application for § 501(c)(3) status because TWR engaged in lobbying, a prohibited activity under § 501(c)(3). TWR claimed that the prohibition against lobbying under § 501(c)(3) violated TWR's First Amendment rights because it was an “unconstitutional condition on the receipt of tax-deductible contributions.” *Id.* at 545 (internal quotation marks omitted). The Court disagreed, finding the § 501(c)(3) prohibition against lobbying a constitutional condition. *Id.* at 546.

⁵⁰ *Id.* (citing *Cammarano v. United States*, 358 U.S. 498 (1959)). “Congress is not required by the First Amendment to subsidize lobbying. In these cases, as in *Cammarano*, Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying.” *Id.* (internal citations omitted).

⁵¹ *Id.* at 544.

⁵² *Id.* at 550.

⁵³ *Id.*

⁵⁴ *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984). Congress authorized the funding in question through the Public Broadcasting Act of 1967. *Id.* at 366.

⁵⁵ *Id.* at 375.

interest.”⁵⁶ In this case, the ban on editorializing was insufficiently tailored to serve the government’s stated purpose of protecting local broadcast stations from improper government influence.⁵⁷ Therefore, the Court found the ban unconstitutional.⁵⁸

The Court synthesized the dual model approach of *Regan* with the reasoning of *League of Women Voters* in *Rust v. Sullivan*.⁵⁹ In *Rust*, the Court found that a provision of Title X of the Public Health Service Act, which provided funding for family planning services on the condition that “[n]one of the funds . . . shall be used in programs where abortion is a method of family planning,” was constitutional.⁶⁰ The Court interpreted the condition as a constitutionally permissible “value judgment favoring childbirth over abortion.”⁶¹ It reasoned that the statute’s limits represented the government’s decision to fund an activity that the government thought was in the public’s best interest (preventative family planning measures) and decline to fund an alternative family planning option (abortion).⁶²

Rust characterized the Title X provision as simply requiring that federal funds support the programs and projects for which they were authorized—in this case, a Title X project aimed to promote preventative family planning, not abortion.⁶³ The Court emphasized that “the [g]overnment [was] not denying a benefit to anyone,”⁶⁴ nor was the government forcing grantees to refrain from discussing abortion.⁶⁵ Rather, grantees

⁵⁶ *Id.* at 380.

⁵⁷ *Id.* at 389, 398-99.

⁵⁸ *Id.* at 398-99. *League of Women Voters* revisited the dual structure outlined in *Regan*. *Id.* at 389. The Public Broadcasting Act did not provide a framework for bifurcated grantee stations, but the Court noted that if Congress amended the Public Broadcasting Act to allow an affiliate grantee station to editorialize with nonfederal funds (and similarly provided that the federal fund recipient could not editorialize), then that sort of dual model would be constitutional under *Regan*. *Id.* at 400. Given the absence of such a provision, however, the Court declined to follow *Regan* and held that the ban unconstitutionally limited grantee stations’ freedom of the press under the First Amendment. *Id.* at 402.

⁵⁹ *Rust v. Sullivan*, 500 U.S. 173 (1991). Title X grantees filed suit against the Secretary of Health and Human Services, arguing that the restriction on abortion-related speech and counseling was unconstitutional because the restriction conditioned receipt of the benefit of Title X funding on relinquishing a constitutional right to speak freely about abortion. *Id.* at 181, 196.

⁶⁰ *Id.* at 178 (alterations in original) (internal quotations marks omitted).

⁶¹ *Id.* at 192-93 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)). Notably, the Court applied this same analysis in *Regan*. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983).

⁶² *Rust*, 500 U.S. at 193.

⁶³ *Id.* at 196.

⁶⁴ *Id.*

⁶⁵ *Id.*

could continue to “perform abortions, provide abortion-related services, and engage in abortion advocacy” so long as those activities were carried out “through programs that are separate and independent from the program that receives Title X funds”⁶⁶—in other words, through an affiliate organization like the 501(c)(4) discussed in *Regan*. Finally, the *Rust* Court clearly articulated the scenarios in which an unconstitutional condition typically exists: “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.”⁶⁷ The facts in *Rust* and the provisions of Title X revealed no such condition. The Court’s analysis laid the foundation for the development of the government speech doctrine as an exception to viewpoint-based discrimination.

B. Viewpoint-Based Discrimination and the Government Speech Doctrine

At its core, the First Amendment stands for freedom of expression, and it has given rise to jurisprudence that clearly states that the government may not discriminate against a certain viewpoint simply because it disagrees with it or deems that viewpoint to be unsavory.⁶⁸ In other words, the government may not engage in viewpoint-based discrimination. Professor Geoffrey R. Stone illuminates the distinction between viewpoint-based discrimination and content-neutral regulations through a

⁶⁶ *Id.* (citing 42 C.F.R. § 59.9 (1989)).

⁶⁷ *Id.* at 197.

⁶⁸ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (“Discrimination against speech because of its message is presumed to be unconstitutional.”); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes [the First Amendment].”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (“The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.”); see also Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 703 (2011) (“The first rule of free speech theory and doctrine is that the government may not discriminate against a particular viewpoint based simply on its disagreement with that viewpoint.”); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 428 (1996) (“[T]he government may not restrict expressive activities because it disagrees with or disapproves of the ideas espoused by the speaker.”); Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 367 (2009) (“One of the most familiar axioms in all of First Amendment law is the general rule that the government is not allowed to restrict private expression based on viewpoint.”).

simple example: a law that bans all billboards is content neutral, whereas a law that bans “all criticism of the anti-billboard law” is viewpoint-based.⁶⁹ The latter law is viewpoint-based because it restricts communication based on its content, and more specifically, based on the viewpoint in opposition to the anti-billboard law.⁷⁰ When a government regulation on private speech is viewpoint-based, then it is subject to strict scrutiny, and the government must show that the regulation is “narrowly tailored to serve a compelling government interest.”⁷¹ Such a restriction is almost always found to violate the First Amendment.⁷²

The critical issue in determining whether the government is engaged in viewpoint-based discrimination is best resolved by the following inquiry: What is the government’s purpose in regulating the speech in question?⁷³ If the purpose of the restriction is to silence an unpopular viewpoint or a viewpoint the government disagrees with, then that restriction is unconstitutional.⁷⁴ If, on the other hand, the purpose of the restriction is to ensure accurate portrayal of the government’s own policy or define the scope of a government program, then such a restriction, *even if it is viewpoint-based*, is constitutional.⁷⁵ Today, this concept represents the core of the government speech doctrine.

