

Anti-Prostitution Pledge Heads to Supreme Court

By: Melissa Gira Grant – April 19, 2013

On Monday, the Supreme Court hears oral arguments in a case that will decide if recipients of government aid can be forced to oppose prostitution—or potentially any other issue as a contingency of receiving US funds. The case, *Alliance for Open Society International v. United States Agency for International Development*, arises from a controversial policy governing AIDS education, prevention and treatment, a decade-long fight that's crossed political lines and was kicked off by Representative Chris Smith as part of a larger conservative attempt to undermine reproductive and sexual health care. With HIV and AIDS projects facing closure if they don't adopt the government's position on sex work, it's sex workers who are paying the ultimate price.

From the onset of the global AIDS epidemic, sex workers have been scapegoated for the spread of HIV—sometimes even by those who claim to help them. Around the globe, AIDS provided an excuse to close red light districts and step up enforcement of anti-prostitution laws. In one early example, in 1988, California considered a bill to forcibly test all people arrested for prostitution-related charges for HIV. If positive, they could face felony charges. Fears, myths and stigma—fueled by a lack of HIV education and a refusal among policymakers to consider the reality of the epidemic—have historically made sex workers, along with gay and bisexual men and injection-drug users, an easy target.

Now, over thirty years into the epidemic, with that much more evidence available on the social and structural factors that drive HIV, policy still lags life-threateningly behind. One such policy is embedded in what's regarded as the United States' cornerstone AIDS policy, PEPFAR (the President's Emergency Plan for AIDS Relief). Passed into law in 2003 under President George W. Bush, PEPFAR has moved approximately \$46 billion to programs working to prevent and treat HIV. But if your HIV program supports sex workers? You could find yourself denied funding and your doors shut.

PEPFAR contains what's been termed the anti-prostitution pledge, which forbids organizations who receive PEPFAR funding from "promoting" or "advocating" for "the legalization or practice of prostitution," and requires organizations to adopt a policy "explicitly opposing prostitution and sex trafficking." In some ways, the pledge resembles the now-repealed Mexico City Policy, or global gag rule, which forbade non-governmental organizations who received US funds from using even entirely separate funds to provide or refer to abortion services. Like the global gag rule, the pledge requirement limits not just what recipients can do with their PEPFAR funds, but with all their funds. But the pledge goes further than the global gag rule in two significant ways. First, in compelling recipient organizations to adopt a policy stating they oppose prostitution and sex trafficking, organizations and the people who work within them are more than gagged—they must take a vocal stance on an issue that may contradict both their public mission and their private beliefs. Second, it applies not just to international

recipients (as the global gag rule did), but also to those organizations incorporated or based in the United States. Therefore, charge the organizations who have brought suit against the pledge, this is a violation of their First Amendment rights.

The anti-prostitution pledge has already been rejected by lower courts, and so comes to the Supreme Court on the government's appeal, with USAID defending their enforcement of the pledge. In 2005, Alliance for Open Society International (AOSI) filed a suit challenging the pledge, and won in district court, receiving a temporary injunction barring its enforcement. After numerous government appeals, as well as successive attempts by USAID and the Department of Health and Human Services (HHS) to clarify how the pledge is enforced in light of the legal challenges, the Second Circuit Court of Appeals ruled in 2011 that the pledge requirement "falls well beyond what the Supreme Court and this Court have upheld as permissible conditions on the receipt of government funds." The pledge, the Court stated, "does not merely require recipients of [PEPFAR] funds to refrain from certain conduct, but goes substantially further and compels recipients to espouse the government's viewpoint."

What has this meant in practice, for people working in HIV prevention and treatment? According to a recent analysis of the pledge's impact published in the *Journal of the International AIDS Society*, whether or not organizations chose to adopt an anti-prostitution stance, the pledge has resulted in HIV and AIDS projects losing funding, shutting down or facing investigation. The analysis also reports that as a result of program closures and investigations, sex workers were isolated from other HIV and AIDS projects. Facing the threat of excluding sex workers from prevention efforts, Brazil turned down \$40 million in PEPFAR funding rather than sign the pledge.

