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# High Court to Consider Global AIDS Funding Restrictions

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## LEGAL

# High Court to Consider Global AIDS Funding Restrictions

Conflicting rulings on requirement that agencies denounce prostitution at issue

BY ARTHUR S. LEONARD

**T**he Supreme Court has announced it will review a ruling striking down the US government's policy of conditioning funding under the US Leadership Against HIV/ AIDS, Tuberculosis and Malaria Act of 2003 on non-profit recipients stating an explicit policy opposing prostitution and sex trafficking and taking no actions inconsistent with that.

On January 11, the high court accepted a petition for review of a Second Circuit Court of Appeals decision that held the policy probably violated the First Amendment rights of the plaintiffs. The suit was brought by the Alliance for an Open Society International against the US Agency for International Development.

The Second Circuit panel, by a vote of 2-1, upheld a preliminary injunction that the district court issued against enforcement of the policy pending a full trial on the merits.

That ruling arguably conflicts with a DC Circuit ruling rejecting a First Amendment challenge to the policy. The circuit split on the constitutionality of a federal statute has now captured the Supreme Court's attention.

At the heart of the case is the complicated doctrine of "unconstitutional conditions" that the Supreme Court has developed through a series of cases involving restrictions placed by Congress on the recipients of federal funds. Perhaps the most notorious of these cases is the 1991 *Rust v. Sullivan* ruling, which rejected a constitutional challenge to the requirement that federal family planning money not be "used in programs where abortion is a method of family planning." Projects receiving federal funds were prohibited from providing abortion counseling or referrals or engaging in any activities that would encourage, promote, or advocate abortion.

The Supreme Court rejected the argument that this was unconstitutionally compelled speech, pointing out that the law authorized fed-

eral funding recipients to establish separate organizations that would not receive federal money and could undertake abortion-related activities. The high court also noted that funding recipients were not required to articulate an anti-abortion message, but merely to remain silent about abortion if they wanted federal money. The court's explanation was that Congress could dictate the content of speech that it was paying for as part of a federally funded family planning program.

The majority of the Second Circuit panel, Judges Barrington Parker and Rosemary Pooler, distinguished the *Rust* abortion holding and similar rulings by the Supreme Court and other Second Circuit panels from the HIV restriction case, primarily because the statute challenged here goes beyond requiring silence and neutrality, instead conditioning federal money on the recipient agency articulating the government's position as if it were its own position.

Dissenting Circuit Judge Chester

Straub rejected this distinction, arguing that this case was controlled by *Rust* and similar rulings, and that the government was entitled to control the speech of HIV-prevention organizations that operated with federal financial assistance.

When the case was pending before the district court, the government argued the plaintiffs did not have standing because they had failed to take an alternative course offered by regulations — to set up separate affiliated organizations with non-governmental funds to undertake efforts to engage prostitutes in HIV-prevention measures without being compromised in those efforts by having to articulate policy positions hostile to prostitution.

The Second Circuit panel majority pointed out that this "affiliated organization" device for avoiding the restriction did not save the statute from constitutional challenge, because it went too far in requiring

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## Gay Couple's Sex Sting Suit Revived

Federal appeals court finds claim of no probable cause for park arrest "plausible"

BY ARTHUR S. LEONARD

**T**he Sixth Circuit Court of Appeals has revived a lawsuit filed by a gay male couple caught up in a Michigan sex sting.

A three-judge panel, on January 7, held that District Judge Gerald E. Rosen erred in dismissing claims by Randy Alman and Michael Barnes, an Indiana couple, in connection with Alman's arrest and the impounding of Barnes' car at Hix Park in Westland, Michigan in 2007. The panel

found that the two men, having made a plausible argument that there was not probable cause for these law enforcement actions, deserve to have their claims heard at trial.

In October 2007, Alman, sitting at a picnic table in the park after having driven Barnes' car there, was approached by a handsome Wayne County undercover officer, Kevin Reed, who was part of a group assigned to "conduct surveillance at Hix Park to investigate complaints of lewd conduct and possible sexual activity taking place," according to Circuit

Judge Damon Keith's opinion.