⁶⁹ Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197-98 (1983).

⁷⁰ *Id.* at 198.

⁷¹ *Turner Broad. Sys., Inc.*, 512 U.S. at 642 (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”); *see* *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“For the [s]tate to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”); Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 596 (2003) (“A content-based government speech restriction receives the most rigorous scrutiny, which is almost always fatal.”); Kagan, *supra* note 68, at 443 (“Formulations of the standard used to review content-based action vary, but the Court most often requires the government to show a compelling interest that could not be attained through less restrictive means. Application of this standard usually leads to a law’s invalidation.”).

⁷² *Rosenberger*, 515 U.S. at 829; *Turner Broad. Sys., Inc.*, 512 U.S. at 641; *Simon & Schuster, Inc.*, 502 U.S. at 116.

⁷³ *See* *Turner Broad. Sys., Inc.*, 512 U.S. at 642 (“[T]he ‘principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.’” (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))).

⁷⁴ *Rosenberger*, 515 U.S. at 828-29; *Simon & Schuster*, 502 U.S. at 116; *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

⁷⁵ *Rosenberger*, 515 U.S. at 833 (citing *Rust v. Sullivan*, 500 U.S. 173, 194, 196 (1991)).

Scholars and the Supreme Court alike identify *Rust* as the origin of the government speech doctrine,⁷⁶ although *Rust* did not expressly name the doctrine. *Rust* held that the government could regulate private citizens' speech as it related to a government-funded program.⁷⁷ Under the government speech doctrine, when the government uses private speakers to convey a government position or viewpoint, it may limit the private speakers' speech in order to ensure an accurate portrayal of the government's position.⁷⁸ In other words, the private speakers are conveying "government speech," and the First Amendment "does not regulate government speech."⁷⁹

For example, in *Rust*, the government chose to "selectively fund a program to encourage certain activities it believe[d] to be in the public interest, without at the same time funding an alternative program."⁸⁰ In particular, through Title X funding, the government promoted its view favoring preventative family planning over abortion. The regulations corresponding to Title X defined the scope of funded programs to exclude abortion and include preventative family planning measures.⁸¹ In turn, healthcare providers administering the programs on the ground conveyed the government message promoting preventative family planning, thereby articulating the government's speech.⁸² Accordingly, the regulations prohibiting Title X grantees from engaging in abortion-related speech were narrowly tailored to serve the programmatic purpose of Title X—to promote preventative family planning.⁸³

The government speech doctrine is paradoxical to the First Amendment. While the First Amendment prohibits viewpoint-based discrimination, the government speech doctrine

⁷⁶ *Id.* at 833. *Rosenberger* articulated that public funding intended to facilitate expression through something like student publications, could not be conditioned on the content of that expression. *Id.* at 827-28. To do so constitutes unconstitutional viewpoint discrimination. *Id.* at 834. *Rosenberger* noted, however, that when funding aims to facilitate expression of government viewpoints and perspectives through private speakers, as was the case with the Title X programs in *Rust*, then the government may impose conditions "to ensure that its message is neither garbled nor distorted by the grantee." *Id.* at 833; Blocher, *supra* note 68 at 708; Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 124 (2009).

⁷⁷ Park, *supra* note 76, at 125.

⁷⁸ *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009) (citations omitted); *Rosenberger*, 515 U.S. at 833.

⁷⁹ *Pleasant Grove City, Utah*, 555 U.S. at 467.

⁸⁰ *Rust*, 500 U.S. at 193.

⁸¹ *Id.* at 179-80.

⁸² *Id.* at 198-99.

⁸³ *Id.* at 195 n.4 (1991); Park, *supra* note 76, at 126.

carves out a loophole and creates instances when the government can do just that: regulate speech related to a specific viewpoint when doing so is in the service of communicating the government's own perspective.⁸⁴ Quite simply, when there is government speech, the First Amendment and its concurrent regulations do not apply.

The Supreme Court, however, has yet to offer clear guidelines on how to determine whether speech qualifies as government speech.⁸⁵ The Court has dodged the question, stating in a recent case that “[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf . . . , but this case does not present such a situation.”⁸⁶ Justice Stevens, in his dissent from *Pleasant Grove City, Utah v. Summum*, described the government speech doctrine as “recently minted,”⁸⁷ and Justice Souter cautioned that “it would do well for [the Supreme Court] to go slow in setting its bounds.”⁸⁸ While the Supreme Court continues to sort out the boundaries and elements of government speech, the U.S. Court of Appeals for the Tenth Circuit developed what has become the leading test for identifying government speech.⁸⁹ In *Wells v. City and County of Denver*, the Tenth Circuit considered four factors in determining whether speech qualifies as government speech:

- (1) the central “purpose” of the program in which the speech in question occurs;
- (2) the degree of “editorial control” exercised by the government or private entities over the content of the speech;
- (3) the identity of the “literal speaker”; and
- (4) whether the government or the private entity bears the “ultimate responsibility” for the content of the speech.⁹⁰

Justice O’Connor, sitting by designation on the U.S. Court of Appeals for the Fourth Circuit, adopted the *Wells* test,⁹¹ as has the Ninth Circuit.⁹² Whether the Leadership Act’s Policy

⁸⁴ Olree, *supra* note 68, at 368 (“[I]f the speech is the government’s own speech, the viewpoint restrictions are permissible, but if the speech is private speech facilitated by government resources, viewpoint restrictions are generally impermissible.”).

⁸⁵ *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001).

⁸⁶ *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009).

⁸⁷ *Id.* at 481.

⁸⁸ *Id.* at 485.

⁸⁹ *Wells*, 257 F.3d at 1140.

⁹⁰ *Turner v. City Council of Fredericksburg, Va.*, 534 F.3d 352, 354 (4th Cir. 2008); *accord Wells*, 257 F.3d at 1141.

⁹¹ *Turner*, 534 F.3d at 354.

⁹² *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008).

Requirement constitutes government speech lies at the heart of *DKT International* and *AOSI*.