"The pledge requirement makes people hesitant to engage in programming because there's considerable confusion about what is and isn't allowed with your private funds," Zoe Hudson, a senior policy analyst at Open Society Foundations, told *The Nation*. "When groups fear that starting a program or taking a stand might run afoul of the law, they're inclined to think, 'forget it, I'm going to go do something else.'" The pledge has also led some organizations to "self-censor," said Hudson. "We'll hold an event, and then a group will say, 'We couldn't possibly come to that because it might violate the pledge.' And we'll say, 'Actually, the preliminary injunction prevents the government from taking action against you.' But the point is, if you're dependent on US government money for your development work, then you don't want to take any of those risks."

The pledge, in a way, extends the exclusion and criminalization faced by sex workers in the United States to the organizations who venture to include them in their US-funded programs—this, despite the fact that USAID regards sex workers as one of their "most-affected risk populations." In what way, then, can PEPFAR effectively reduce HIV among sex workers, when it's also producing an environment where those best positioned to support them are cut off from the resources to do so?

"I helped write PEPFAR," Representative Barbara Lee told *The Nation*. "This was an idea that came out of the Congressional Black Caucus, right before President Bush's first State of the Union." Lee said that it was after getting Democratic and Republican consensus on PEPFAR that Representative Chris Smith proposed an amendment. "I'll never forget that day," said Lee. "We thought we had the votes to pass it based on negotiations, but then Chris Smith offers this—what did he call it? A conscience clause. This was the start of this anti-prostitution clause."

Smith's amendment adding the anti-prostitution pledge to PEPFAR came with other Republican amendments that have also been challenged by advocates, such as requiring the "ABC approach"—*abstinence, be faithful, use a condom*, with emphasis on the A and the B. For ten years now, Smith has defended the pledge, both from failed attempts to remove it from subsequent re-authorizations of PEPFAR and from the courts. Speaking before the House Committee on Foreign Affairs in 2007, Smith alleged that his amendment was necessary in order to prevent PEPFAR from making the U.S. "enablers of prostitution and sex trafficking," even as district courts had already rejected the pledge. In 2010, when USAID and HHS considered amending guidance on how the pledge should be enforced in response to the legal challenges, Smith claimed that in doing so, "The Obama Administration is enabling sex trafficking and prostitution all over the world. The brothel owners and operators and sex traffickers want U.S. taxpayer funds. The Administration is practically working hand-in-glove with them."

This is not a belief shared by all those in Congress who authored PEPFAR. Several current and former members of Congress—including Lee as well as Republican PEPFAR supporter Senator Bill Frist and Democratic Senator Patrick Leahy, who has worked on anti-trafficking policy—state in their brief to the Supreme Court that Congress's AIDS strategy is in reality undercut by the anti-prostitution pledge. "The strategy that Congress chose," they write, "reflects Congress's determination that, absent violence or coercion, conveying a government message explicitly opposing prostitution is not an effective way to address that high-risk behavior, and could disserve [PEPFAR]'s HIV/AIDS-fighting purpose."

"I've visited a variety of countries around the world and talked to sex workers," said Lee, "and I really understand how this is a big problem, in terms of getting the kind of treatment, services, and prevention that they need." (In July 2012, sex workers disrupted a session on US AIDS policy at the International AIDS Conference, demanding "Repeal the pledge, reform PEPFAR" and occupying the session hall as both Frist and Lee spoke.) Were it not for the pledge, said Lee, "we'd save more lives. That's the bottom line. And because of the stigma and because of all the issues around this, we're not reaching the numbers that we need to reach."

It's Smith's position that the government must defend this Monday: that advocating against prostitution is "central" to PEPFAR. "What the government is trying to argue," said Hudson, "is that this requirement is essential for the effective operation of the program: programs in foreign countries are hard to monitor and NGOs are a representative of the US government, so they should be able to screen people based on their views. They argue that eradicating prostitution is central to their global HIV/AIDS strategy." By this logic, in order to prevent sex workers from being infected with HIV, more emphasis is placed on eradicating sex work than on eradicating HIV.

But that isn't the case before the court on Monday. For the plaintiffs, who are supported with amici briefs from the American Civil Liberties Union, the Cato Institute, Partners in Health, the Center for Reproductive Rights and the American Jewish World Service, among others—Monday's arguments are not about sex work, or even HIV. They will argue that the government cannot, as a condition of funding and as Hudson explained, "force people to take an opinion on a controversial issue. The government is not allowed to tell groups what to think."