Testimony from Alman and Reed differ about the nature of the conversation, but eventually Alman got up and walked down a trail, with Reed following, and veered off to a secluded spot. Alman contends Reed was acting flirtatiously and told him he "liked to watch," while the officer testified he told Alman he was "a little nervous" and "new to this." The two were standing close to each other and Alman reached out and "touched the zipper area on the front of Reed's crotch." Alman claimed he just "brushed" his hand up against the area, while Reed claimed that Alman "grabbed" his crotch. Reed stepped back and Alman went down on one knee, facing sideways and pretending to tie his shoe. Reed pulled out his badge and told Alman he was under arrest.

When Reed walked Alman back to the parking lot where other officers were waiting, he told his sergeant that Alman had "grabbed me or touched my crotch." The sergeant had the car impounded and towed to the police department lot, and Alman was charged with Accosting and Soliciting and Fourth Degree Criminal Sexual Conduct, state offenses. Alman was held in a cell for two hours and released after posting a \$150 bond.

When Barnes came to pick up Alman and retrieve his car, he paid a \$900 redemption fee and signed a

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## ► AIDS FUNDING, from p.28

ing funding recipients to adopt an express policy position with which they may disagree.

"Furthermore," the court said, "the targeted speech, concerning prostitution in the context of the international HIV/ AIDS prevention effort, is a subject of international debate. The right to communicate freely on such

matters of public concern lies at the heart of the First Amendment. The Policy Requirement offends that principle, mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue where the differences are both real and substantive. For example, the World Health Organization ("WHO") and the Joint United Nations Programme on HIV/AIDS ("UNAIDS")

have recognized advocating for the reduction of penalties for prostitution — to prevent such penalties from interfering with outreach efforts — as among the best practices for HIV/ AIDS prevention. Plaintiffs claim that being forced to declare their opposition to prostitution 'harms their credibility and integrity.'

The panel noted that the policy required of funding recipients would

likely offend "the very people, prostitutes, 'whose trust they must earn to stop the spread of HIV/AIDS,'" in the words of the plaintiffs."

The plaintiffs are represented by the Brennan Center for Justice and attorneys at Wilmer Cutler Pickering Hale & Dorr PC. Their lawsuit attracted amicus briefs from a large group of public health and human rights organizations.

## ► LAWSUIT, from p.28

release stating it "precludes any action in this case regarding the vehicle and constitutes a final settlement of the civil nuisance abatement case."

The assistant county prosecutor assigned to the case, Luke Skywalker — you can't make this stuff up — filed a motion to dismiss the criminal charges against Alman because of a policy that "charges will not be pursued by this office if the officer's conduct was designed to make the individual believe the act was invited or consensual." At the same time, however, a Westland police officer issued Alman a ticket for violating city disorderly conduct and battery ordinances. A state court judge dismissed the disorderly conduct charge, finding it required "some exposure of bodily parts," but put the battery charge on the calendar for trial. When none of the police officers showed up to testify on the trial date, the court dismissed that charge as well.

Alman claimed his arrest violated his Fourth and 14th Amendment rights

and asserted a state malicious prosecution claim. Barnes raised a Fourth Amendment claim and a state abuse of process claim involving the impounding of his car. Both men asserted that their First Amendment rights had been violated, claiming the police activity would chill expressive activity.

The district judge granted summary judgment to the defendants, who included the officers, the city and county police departments, and the city and county, finding there was probable cause for both Alman's arrest and the seizure of the car. Judge Keith found that there were factual disputes that should have precluded summary judgment and authorized Alman and Barnes to pursue some of their claims.

Specifically, since the statute under which Alman was charged with criminal sexual conduct requires elements of coercion or surprise, Keith found that that the varying descriptions of what happened did not support the arrest.

"Aside from engaging in flirtatious conversation and his brief touching of Reed's crotch, there is nothing in the

record that evinces" an intention to engage in public sexual conduct "on Alman's part," the judge wrote. "To the contrary, the only objective indications in the record about a state of mind relate to Reed, who stated that he was 'new to this' and that he 'liked to watch.' Under these circumstances, there was no probable cause."

On the city's charges of indecency, Keith found, Alman was correct that it had uniformly been interpreted to require exposure of genitals.