III. THE CIRCUIT SPLIT

A. DKT International v. U.S. Agency for International Development

DKT is an NGO that engages in international family planning education and HIV/AIDS prevention; DKT is also a subgrantee of Family Health International (FHI).⁹³ In June 2005, FHI provided DKT with an agreement to operate a program that distributes condoms and condom lubricants, funded by USAID.⁹⁴ The agreement included “a certification that ‘DKT has a policy explicitly opposing prostitution and sex trafficking.’”⁹⁵ But DKT refused to adopt that policy and did not sign the agreement.⁹⁶ As a result, FHI cancelled DKT’s grant and declined to provide DKT with additional funding.⁹⁷

DKT refused to adopt the anti-prostitution policy because it was concerned that doing so would “stigmatiz[e] and alienat[e]”⁹⁸ sex workers, who are extremely vulnerable to contracting HIV/AIDS.⁹⁹ DKT brought suit against USAID in the U.S. District Court for the District of Columbia, alleging that the Policy Requirement violated DKT’s First Amendment rights by restraining its speech in other areas of work for which it did not receive federal funds. Additionally, DKT alleged that the Policy Requirement “force[d] DKT to convey a message with which it does not necessarily agree.”¹⁰⁰ The district court sided with DKT, finding that the Policy Requirement violated the First Amendment because it “constitute[d] [a] view point based restriction[] on speech” and is “not narrowly tailored to further a compelling government interest.”¹⁰¹

The Court of Appeals for the District of Columbia Circuit reversed.¹⁰² The court distinguished *League of Women*

⁹³ DKT Int’l, Inc. v. U.S. Agency for Int’l Dev., 477 F.3d 758, 760 (D.C. Cir. 2007).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 761.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ DKT Int’l, Inc. v. U.S. Agency for Int’l Dev., 435 F. Supp. 2d 5, 18 (D.D.C. 2006), *rev’d*, 477 F.3d 758 (D.C. Cir. 2007).

¹⁰² DKT Int’l, Inc. v. U.S. Agency for Int’l Dev., 477 F.3d 758, 759 (D.C. Cir. 2007).

Voters and relied on *Rust* to find that when the government offers funding to promote its own policy—in this case, fighting HIV/AIDS and discouraging prostitution—then it may impose conditions to ensure that grantees deliver the government policy and do not engage in contrary behavior or convey contradictory messages.¹⁰³ The D.C. Circuit supported its position by citing the government’s brief, which stated:

It would make little sense for the government to provide billions of dollars to encourage the reduction of HIV/AIDS behavioral risks, including prostitution and sex trafficking, and yet to engage as partners in this effort organizations that are neutral toward or even actively promote the same practices sought to be eradicated. The effectiveness of the government’s viewpoint-based program would be substantially undermined, and the government’s message confused, if the organizations hired to implement that program by providing HIV/AIDS programs and services to the public could advance an opposite viewpoint in their privately-funded operations.¹⁰⁴

The court concluded that the Policy Requirement did not compel DKT to promote a certain policy, but created a condition whereby DKT had to “communicate the message”¹⁰⁵ behind the policy that the government chose to fund. The court therefore found the Policy Requirement to be constitutional.¹⁰⁶

B. Alliance for Open Society International v. U.S. Agency for International Development

Four years after the D.C. Circuit Court found the Policy Requirement constitutional, the Court of Appeals for the Second Circuit arrived at the opposite conclusion, holding that the Policy Requirement was unconstitutional.¹⁰⁷ In *AOSI*, two NGOs, Pathfinder and AOSI, sought a preliminary injunction against USAID and HHS (among others), which would bar enforcement of the Policy Requirement.¹⁰⁸ Pathfinder and AOSI argued that the Policy Requirement limited the work they could carry out with funding from private donors, and that it restricted their ability to express ideas that may be “insufficiently opposed to prostitution” under the Policy Requirement.¹⁰⁹

¹⁰³ *Id.* at 761-62.

¹⁰⁴ *Id.* at 762-63 (quoting USAID brief).

¹⁰⁵ *Id.* at 764.

¹⁰⁶ *Id.*

¹⁰⁷ *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651 F.3d 218, 223-24 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 928 (2013).

¹⁰⁸ *Id.* at 225.

¹⁰⁹ *Id.*

AOSI's program, the Drug Demand Reduction Program, targets high-risk groups, including sex workers, to help contain the use of injection drugs in Uzbekistan, Tajikistan, and Kyrgyzstan.¹¹⁰ The program is funded by USAID and by a sizeable grant from the Open Society Institute.¹¹¹ Pathfinder runs a number of programs addressing HIV/AIDS prevention, including a program in India that organizes sex workers, and educates and encourages them to engage in safe sex practices.¹¹² The program also includes elements of community outreach that entail working with pimps and brothel owners.¹¹³

In order to comply with the Policy Requirement, both AOSI and Pathfinder adopted policy statements opposing prostitution.¹¹⁴ Shortly thereafter, both NGOs filed suit against USAID.¹¹⁵ AOSI claimed that the Policy Requirement forced "the organization to engage in speech against its own will,"¹¹⁶ and Pathfinder argued that the Policy Requirement prevented the organization from continuing its work in educating and organizing sex workers, which was made possible through private funding.¹¹⁷ Both organizations sought a declaratory judgment limiting the scope of the Policy Requirement's application or, in the alternative, declaring the Policy Requirement unconstitutional.¹¹⁸

The U.S. District Court for the Southern District of New York applied strict scrutiny to the Policy Requirement, finding that "when a spending enactment substantially impairs First Amendment protected activity conducted by private entities with private funds as a condition of receiving a government benefit, heightened scrutiny is warranted."¹¹⁹ Under strict scrutiny analysis, the court asked whether the Policy Requirement was "narrowly tailored to fit Congress's intent."¹²⁰ The court held that the Policy Requirement was not narrowly tailored because it acted as "a blanket ban on certain constitutionally protected

¹¹⁰ *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222, 230 (S.D.N.Y. 2006).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Alliance for Open Soc'y Int'l, Inc.*, 651 F.3d at 228.

¹¹⁵ *Alliance for Open Soc'y Int'l, Inc.*, 430 F. Supp. 2d at 237.

¹¹⁶ *Id.* at 238.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 259.

¹²⁰ *Id.* at 267 (internal quotation marks and citations omitted).

speech”¹²¹ without serving the government’s stated purpose of fighting HIV/AIDS.¹²² As a result, the court granted a preliminary injunction enjoining further enforcement of the Policy Requirement.¹²³

On appeal, the defendants informed the Second Circuit that they were developing guidelines that they believed would mitigate the constitutional issues underlying the Policy Requirement.¹²⁴ The Second Circuit therefore remanded the case to the district court for findings on whether the preliminary injunction still constituted appropriate relief.¹²⁵ On remand, the district court found that the injunction remained an appropriate remedy because, even though the guidelines appeared to bring the Policy Requirement in line with the dual structure approved in *Rust*, they nevertheless failed to address the fact that the Policy Requirement compelled speech.¹²⁶ Accordingly, defendants’ revised guidelines failed to mitigate First Amendment concerns.¹²⁷

On appeal a second time, the Second Circuit affirmed the district court’s findings. The Second Circuit measured the Policy Requirement against the unconstitutional conditions doctrine, finding that it far exceeded the funding conditions outlined in *Regan*, *League of Women Voters*, and *Rust*—cases in which the government prohibited funding recipients from engaging in certain types of speech.¹²⁸ The court’s concern was not simply that the Policy Requirement limits speech, but that it *compels* speech.¹²⁹ Moreover, the speech that the Policy Requirement compels is not neutral but is instead viewpoint-based, because it requires Leadership Act grantees to espouse the government’s anti-prostitution perspective.¹³⁰ As established in *Rosenberger v. Rector & Visitors of the University of Virginia*,¹³¹ “viewpoint-based intrusions on free speech offend the First

¹²¹ *Id.* at 270.

¹²² *Id.* at 269.

¹²³ *Id.* at 278.

¹²⁴ *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651 F.3d 218, 226 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 928 (2013).

¹²⁵ *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 254 F. App’x 843, 846 (2d Cir. 2007), *aff’d*, 651 F.3d 218 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 928 (2013).

¹²⁶ *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 570 F. Supp. 2d 533, 549 (S.D.N.Y. 2008), *aff’d*, 651 F.3d 218 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 928 (2013).

¹²⁷ *Id.*

¹²⁸ *Alliance for Open Soc’y Int’l, Inc.*, 651 F.3d at 234.

¹²⁹ *Id.*

¹³⁰ *Id.* at 234-35.

¹³¹ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995).

Amendment.”¹³² Because the Policy Requirement compels viewpoint-based speech, the Second Circuit held that it was subject to heightened scrutiny.¹³³ The court then found that the Policy Requirement was not narrowly tailored to serve the Leadership Act’s purpose of fighting HIV/AIDS.¹³⁴ The court concluded that the Policy Requirement improperly compelled grantees to adopt and convey the government’s position opposing prostitution, and it found that Pathfinder and AOSI demonstrated a likelihood of success on the merits of their First Amendment claim.¹³⁵ The Supreme Court granted certiorari for the case on January 11, 2013.¹³⁶

IV. ANALYSIS

As established above, the Policy Requirement created a circuit split between the Second Circuit and the D.C. Circuit. This note contends that the D.C. Circuit’s analysis in *DKT International* erroneously classified the Policy Requirement as government speech—by equating it with the Title X speech restrictions that the Court deemed acceptable in *Rust*—and therefore bestowed upon it the concomitant allowance of viewpoint-based discrimination.¹³⁷ The Second Circuit, on the other hand, recognized the Policy Requirement as an impermissible viewpoint-based restriction on private speech, one that is overly broad and fails to serve the underlying purpose of the Leadership Act—to eradicate HIV/AIDS.¹³⁸ The Second Circuit’s analysis represents not only a logical extension of the unconstitutional conditions doctrine, but also a strong public-policy decision that supports the global battle against HIV/AIDS.

A. *The Purpose of the Leadership Act and the Policy Requirement*

To determine the constitutionality of the Policy Requirement and its proper categorization as either viewpoint-based discrimination or government speech, it is necessary, first, to examine its purpose within the context of the

¹³² *Alliance for Open Soc’y Int’l, Inc.*, 651 F.3d at 235 (citing *Rosenberger*, 515 U.S. at 828).

¹³³ *Id.* at 236.

¹³⁴ *Id.* at 237.

¹³⁵ *Id.* at 239.

¹³⁶ *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l*, 133 S. Ct. 928, 928 (2013).

¹³⁷ *DKT Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 477 F.3d 758, 763-64 (D.C. Cir. 2007).

¹³⁸ *Alliance for Open Soc’y Int’l, Inc.*, 651 F.3d at 237-39.

Leadership Act as a whole.¹³⁹ The bottom line is that the purpose of the Leadership Act is to strengthen U.S. leadership and efficacy in an ongoing, global battle against HIV/AIDS.¹⁴⁰ To achieve this goal, the Leadership Act provides for consideration of gender equity issues and targeted outreach toward vulnerable populations.¹⁴¹ Sex workers constitute a vulnerable population, and Congress points to the sex industry as one of the causes of the HIV/AIDS epidemic.¹⁴² Additionally, and quite significantly, the Leadership Act explicitly recognizes that NGOs have valuable on-the-ground experience and expertise, which make them a critical part of the U.S. effort to reduce the spread of HIV/AIDS.¹⁴³

Within the context of the Leadership Act's overarching purpose to eradicate HIV/AIDS, the Policy Requirement simply does not belong. On its face, the Policy Requirement might appear to further the Leadership Act's consideration of gender equity issues—after all, the Policy Requirement condemns prostitution and any support of prostitution, seemingly in support of women's autonomy.¹⁴⁴ Moreover, prostitution is nearly universally abhorred. But, this is an oversimplification. The Policy Requirement is actually the manifestation of conservative political ideologies, which Republican and Democratic representatives hotly debated while drafting the statute. Republican desires to include the requirement divorced the ideal of ending prostitution from the reality of preventing and combating HIV/AIDS. This ratification of conservative ideals subsequently tied the hands of the NGOs that Congress wanted to partner with.

Republican Congressman Chris Smith, known for his strong pro-life politics and socially conservative perspective, introduced the Policy Requirement as an amendment to the Leadership Act, and the House Committee on International Relations approved the amendment by a slim margin, "24 ayes to 22 noes."¹⁴⁵ After approval by both the House of Representatives and the Senate, the Leadership Act returned

¹³⁹ See *supra* notes 73-79 and accompanying text.

¹⁴⁰ 22 U.S.C.A. § 7603 (West 2012).

¹⁴¹ *Id.* § 7601(21)(C).

¹⁴² *Id.* § 7601(23).

¹⁴³ *Id.* §§ 7601(18), 7621(a)(2)-(4).

¹⁴⁴ *Id.* § 7631(f).