"We have uncovered no authority indicating that a brief touching of another person's crotch during a flirtatious conversation constitutes indecent or obscene conduct, and based on the record before us, it cannot be said that the Westland police officers had probable cause that Alman was about to expose himself," the judge wrote.

On the charge of battery, Keith noted, there was no element of "force or violence" in Alman touching Reed's crotch to justify the arrest.

Given that the law on these charges is clearly established, the police offi-

cers do not enjoy "qualified immunity" from personal liability for making these arrests, the panel found.

And, if there was no probable cause for the arrest, then impounding Barnes's car was improper as well.

The appellate panel, however, found no factual basis for claims of malicious prosecution or abuse of process.

Mary K. Kator of the Rainbow Law Center in Southfield, Michigan, argued the appeal for Alman and Barnes and the Triangle Foundation, a gay rights group that joined in the case. The Court of Appeals sent the case back to the district court for a trial on the claims it had revived.

Alman and Barnes could yet lose at trial, but the circuit court's decision has the salutary effect of sending a message to Michigan law enforcement authorities engaged in the age-old cat-and-mouse game of entrapping gay men in public places. Law enforcement is put on record that arresting people for the kind of innocuous conduct described by Alman is inappropriate and may subject police officers to liability.

## ► MOTHER OF P-FLAG, from p.10

national group.

Jeanne Manford once told gay author Eric Marcus, "I'm very shy, by the way. But I wasn't going to let anybody walk over Morty."

That attitude was on display shortly after Morty's death from AIDS in 1992. I was then director of education at the Hetrick-Martin Institute for LGBT youth, and I joined her to discuss youth issues on Geraldo Rivera's television show. Over our pre-show objections, Rivera inserted the psychologist Paul Cameron — whose theories

linking homosexuality to child sex abuse had already been discredited by his professional peers — into the program. When Cameron began to attack Morty, saying his homosexuality caused his death, Jeanne rose up like a mother lioness and screamed at him, not allowing him to continue with his calumny.

Geto said that "at the end stages of Morty's illness, he lived at home, refusing to be hospitalized. He slept on a bed downstairs in the living room — not out of the way in a bedroom upstairs — with IVs, right there when you came into house with people coming and going. His

mother insisted. She wanted to take care of him personally. She really masked her grief and horror and when I would come to visit, she was so upbeat and pleasant. It was the most difficult act any performer could perform because her heart was melting away. He wanted to be at home and his mother wanted him at home. Her devotion was there to the last day."

Jeanne Sobelson Manford was born December 4, 1920. She graduated from Queens College in 1964 and was an elementary school math teacher at PS 32 in Queens for 26 years, retiring in 1990 at age 70. Her husband,

Jules, died in 1982. She is survived by her daughter, Suzanne Swan, one granddaughter, and three great granddaughters. She moved Rochester, Minnesota, in 1996 to be near her family and later to Daly City, California. That is where she died of natural causes, according to Swan.

Jody Huckaby, P-FLAG's national executive director, said in a statement, "Jeanne Manford proved the power of a single person to transform the world. She paved the way for us to speak out for what is right, uniting the unique parent, family, and ally voice with the voice of LGBT people everywhere."

## ► MORTY, from p.11

if they could — was right there out on the streets, in meetings, and in newspapers, with real faces and real people attached.

And some of our parents along, as well.

I felt at that point that our movement had a "genius" to it — an ani-

inating spirit unafraid to look at the truth and create something important from it. At a demonstration I asked Arthur Bell, "Do you think our movement has a genius to it?" And he said, "Look around you. What do you think? Of course!"

Morty died on May 14, 1992, at his home in Queens, of complications

from AIDS. His father Jules had died ten years earlier, and Morty's only brother, Charles, died in 1966 — what an awful lot of deaths for Jeanne to take. I remember hearing about his death and taking it hard — that this young, beautiful guy who'd become a lawyer, had died. I'm sure that I still miss his quiet presence, but now it

has been joined by Jeanne's.

*The latest book by Perry Brass, author of "The Manly Art of Seduction," is "King of Angels, A Novel About the Genesis of Identity and Belief," set in Savannah, Georgia, in 1963, the year JFK was assassinated. For more information about him, visit perrybrass.com.*