¹⁴⁵ H.R. REP. NO. 108-60, at 29 (2003); Aziza Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women's Health*, 34 HARV. J. L. & GENDER 225, 243 (2011).

to the House for final approval of amendments proposed by the Senate. During that session, Congressman Todd Akin (R-NJ) voiced additional support for the Policy Requirement, stating, “We have received word that there are groups who actively promote prostitution on their Web site, that they have received U.S. tax dollars in the past, and that is why [the Policy Requirement] is important and why it must be enforced.”¹⁴⁶ In his statement of support, however, Congressman Akin did not offer any evidence of how grantees promoted prostitution.¹⁴⁷

Opposition to the Policy Requirement came solely from the other side of the aisle. Democratic Congressman José Serrano (D-NY) cautioned that the amendment was “overreaching” and “too broad.”¹⁴⁸ Congresswoman Barbara Lee (D-CA) characterized the Policy Requirement as “a bad piece of public health policy” and proceeded to describe it as “counterproductive to achieving our long term goals of reducing the spread of the disease, and treating those already infected.”¹⁴⁹ Finally, Congresswoman Lee cut to the heart of the Policy Requirement, articulating the issue that has become the core of the dispute between NGOs and USAID: “How can an organization that is seeking to mitigate the risk of infection for sex workers reach out to these women when we require them to have an affirmative policy in place that would turn these very women away from receiving education and treatment for HIV/AIDS?”¹⁵⁰

Nicholas Kristof, *New York Times* columnist, author, and human rights advocate, suggests that feminist ideologies, morality, and most importantly, politics, create division over a fact that both sides of the aisle actually agree on—that child prostitution and forced prostitution are horrendous realities.¹⁵¹ This note argues that the Policy Requirement represents just such a division. Professor Aziza Ahmed and the Guttmacher Institute, a sexual and reproductive health policy institute, liken the Policy Requirement to other socially conservative policies such as the “Global Gag Rule,” which required international organizations receiving U.S.-based financial

¹⁴⁶ 150 CONG. REC. H5348, 5357 (July 8, 2004) (statement of Rep. Todd Akin (R-MO) commenting on the Policy Requirement).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 5358 (statement of Rep. José Serrano (D-NY) opposing the Policy Requirement).

¹⁴⁹ *Id.* (statement of Rep. Barbara Lee (D-CA) opposing the Policy Requirement).

¹⁵⁰ *Id.*

¹⁵¹ KRISTOF & WUDUNN, *supra* note 1, at 25.

assistance to denounce and dissociate themselves from abortion and promote abstinence-based sex education.¹⁵²

In addition to the fact that the Policy Requirement represents partisan perspectives, the Leadership Act specifically provides for its inconsistent application, further highlighting its lack of functionality. The Leadership Act carves out an exception to the Policy Requirement for the Global Fund to Fight AIDS, Tuberculosis, and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.¹⁵³ This exception is quite large, and it applies to agencies carrying out work that is nearly identical to that of AOSI, DKT International, and Pathfinder International.

For example, the United Nations Population Fund (UNFPA)—a United Nations agency that describes its mission as “promot[ing] the right of every woman, man and child to enjoy a life of health and equal opportunity”¹⁵⁴—is exempt from the Policy Requirement, even though UNFPA regularly engages with sex workers as part of its work to combat HIV/AIDS. UNFPA’s work involves HIV prevention among vulnerable populations, including sex workers.¹⁵⁵ In fact, UNFPA actually works alongside Pathfinder International, one of the plaintiffs in *AOSI*, as part of the Maternal Health Task Force, a collaborative effort by like-minded organizations to address maternal morbidity and mortality and their related causes, such as HIV/AIDS.¹⁵⁶

In this manner, the Policy Requirement’s purpose is further called into question because the requirement works against one of the stated aims of the Leadership Act—to intensify public–private partnerships as part of the strategy to combat HIV/AIDS.¹⁵⁷ In effect, the Policy Requirement ties the hands of NGOs engaged in critical HIV/AIDS-focused work on

¹⁵² Ahmed, *supra* note 145, at 242-43; Susan A. Cohen, *Ominous Convergence: Sex Trafficking, Prostitution and International Family Planning*, 8 GUTTMACHER REP. ON PUB. POL’Y, Feb. 2005, at 12, available at <http://www.guttmacher.org/pubs/tgr/08/1/gr080112.html>.

¹⁵³ 22 U.S.C.A. § 7631(f) (West 2008).

¹⁵⁴ *Population Issues Overview*, UNFPA, <http://web.unfpa.org/issues/index.htm> (last visited Feb. 14, 2013).

¹⁵⁵ *Preventing HIV/AIDS, Focus on Especially Vulnerable Groups*, UNFPA, <http://www.unfpa.org/hiv/groups.htm> (last visited Feb. 14, 2013). Ironically, the Leadership Act cites UNAID as its source for statistics on HIV/AIDS and gender, even though UNAID’s work is spearheaded by UNFPA, whose work would not comply with the Policy Requirement if it were to be applied to UNFPA. 22 U.S.C.A. § 7601(36)(A)-(C).

¹⁵⁶ *Mission*, MATERNAL HEALTH TASK FORCE, <http://maternalhealthtaskforce.org/component/content/article/1-pages/23-mhtf-mission> (last visited Feb. 27, 2013); see also *The MHTF Partner Channel*, MATERNAL HEALTH TASK FORCE, <http://maternalhealthtaskforce.org/collaborate-1/partners> (last visited Feb. 27, 2013).

¹⁵⁷ 22 U.S.C.A. §§ 7603(4), 7621(b)(1)-(2).

the ground.¹⁵⁸ Even though the Leadership Act recognizes that NGOs possess expertise and knowledge that are critical to effectively reduce the spread and transmission of HIV/AIDS,¹⁵⁹ the Policy Requirement blocks NGOs from exercising their best practices. Such contradictions within the Leadership Act indicate that the Policy Requirement does not further the goals of the Leadership Act itself, but rather functions as an expression of a conservative viewpoint.

B. The Policy Requirement Constitutes Viewpoint Discrimination and Is Unconstitutional Under the First Amendment

As discussed in Part II.B, the U.S. Supreme Court has repeatedly held that the government may not regulate private speech when its primary purpose is to quash a particular viewpoint.¹⁶⁰ When a regulation on speech is viewpoint-based, it is subject to strict scrutiny—that is, the regulation is presumptively unconstitutional unless the government can show that the regulation is narrowly tailored to serve a compelling governmental interest.¹⁶¹ As outlined in Part IV.A, the Policy Requirement serves no functional purpose within the Leadership Act, let alone a compelling governmental interest. As a result, the Policy Requirement fails the threshold requirement for a finding of constitutionality under strict scrutiny analysis.

But, even if we were to suppose that it serves a compelling governmental interest, the Policy Requirement and its corresponding guidelines are far too broad to qualify as a narrowly tailored legislative program under a strict scrutiny analysis. Although the Policy Requirement seems straightforward in its call for “a policy explicitly opposing prostitution and sex trafficking,”¹⁶² its corresponding guidelines call for grantees to maintain “objective integrity and independence from any

¹⁵⁸ Jodi Jacobson, *UPDATED: Federal Appeals Court Overturns United States “Prostitution Pledge” for U.S. Groups; Int’l Orgs Still Subject to Pledge*, RH REALITY CHECK (July 6, 2011, 8:00 PM), <http://www.rhrealitycheck.org/blog/2011/07/06/federal-appeals-court-overtorns-united-states-prostitution-pledge> (“[P]rograms that might otherwise [have] been funded were dropped, irrespective of whether the strategies involved had been proven to reduce the spread of HIV. Moreover, programs recognized around the world for their successes in working with marginalized populations such as sex workers and other marginalized populations have been de-funded.”).

¹⁵⁹ 22 U.S.C.A. § 7621(a), (b).

¹⁶⁰ See *supra* notes 67-71 and accompanying text.

¹⁶¹ See *supra* note 70 and accompanying text.

¹⁶² 22 U.S.C.A. § 7631(f).

affiliated organization that engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking"¹⁶³ These guidelines, however, fail to define what types of activities are "inconsistent" with the anti-prostitution policy statement.

In fact, after hearing oral arguments in *AOSI*, the Second Circuit noted that it had "the distinct impression that not even Defendants have a grasp on what it means to engage in expression that is 'inconsistent' with an opposition to prostitution."¹⁶⁴ Indeed, *AOSI*, shortly after adopting its anti-prostitution policy statement, sought confirmation from USAID that the policy statement complied with the Policy Requirement.¹⁶⁵ But this query yielded little clarification. *AOSI* claimed that Kent Hill, Acting Assistant Administrator for Global Health at USAID, offered the following guidance: "(1) organizations that promoted the legalization of prostitution would violate the requirement and (2) organizations that limited their activities to providing health services to prostitutes would be in compliance."¹⁶⁶ According to the district court's opinion, Hill was unable to offer any further information about activities that might fall in between those two positions.¹⁶⁷ When even a USAID official charged with enforcing the Policy Requirement cannot articulate exactly what it demands of grantees, that requirement and its affiliated regulations cannot be characterized as "narrowly tailored." Therefore, under strict scrutiny analysis, the Policy Requirement should be held to represent unconstitutional viewpoint-based discrimination.¹⁶⁸

¹⁶³ 45 C.F.R. § 89.3 (2010).

¹⁶⁴ *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 240 n.8 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 928 (2013).

¹⁶⁵ *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222, 235-36 (S.D.N.Y. 2006), *aff'd*, 651 F.3d 218 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 928 (2013).

¹⁶⁶ *Id.* at 236.

¹⁶⁷ *Id.*

¹⁶⁸ For additional scholarship on how the Policy Requirement constitutes viewpoint-based discrimination, see Garima Malhotra, *Good Intentions, Bad Consequences: How Congress's Efforts to Eradicate HIV/AIDS Stifle the Speech of Humanitarian Organizations*, 61 CATH. U. L. REV. 839 (2012). Other scholars have argued that the Policy Requirement does not constitute viewpoint-based discrimination, but rather, that it is a straightforward coercive penalty, an unconstitutional conditional government subsidy. See Alexander P. Wentworth-Ping, *Funding Conditions and Free Speech for HIV/AIDS NGOs: He Who Pays the Piper Cannot Always Call the Tune*, 81 FORDHAM L. REV. 1097, 1144 (2012). For the reasons outlined above, however, I disagree with that assessment and view the Policy Requirement as clear viewpoint-based discrimination.

C. *Anti-Prostitution Policy Statements Are Not Government Speech*

Because viewpoint-based discrimination is constitutional only in the context of government speech, the Policy Requirement will be deemed constitutional only if an organization's anti-prostitution policy statement qualifies as government speech. To determine whether the anti-prostitution policy statement may qualify as government speech, the Tenth Circuit offers a four-factor test under which a court must consider:

- (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.¹⁶⁹

I will examine each element in turn.

The *DKT International* court improperly characterized the Policy Requirement as reflective of the government's purpose in the Leadership Act.¹⁷⁰ According to the D.C. Circuit, the governmental purpose of the Policy Requirement is to "eradicate HIV/AIDS" by "speak[ing] out against legalizing prostitution in other countries."¹⁷¹ This characterization allowed the court to conclude that, through the Policy Requirement, "the government's own message is being delivered."¹⁷² The D.C. Circuit found that the viewpoint-based Policy Requirement is constitutional, because it represents "criteria to ensure that [the government's] message is conveyed in an efficient and effective fashion."¹⁷³ The D.C. Circuit mischaracterized the Leadership Act as legislation that is meant to convey the government's message opposing prostitution.¹⁷⁴ This "recast[s] a condition on funding as a mere definition" of the government program—a tactic that the Supreme Court has rejected explicitly.¹⁷⁵ The section of the Leadership Act that defines its purpose makes no mention of prostitution whatsoever.¹⁷⁶ In contrast, the purpose of the

¹⁶⁹ *Turner v. City Council of Fredericksburg, Va.*, 534 F.3d 352, 354 (4th Cir. 2008); *accord Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001).

¹⁷⁰ *DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 477 F.3d 758, 761 (D.C. Cir. 2007).

¹⁷¹ *Id.*

¹⁷² *Id.* at 762 (quoting *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001)) (analogizing to *Rust*).

¹⁷³ *Id.*

¹⁷⁴ *See DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 477 F.3d 758, 761 (D.C. Cir. 2007).

¹⁷⁵ *Legal Servs. Corp.*, 531 U.S. at 547.

¹⁷⁶ 22 U.S.C.A. § 7603 (West 2012).

Leadership Act and the NGO programs it funds is to strengthen U.S. leadership in the effort to eradicate HIV/AIDS, increase resources available to fight HIV/AIDS, and increase access to healthcare and treatments.¹⁷⁷

The second element of the Tenth Circuit's government speech test, which evaluates the degree of editorial control exercised by the government or the private party, also supports a conclusion that the anti-prostitution policy statement is not government speech. The NGOs, not the government, maintained editorial control over the anti-prostitution policy statements. The Leadership Act does not dictate what the policy statements must say, and the regulations that HHS promulgated do not clarify the Policy Requirement's meaning.¹⁷⁸ Unlike DKT International,¹⁷⁹ AOSI and Pathfinder each adopted their own individualized policy statements. AOSI's policy statement read:

AOSI and the Soros Foundation in Tajikistan and Kyrgyzstan believe that trafficking and sex work do harm both to the individuals directly involved and to others in various ways. AOSI and the Soros Foundations in Tajikistan and Kyrgyzstan do not promote or advocate such activities. Rather, our approach is to try to reduce the harms caused by disseminating credible information on questions such as the prevention of disease, and by providing direct public health assistance to vulnerable populations¹⁸⁰

Pathfinder's policy statement read:

In order to be eligible for federal funding for HIV/AIDS, Pathfinder opposes prostitution and sex trafficking because of the harm they cause primarily to women. Pathfinder's HIV/AIDS programs seek to promote effective ways to prevent the transmission of HIV/AIDS and to reduce the suffering caused by HIV/AIDS. In order to achieve these goals, Pathfinder works with, and provides assistance and support to and for, many vulnerable groups, including women who are commercial sex workers, who, if not effectively reached by HIV/AIDS programs, will suffer and can become drivers of the HIV/AIDS epidemic.¹⁸¹

Both the absence of regulatory guidance about the contents of the policy statement and the distinct statements adopted by AOSI and Pathfinder signal that the federal government did not exercise control over the editorial content of the policy statement. Similarly, under the third factor, it is clear that the

¹⁷⁷ *Id.*

¹⁷⁸ *See id.* § 7631(f); 45 C.F.R. § 89.3 (2010).

¹⁷⁹ *DKT Int'l*, 477 F.3d at 761.

¹⁸⁰ *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222, 235 (S.D.N.Y. 2006) (citations omitted).

¹⁸¹ *Id.* at 237.

anti-prostitution policy statements are not government speech. Indeed, the Leadership Act grantees published the policy statements in their capacity as private organizations, in order to retain their funding; the government was not the speaker behind the individual policy statements.

The fourth and final factor, which requires consideration of who bears the ultimate responsibility for the speech in question, also supports a finding that the anti-prostitution policy statements do not qualify as government speech. The Tenth Circuit and Fourth Circuit cases, however, shed little light on how to best conduct this analysis. These cases provided rather clear facts that left little doubt that the speech in question was government speech.¹⁸² While the government may contend that it bears the ultimate responsibility for any anti-prostitution policy statement because it provides funding for HIV/AIDS eradication programs, common sense indicates that the NGOs are ultimately accountable, because they must deal with the consequences of the policy statement. These consequences include ostracizing the vulnerable populations that they wish to serve or losing additional funding from private donors.

The dissent in *Wells v. City and County of Denver* advocated consideration of an additional factor in determining who bears the ultimate responsibility related to the policy statement: “who the listener believes to be the speaker.”¹⁸³ In this case, the listener or reader would reasonably believe that the “speaker” for an anti-prostitution policy statement is the NGO that published the statement. For example, AOSI’s policy statement made no reference to the fact that it published the policy statement solely to ensure retention of Leadership Act funding.¹⁸⁴ Although Pathfinder did qualify its policy statement with the language “[i]n order to be eligible for federal funding for HIV/AIDS, Pathfinder opposes prostitution,”¹⁸⁵ such a disclaimer does not negate the fact that in its own materials Pathfinder still took a public position opposing prostitution.

¹⁸² *Turner v. City Council of Fredericksburg, Va.*, 534 F.3d 352, 354 (4th Cir. 2008) (finding that the government retained the ultimate responsibility for a prayer spoken by a City Councilman, in his capacity as a City Councilman, at the beginning of a City Council meeting); *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1142 (10th Cir. 2001) (finding Denver retained ultimate responsibility over a Happy Holidays sign because it was created by the city of Denver, secured by the city of Denver, and surrounded by a fence erected by the city of Denver).

¹⁸³ *Wells*, 257 F.3d at 1155.

¹⁸⁴ See *Alliance for Open Soc’y Int’l*, 430 F. Supp. 2d at 235-37.

¹⁸⁵ *Id.* at 237.

Quite simply, there is no reason that a reader of an anti-prostitution policy statement would believe that the government, rather than the NGO, is the true source of the anti-prostitution policy statement.

Professor Leslie Gielow Jacobs suggests that a deeper analysis is warranted in order to determine who bears ultimate responsibility for the speech in question, which she characterizes as “accountability.”¹⁸⁶ Jacobs argues that government speech will be illegitimate unless the government “adequately inform[s]” the public that that the government “is speaking through private speakers and provid[ing] the content” that is being expressed.¹⁸⁷ Jacobs assesses whether the government has adequately informed the public of its intent to speak by examining whether the government meets two requirements: (1) “general accountability” and (2) “specific accountability.”¹⁸⁸ The general accountability requirement asks whether the government authorized the speech in question “in a legitimate and publicly visible process,”¹⁸⁹ such as valid enactment of a piece of legislation. This requirement is generally easy to satisfy, and because the Leadership Act constitutes a validly enacted piece of legislation, it meets this first requirement.

The specific accountability requirement is less easily satisfied, because it focuses on the audience’s interpretation of the speech in question, rather than on the process through which the legislation was enacted.¹⁹⁰ Jacobs argues that when speech targets a specific population, “the government must make them reasonably aware . . . of the source of the communication and its content.”¹⁹¹ For example, in *Rust*, the Court held that the structure of the preventative family planning program itself provided adequate notice to the public that doctors’ silence pertaining to abortion reflected the program’s intent—preventative family planning—not the doctors’ personal beliefs.¹⁹² Jacobs contends, however, that such notice is insufficient, particularly when the audience members

¹⁸⁶ Jacobs suggests consideration of three factors to determine whether or not speech qualifies as government speech: “accountability for speaking, identifiable message, and non-speech-suppressing impact.” Leslie Gielow Jacobs, *Who’s Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 56 (2002).

¹⁸⁷ *Id.* at 57.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 61 n.189.

¹⁹¹ *Id.* at 61.

¹⁹² *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

are average individuals.¹⁹³ Jacobs reasons that when the audience members lack legal training and no reason to believe that the message reflects a government message, “the government should be required to make clear to individual listeners that it is influencing the private speakers’ message.”¹⁹⁴

The Policy Requirement has no provision to ensure that readers of an NGO’s anti-prostitution policy statement are aware that it reflects a government message rather than the message of an NGO. Further, the “audience” in this case likely consists of sex workers, other NGOs, or potential donors. It is unlikely that these constituencies would presume the anti-prostitution policy statement reflected anything other than the organization’s own policy. Therefore, the government’s failure to disclose its role in the promulgation of anti-prostitution policies does not meet Jacobs’s specific accountability requirement.

Under Jacobs’s accountability framework or the *Wells* dissent’s additional factor of “who the listener believes to be the speaker,”¹⁹⁵ it is clear that NGOs, not the government, retain ultimate responsibility for the content of their anti-prostitution policy statements. In fact, a report authored by the Center for Public Health and Human Rights at Johns Hopkins University suggests that the Policy Requirement in several instances has already had negative implications for Leadership Act grantees.¹⁹⁶ Under both the four-factor test adopted by the circuit courts and additional frameworks that have been proposed, anti-prostitution policy statements do not qualify as government speech. As a result, they are subject to regulation under the

¹⁹³ Jacobs makes a distinction between *Velazquez*, in which the judges were the audience (and lawyers’ speech was restricted) and *Rust*, in which the audience was comprised of indigent patients seeking family planning advice and who likely had no expertise in law. Jacobs, *supra* note 186, at 62.

¹⁹⁴ *Id.* at 63.

¹⁹⁵ *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1155 (10th Cir. 2001).

¹⁹⁶ Nicole Franck Masenior & Chris Beyrer, *The US Anti-Prostitution Pledge: First Amendment Challenges and Public Health Priorities*, 4 PLOS MED. 1158, 1160 (2007). The Lotus Project was an initiative run by an organization who received Leadership Act funding from USAID. The Lotus Project, based in Cambodia, provided health services and skills training to sex workers. After a crackdown on brothels in the area changed the dynamics around sex work, sex workers (many of whom said they worked in the sex trade voluntarily) had restricted mobility and limited access to health care services. The Lotus Project was unable to respond effectively to the change in scenario—it feared that a response and delivery of health services per best practices would be interpreted to be promotion of prostitution and would result in a loss of funding. In the end, funding from USAID decreased and the Lotus Project eventually ceased operations. *Id.*

First Amendment and, as discussed above, represent unconstitutional viewpoint-based discrimination.¹⁹⁷

D. The Policy Requirement and Its Policy Implications

The international development community has protested the Policy Requirement since its inception. Although not all NGOs have filed suits like AOSI, Pathfinder, and DKT International, members of the international reproductive-health community stood in solidarity and voiced their displeasure with the Policy Requirement. In 2009, twenty-one NGOs sent a letter to HHS Secretary Kathleen Sebelius offering comments on the Policy Requirement.¹⁹⁸ In that letter, organizations such as CARE, the Guttmacher Institute, the International Women's Health Coalition, and Ipas-USA stated that the Policy Requirement undermines the true goal of the Leadership Act—to reduce the spread of HIV/AIDS worldwide.¹⁹⁹ Importantly, the NGOs called attention to what in many ways is the crux of the HIV/AIDS pandemic: it “is *difficult*[and] *complicated*.”²⁰⁰

The Policy Requirement fails to appreciate the nuanced problem the HIV/AIDS pandemic presents and instead takes a dull knife to a multifaceted, amorphous problem that requires a scalpel. Prostitution is terrible. Many, if not most, women and girls enter into a life of prostitution against their will.²⁰¹ The goal of reducing prostitution and its negative consequences is a valid one, but it is neither the main goal of the Leadership Act nor one that will be achieved by forcing NGOs to adopt policy statements that ostracize and cast judgment on the women and girls who desperately need the services, programming, and support that NGOs provide around the world.

A representative from an NGO that was working to help Bangladeshi sex workers gain the right to wear shoes outside of brothels posed a simple question about the Policy Requirement: “How can we help these beaten down,

¹⁹⁷ See *supra* Part III.B.

¹⁹⁸ Letter from AIDS Foundation of Chicago et al., Comments on Office of Global Health Affairs; Regulation on the Organizational Integrity of Entities Implementing Leadership Act Programs and Activities, Notice of Proposed Rulemaking, to Kathleen Sebelius, Sec'y, U.S. Dep't of Health & Human Servs. (Nov. 23, 2009), available at http://www.brennancenter.org/page/-/Justice/AJLawsuits/20091223.Groups_Comments.pdf.

¹⁹⁹ *Id.* at 1.

²⁰⁰ *Id.* (emphasis added).

²⁰¹ See KRISTOF & WUDUNN, *supra* note 1, at 3-46 (describing the process by which human trafficking operations smuggle girls across borders, deliver them to brothels and effectively doom them to a life of modern slavery).

marginalized women organize themselves to achieve such victories if we are publicly opposing what they do to earn money?”²⁰² As it stands now, the Policy Requirement is a single-minded approach to a problem that requires comprehensive, holistic, and culturally sensitive responses, not only to the sex industry, but also to the other illicit industries that support it—such as the human trafficking industry. Holly Burkhalter, the former policy director of Physicians for Human Rights and its Health Action AIDS Campaign, noted that sound health policy requires several components.²⁰³ First, a sound health policy requires efforts to assist and liberate women and girls engaged in the sex industry.²⁰⁴ Second, it requires providing healthcare services and protection for women and girls who remain in the sex industry and who continue to need help.²⁰⁵

CONCLUSION

The Policy Requirement fails on many fronts. It fails to further the goal of the Leadership Act—the eradication of HIV/AIDS. It regulates speech in order to quash a viewpoint that favors actual, on-the-ground human rights and needs over sweeping judgments that carry no practicable effect. As a result, the Policy Requirement is unconstitutional viewpoint-based discrimination that violates NGOs’ rights under the First Amendment. The analysis put forth by the Second Circuit in *AOSI* properly characterizes the Policy Requirement as impermissible viewpoint-based discrimination. In contrast, the D.C. Circuit’s characterization of the Policy Requirement as government speech misconstrues the central purpose of the Leadership Act, as well as the Policy Requirement’s purpose within the Leadership Act as a whole.

The Supreme Court will soon decide on the constitutionality of the Policy Requirement, and I urge the Court to adopt the Second Circuit’s reasoning. To do so would represent not only a logical extension of the Court’s previous unconstitutional conditions and viewpoint-based discrimination jurisprudence, but it would also represent a strong policy

²⁰² Holly Burkhalter, *Better Health, Better Lives for Sex Workers*, WASH. POST, Dec. 8, 2003, at A25 (internal quotation marks omitted), available at 2003 WLNR 19309301.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

decision that favors empowering NGOs to change the reality of HIV/AIDS rather than adopting a singular focus that only changes the laws.

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